MAINE REPORTS

122

CASES ARGUED AND DETERMINED

IN THE

SUPREME JUDICIAL COURT

OF

MAINE

NOVEMBER 1, 1922—JUNE 1, 1923

FREEMAN D. DEARTH

REPORTER

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JUSTICES

OF THE

SUPREME JUDICIAL COURT

DURING THE TIME OF THESE REPORTS

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

Justices of the Superior Courts

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

ATTORNEY GENERAL

RANSFORD W. SHAW

REPORTER OF DECISIONS

FREEMAN D. DEARTH

ASSIGNMENT OF JUSTICES

FOR THE YEAR 1923

LAW TERMS

BANGOR TERM, First Tuesday of June.

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

PORTLAND TERM, Fourth Tuesday of June.

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

AUGUSTA TERM, Second Tuesday of December.

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

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CASES

IN THE

SUPREME JUDICIAL COURT

OF THE

STATE OF MAINE

MAUD WINCHESTER *vs.* INHABITANTS OF PERRY.

Washington. Opinion November 1, 1922.

Allegation in declaration held immaterial and surplusage. Verdict not set aside as the evidence failed to show that it was so manifestly wrong that it must have been the result of bias, prejudice or some other improper consideration.

On a motion for a new trial on the usual grounds it was urged that the evidence did not support the allegation that the wheel of the vehicle dropped "on to the broken pipe" and that the verdict was against the evidence,

Held:

That it was the hole in the way which constituted the defect and not the fact that there was a broken pipe in it, and the allegation that the wheel of the vehicle in going into the hole struck the pipe may be regarded as immaterial and a surplusage, and the allegation was sustained by evidence showing that the wheel dropped into the hole in the highway caused by the broken drain-pipe.

That the evidence as a whole was conflicting, but it not appearing to this court that the verdict of the jury was manifestly wrong, it must stand.

On motion for a new trial. This is an action to recover damages for personal injuries sustained by plaintiff by reason of an alleged defective way in defendant town. The defendant pleaded the general issue and the case was tried to a jury and a verdict for plaintiff for seven hundred and seventy-nine dollars was rendered, and defendant filed a general motion for a new trial. Motion overruled.

The case is stated in the opinion.

H. E. Saunders, Gray & Sawyer, for plaintiff.

L. H. Newcomb and J. H. Gray, for defendant.

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

WILSON, J. An action against the town of Perry to recover for personal injuries alleged to have been received through a defective highway in said town. The jury awarded a verdict for the plaintiff which it is admitted, if it is allowed to stand, is not excessive. The case comes before this court on motion of the defendant for a new trial upon the usual grounds.

The ground relied upon by the defendants is that the verdict is against the evidence, and in support of this contention the defendant urges, first, that the evidence does not support the allegation in the declaration as to the manner in which the accident occurred, and second, that the evidence does not show that the driver of the vehicle in which the plaintiff was riding was in the exercise of ordinary care, but on the contrary shows that he was guilty of negligence which was the real cause of the plaintiff's injuries.

The declaration describes the defect in the highway as a hole in the travelled part of the way caused by a broken waterway pipe; and alleges that the accident was caused by the wheel of the vehicle in which the plaintiff was riding dropping down into said hole and "on to said broken pipe."

The defendant's counsel strenuously contends that the evidence does not show that the wheel of the cart "dropped . . . . on to said broken pipe," and therefore does not support the allegation.

It is obvious from both the declaration and the evidence that it was the hole in the way which constituted the defect and not the fact that there was the broken pipe in it. Whether the wheel when it dropped into the hole hit the broken pipe or not, would have no effect in causing the accident. It was the sudden and unexpected jolt or tipping of the cart which threw the plaintiff out and caused her injuries. The allegation that the wheels struck the broken pipe in the hole may, therefore, be regarded as immaterial and surplusage. *Holt* v. *Penobscot*, 56 Maine, 15. The allegations of the declaration were sufficiently sustained, if the jury was warranted in concluding from the evidence that the wheels of the cart dropped into the hole caused by the broken drain-pipe—if, indeed, it was not also warranted in concluding from the evidence in the case that if the wheels dropped into the hole described in the declaration, they must also have dropped on to the broken pipe therein.

The defendant relies mainly, however, upon the contention that the accident was due to the negligence of the driver of the vehicle in which case it is admitted that the plaintiff may not recover. *Mosher* v. *Smithfield*, 84 Maine, 336.

In support of this contention it is urged, that even if the wheels of the cart did drop into the hole caused by the broken pipe, it was plainly marked by a stake and was known by the driver to be there, as it was directly in front of his premises, and he had been asked to repair it by the road commissioner of the town, and that there was sufficient room on the westerly side of the road for the safe passage of teams, and where at the time of the accident travellers using the way were going.

Counsel for the defendant, however, also insists that the evidence of where the plaintiff struck the ground when she was thrown out, it being as the defense claims about thirteen feet beyond the defect in the causeway or culvert, shows that it was not the tipping of the cart by the wheels dropping into the hole in the road which threw her out; but that the driver in trying to avoid the hole drove his team so far to the west to avoid it that his outside, or off wheels, went out over the shoulder of the road and dropped down over the ends of some logs or poles forming the westerly end of the culvert; and when he reined his horse into the road again, it started up, and the consequent dropping of the cart off the poles and the righting it up, when the horse drew it into the road, threw the plaintiff out at the spot where it is claimed she fell. In either case it is contended, whether the driver allowed his wheels to drop down into the hole in the road or drove off over the westerly shoulder, the accident was due to his negligence.

The evidence on these points is conflicting and in many respects vague and unsatisfactory. The jury, however, heard and saw the witnesses, some of whom positively stated that there was not room to drive over this culvert without the wheels dropping into the hole, and there was evidence of an automobile being stalled in it. One witness testifying that the washout or gully extended nearly across the travelled part of the way and another that you couldn't shun it, you had to cross it. The driver of the vehicle testified that he eased his team over it as well as he could, but his nigh wheels "must have dropped into the hole."

The defendant offered evidence it is true to the effect that a sufficient width of passable road existed at the time of the accident west of the hole over the drain-pipe to afford a safe passage for teams, and lays great stress upon the point where it is claimed the evidence shows the plaintiff fell. But no person saw her fall, nor is it likely that in the excitement of the moment any thought was taken at the time, by either the driver or her husband, as to the exact point where she fell. The measurements upon which the defendant's contention is based were taken a year after the accident occurred and after the culvert had been rebuilt and a fill of about three and one half feet made at this point, and under the circumstances can hardly be taken as conclusive.

Even though this court might have come to a different conclusion upon the printed evidence, a jury which heard the witnesses and which had the several points raised by the defendant sharply and clearly defined for them by the presiding Justice found the weight of the evidence was with the plaintiff. After a careful consideration of all the evidence we can not say that the verdict is so manifestly wrong that it must have been the result of bias, prejudice or some other improper consideration.

Entry will be,

Motion overruled.

JAMES A. HOWARD, Adm'r., In Equity

vs.

AMORILLA M. DINGLEY et als.

Androscoggin. Opinion November 3, 1922.

An entry on a deposit account in a bank as follows: "A, B, Payable to either, before or after the death of the other" 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.

In the instant case the evidence is very clear that while the decedent intended to bestow his bounty upon the defendants, his words and acts as recounted by the witnesses fall far short of the legal requirements necessary to establish either a gift causa mortis, or a trust.

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.

Failing to establish a perfected gift, the defendants fail to establish a trust, for the court will not enforce as a trust a transaction intended as a gift, if imperfect for that purpose.

There is but one way of making a testamentary disposal of property and that is by will; the statute of wills was intended 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.

On report. The decedent, George F. Merrill, died May 27, 1920, at the age of eighty-one years. Prior to his death he made deposits in several banks the accounts being designated as follows: "George F. Merrill, Mrs. A. M. Dingley—Payable to either before or after the death of the other." "George F. Merrill—Isabel D. Kilbreth—Payable to either before or after the death of the other." "Miss Lorette E. Marquis—Geo. F. Merrill,—Payable to either before or after the death of the other." "George F. Merrill,—or Carrie A. Dillingham."

The decedent gave certain instructions to C. H. Averill in the event of his death relative to the settlement of his business affairs

and the disposal of what property he might have left. The plaintiff claimed that the deposits in the banks belonged to the estate, while defendants claimed that such deposits respectively belonged to them as being gifts causa mortis. A hearing was had upon bill, answers, replication and proof. At the conclusion of the evidence, by agreement of the parties, the cause was reported to the Law Court. Bill sustained. Decree in accordance with the opinion.

The case is sufficiently stated in the opinion.

George C. Wing and George C. Wing, Jr., for plaintiff.

Harry Manser, for defendants.

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

HANSON, J. This is a bill in equity brought by the administrator of the estate of George F. Merrill, late of Auburn. At the conclusion of the evidence, by agreement of the parties the case was reported to this court.

The administrator in his official capacity claims certain savings bank books now impounded to await the decision of this court, and the defendants claim to be entitled to possession of said bank books, because they say that George F. Merrill made a gift *causa mortis* to the persons named in the bank books, that he delivered the books to one C. H. Averill as trustee for the benefit of the defendants as donees, and that the terms of the trust were plain, definite and certain, and it is claimed by defendants' counsel that the intention of the decedent was effectually accomplished.

George F. Merrill died May 27, 1920, at the age of eighty-one years. On September 5, 1918, he deposited in the Lewiston Trust Company, nine hundred and fifty dollars. The account was designated:

George Merrill
Mrs. A. M. Dingley.

Payable to either before or after the death of the other. At the time of his death, there was eight hundred and fifty dollars in this account. On the same date he deposited in the same bank one thousand dollars to the credit of himself and Isabel D. Kilbreth, payable as in the first deposit. At the date of his death there was nine

hundred and fifty dollars in this account. On March 1, 1919, he deposited in the same Trust Company two hundred dollars, to the credit of Miss Lorette E. Marquis and George F. Merrill. This account was payable to either before or after the death of the other. Nothing was withdrawn therefrom. On the same day he deposited in Mechanics Savings Bank of Auburn four hundred dollars, to the credit of

George F. Merrill or Carrie A. Dillingham.

There were no withdrawals from this account. The bank books and ten dollars in currency comprised the estate of Mr. Merrill. That he intended to make the defendants and Mr. Averill his beneficiaries is not controverted. The question for determination here is, was his intention carried into execution?

Mr. Merrill had made his home with Mr. Averill for four or five years and a firm friendship had been established between them. Mr. Merrill had included Mr. Averill in the number to be benefitted by his bounty, and a bank book with a deposit for two hundred dollars in his name was originally with the bank books impounded, but according to the testimony Mr. Averill secured the books from the custodian and drew the money from the banks, which may explain why he is not a party defendant. Mr. Merrill fell ill at Mr. Averill's house, was ill about ten days, and died May 27, 1920. During his sickness, Mrs. Dillingham, one of the defendants, was called in to assist in caring for him. In the final week of his illness he requested her to go to the Trust Company and draw one hundred dollars to be used with the money in his joint account with Mr. Averill to defray his funeral expenses. This she did, taking with her Mrs. Dingley's book and an order on the Trust Company from Mr. Merrill, witnessed by Mr. Averill. On her return to his room with the book and money, a conversation took place which leads to a solution of the question involved. Mrs. Dillingham was asked, "Q—Will you state the conversation that took place then relative to the bank books? A—When I came back with the money he wanted me to sit down by the bed and show him the books. He wanted me to look at the books, and I did. He says, 'You take that hundred dollars and put it with those books and my funeral expenses are to be paid out of it. I want you to put the money with the books and give them to Mr. Averill when I am dead and see that he attends to

everything. I want Mr. Averill to look after everything.' Mrs. Dillingham again stated: 'He told me to keep those books safe and give them to Mr. Averill after he died, to deliver them to him and see that everything was done; he wanted him to attend to all his business; he had great confidence in him.' 'He wanted him to see to everything, do all the settling up.' " Mrs. Dillingham stated further in relation to Mr. Merrill: "He had said before he had got his property all arranged as he wanted it . . . . and he thought it wouldn't have to be administered on." "He had made a will, and then he thought that would have to be administered on, so much red tape gone through; he decided to have them put into bank books," and he destroyed his will. "The book for two hundred dollars bearing his name with that of Charles H. Averill was to be used with the one hundred dollars in money to pay his funeral expenses, and the balance to go to Mr. Averill." Mrs. Dillingham testified that she gave Mr. Averill the instructions she had received from Mr. Merrill.

The foregoing comprises all the material testimony of Mrs. Dillingham, except that she stated that a note for fifty dollars which she had given Mr. Merrill "was to come out of her bank book," "it had got to be paid." And she stated further that she delivered the bank books to Mr. Averill several days before Mr. Merrill died. Mr. Averill in direct examination answered as follows: "What instructions did you receive in regard to them?" Averill answered: "They were passed to me with the instructions that I was to see that his affairs were settled up, and the books should go to the one they were made out to." "Q—Had Mr. Merrill made any talk with you himself relative to what you should do in case of his death? A—He had.

"Q—What was it? A—That I should look after his business when he got through.

"Q—Did he make any statements as to what he had done with his property? A—Why, he told me that he had made it out in bank books and fixed it just the way he wanted it to go so there would be no fuss about it.

"Q—Were there any items, any details that you think of that he told you relative to what he wanted you to do? A—Yes, about two weeks before he died he brought these bank books into my kitchen

and showed them to me, and says, 'if anything happens to me I want you to know I have got these bank books, and I want you to see that they go where they belong.' "

Mr. Averill was asked by his counsel,—"Q—Did he (Mr. Merrill) say anything to you about his funeral or anything of the kind," and he answered, "Never." In cross-examination he disclaimed all knowledge as to how the funeral charges were to be paid, that "nothing had been said about it, Uncle George (Mr. Merrill) never mentioned it." He denied knowledge of, or responsibility for debts and expenses of illness and funeral of the decedent, although they total nearly four hundred dollars; denied that he hired the undertaker, and stated that Mr. Merrill sent for the undertaker himself, notwithstanding the testimony of the physician and others that for the last few days of his illness Mr. Merrill was in a state of coma; contradicted Mrs. Dillingham's statement that he had witnessed the order on the bank, and finally stated that he had no conversation with Mr. Merrill in relation to the bank books after they were delivered to him by Mrs. Dillingham. Mrs. Catherine W. Page, a trained nurse in attendance, testified: "A—I saw Mrs. Dillingham when she gave the bank books to Mr. Averill.

"Q—Did you hear what was said by Mrs. Dillingham to Mr. Averill?

"A—I did. Q—What was said? A—She brought out the books and said that Mr. Merrill wanted him to take the books and settle up the business. Q— Was that practically all that was said at that time? A—I don't remember any other conversation . . . Mr. Averill took the books and put them in a sideboard in the same room."

It is urged by counsel for the defendants in his very able and helpful brief that the facts disclosed sustain his contention that a gift *causa mortis* was perfected, and that a trust was created for the benefit of the defendants, in plain, definite, and certain language, empowering C. H. Averill as trustee to deliver said bank books to the defendants. We are not able so to conclude. On the contrary, the evidence is very clear that while the decedent intended to bestow his bounty upon the defendants, his words and acts as recounted by the witnesses fall far short of the legal requirements necessary to establish either a gift *causa mortis*, or a trust.

No witness testifies that on or after the delivery to Mr. Averill, the bank books were to be turned over to any person. The instruc-

tions to Mr. Averill were "to attend to everything," "to look after everything," "do all the settling up," "and settle up the business." This testimony comes from Mrs. Dillingham and Mrs. Page, the only witnesses professing any knowledge of the facts when and after the books were delivered to Mrs. Dillingham. Mr. Averill denies any conversation with Mr. Merrill after the receipt of the bank books, but says that before Mr. Merrill became ill "he brought these bank books into my kitchen and showed them to me, and says 'if anything happens to me I want you to know I have got these books, and I want you to see that they go where they belong.'" The latter is the only testimony tending to sustain a gift *causa mortis*, but it was made while the decedent was in his usual health, and could at best be taken as an evidence of his intention to give, and which as has been seen was not carried out as required by law. Of such testimony our court has said: "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 only ajar, but propped wide open, to every species of fraud that ingenuity in the invention of evidence might be able to devise." *Maine Savings Bank* v. *Welch*, 121 Maine, 49. *Barstow et al.* v. *Tetlow, Apt.*, 115 Maine, 96; *Weston* v. *Hight*, 17 Maine, 287. Failing to establish a perfected gift, the defendants fail to establish a trust, for the court will not enforce as a trust a transaction intended as a gift, but imperfect for that purpose. *Norway Savings Bank* v. *Merriam*, 88 Maine, 146; *Cazallis* v. *Ingraham*, 119 Maine, 240. There were no words used by decedent or witness indicating a gift of a bank book to any person, and no words used creating a trust, or from which the court would be justified in declaring that a constructive trust resulted. The record discloses an attempted testamentary disposition of his property after death, on the part of Mr. Merrill, an attempted evasion of the statute of wills. The attempt was ineffectual. "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." *Maine Savings Bank* v. *Welch*, supra.

The bank books remained the property of Mr. Merrill at the time of his death, and belong to the administrator to be disposed of according to law.

The entry will be,

Bill sustained.
Decree in accordance with this opinion.

CHARLES POOLER'S CASE.

Somerset. Opinion November 3, 1922.

Claimant under the Workmen's Compensation Act in order to be entitled to compensation must show that at the time of injury he was engaged in the kind of work at the place specified in the written acceptance filed by the employer with the Industrial Accident Commission. If injured while engaged in labor resulting from an emergency, that is, not regular work, but work of a temporary nature, required as a result of some unexpected occurrence, he is not entitled to compensation, as he comes within the exception specified in Sec. 4, Chap. 238, of Public Laws of 1919, as a casual employee.

In the instant case the issues being determined by the Commission upon facts undisputed, are questions of law, open to review.

The employment was casual. An emergency arose and the opposite of regular business occurred. The unexpected had happened. An emergency crew was hired, and when the emergency ceased their labor ceased. In such emergency employment of labor to meet the same is and must be casual.

On appeal. This is a proceeding under the Workmen's Compensation Act to recover compensation for an injury sustained by claimant while engaged in unloading pulp wood from a freight car at Fairfield on the 29th day of January, 1921, by dropping a stick of wood on his toe.

In defense the respondents contended that at the time of the injury claimant was not engaged in work specified in the written acceptance filed by the employer with the Industrial Accident Commission, nor at the place designated therein. Upon a hearing the chairman of the Industrial Accident Commission granted compensa-

tion and respondents appealed from the decree of the sitting Justice affirming the findings of the Commission. Appeal sustained. Decree of sitting Justice reversed. Petition dismissed.

The case is stated in the opinion.

Carl A. Blackington, for claimant.

Robert Payson and Perkins & Weeks, for respondents.

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

HANSON, J. This case arises under the Workmen's Compensation Act (R. S., Chap. 50), Public Laws, 1919, Chapter 238, and comes before the court upon an appeal by the employer and insurance company from a finding of the Industrial Accident Commission in favor of the petitioner.

The petitioner alleged:

First, "that on the fifth day of February, 1921, while working as a laborer in the employ of Frank Sawyer at Fairfield, Maine, I received a personal injury by accident arising out of and in the course of my employment.

Second, "Said accident happened as follows: Heavy wood falling on my foot.

Third, "which resulted in an injury as follows: Crushed toe which afterward became infected."

It is not controverted that an accident occurred resulting in injury to the petitioner, but the respondents in defense urge that, 1, "the claimant was not at the time of the alleged accident an employee of said Frank S. Sawyer, nor was he working under the direction and control of said Sawyer.

2. "Said Frank Sawyer is an assenting employer under the Workmen's Compensation Act for a saw mill in the city of Ellsworth, Maine, as appears from the written assent on file with your Commission, and the alleged accident occurred, if at all, while said claimant was handling pulp wood in the town of Fairfield, Maine.

3. "Claimant's employment was but casual, if he was employed by said Frank S. Sawyer, which as above stated is denied."

Upon the issues raised the Commission found, "that Charles Pooler was at the time of the accident an employee of Frank S.

Sawyer as defined by subsection 11 of Section 1 of the Workmen's Compensation Act, and further that Frank S. Sawyer was an assenting employer as to Mr. Pooler."

The issues so determined by the Commission upon facts undisputed, are questions of law, open to review by this court.

The employer on March 22, 1920, was a manufacturer of laths at Ellsworth, and on that day obtained liability insurance for one year. On April 1, 1920, he filed an acceptance with the Commission, and certificate was issued April 6, 1920. The written acceptance was dated at Ellsworth, March 26, 1920, and contained the following:

"Average number of employees, 20; male 20.

"Location of Employment, Ellsworth, Maine.

"Nature of employment, Saw Mill."

The employer also filed with the Commission a copy of the Universal Standard Workmen's Compensation Policy, containing the following:

"3. Location of all factories, shops, yards, buildings, premises or other work places of this Employer, by Town or City, with Street or Number, Ellsworth, Maine, and elsewhere in the State.

"1 (a) Saw mill for laths. $3,000. 4.20 $126.00

"Estimated advance premium $126."

The testimony shows that $3,000 was the estimated cost of labor in and about the mill business at Ellsworth, and at no other place although the employer manufactured laths in other places from time to time, and as to such manufacturing he was an assenting employer, and the contract of insurance had in contemplation the manufacture of laths at other points outside of Ellsworth if the employer so desired, but did not have in contemplation the assumption of liability for an injury arising from any business of the employer not connected with or incident to the manufacture of laths, either at Ellsworth or any other point in Maine.

The defendant, Frank S. Sawyer, was engaged in other business at various points, in buying and selling pulp wood and other timber, and in buying and selling land; but in compliance with R. S., Chap. 50, Sec. 3, Public Laws, 1919, Chap. 238, Sec. 3, he "specified the business in which he is engaged and concerning which he desires to come under the provisions hereof." He was admittedly engaged in buying and selling pulp wood at the date of injury claimed by petitioner. So far as the case shows, it was at that date his only business,

the lath business having been discontinued for many months. The pulp wood contract involved did not comprehend any delivery or work at Ellsworth or Fairfield. An emergency due to some unexplained cause aside from expense of demurrage compelled the respondent to unload and yard certain pulp wood at Fairfield. For this purpose he sought the aid of a friend who employed the petitioner and others to unload the same, and while the petitioner was so employed, the unfortunate accident occurred. The employment was casual. As has been seen, an emergency arose and the opposite of regular business occurred and persisted. A situation developed in which all effort in relation to the pulp wood must be casual. The unexpected had happened. An emergency crew was hired, and when the emergency ceased their labor ceased. In such emergency, employment of labor to meet the same is and must be casual. The occurrence was not a part of the usual, orderly and normal conduct of the pulp wood business, in which such employment would bind respondents, even if Charles Pooler had been an assenting employer as to the pulp wood business. *Fournier's Case*, 120 Maine, 191.

Subsection 11 of Section 1 of the Workmen's Compensation Act, to which the chairman of the Commission refers as the basis of his finding of law, provides that " 'Employee' shall include every person in the service of another under any contract of hire, express or implied, oral or written, except: (a) farm laborers; (b) domestic servants; (c) masters of and seamen on vessels engaged in interstate or foreign commerce; (d) persons whose employment is but casual, or is not in the usual course of trade, business, profession or occupation of his employer." . . . .

It is clear from the undisputed facts that the finding is erroneous, and therefore cannot stand. Petitioner's employment was casual within the meaning of subsection 11 of Section 1 of the Workmen's Compensation Act. "Casual" is the antonym of "regular," "systematic," "periodic" and "certain." In re *Gaynor*, 217 Mass., 86. In re *Cheevers*, 219 Mass., 244; *Callahan* v. *Montgomery*, Penn. Sup. Ct., 115 Atl., 889, and cases cited. See *Smith* v. *Boiler Company*, 119 Maine, 552. *Guy L. Mitchell's Case*, 121 Maine, 455.

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

MARIA HEAD, Guardian *vs.* EARL E. FULLER.

Androscoggin. Opinion November 17, 1922.

Private and Special Laws, 1919, Chap. 3, Sec. 2, Par. IV, authorizing removal of actions, is restricted to actions of law with an ad damnum, to judicial writs in the ordinary form, made returnable at a regular term of court, and does not include a summary process, without ad damnum, made returnable either in term time or vacation and requiring speedy consideration by the court.

Proceedings brought to compel a father to contribute to the support of his wife and minor children do not come within the category of "actions" as used in the removal statute.

It is a summary process and falls in line rather with certain other special proceedings that have been held not to be actions.

Furthermore, if the right of removal in such preceedings existed it would follow that there should also be the same right of appeal as in actions in the Municipal Court, but this court has decided that no appeal lies.

This reasoning as to the delay caused by appeal applies with equal force to the delay caused by removal. The spirit of the proceeding forbids both.

On exceptions. This is a process brought under the provisions of R. S., Chap. 66, Sec. 9, before the Municipal Court of Auburn, seeking to require respondent to contribute a weekly sum toward the maintenance of his minor child. The respondent filed a motion to remove the proceedings to the Superior Court for Androscoggin County, claiming the right of removal under Sec. 2, Par. IV, Chap. 3, of the Private and Special Laws of 1919. The Judge of the Municipal Court denied the motion, and respondent excepted, and such exceptions were certified directly to the Chief Justice under Private and Special Laws of 1919, Chap. 3, Sec. 4. Exceptions overruled.

The case is sufficiently stated in the opinion.

Frank A. Morey, for petitioner.

George C. Webber, for respondent.

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

CORNISH, C. J. This is a petition brought under the provisions of R. S., Chap. 66, Sec. 9, before the Municipal Court of Auburn, praying that the respondent may be ordered to pay such sum weekly for the suitable maintenance of his minor child, of whom the plaintiff is guardian, as the court may deem reasonable and just.

The respondent seasonably filed in the Municipal Court a motion to remove the proceedings to the Superior Court for Androscoggin County, claiming the right of removal under the charter of said Municipal Court which provides that "any action wherein the debt or damage demanded exceeds twenty dollars brought in said court shall be removed by order of the judge into the Superior Court on motion of the defendant, filed at the return term," provided he files the proper affidavit and makes the required deposit. Private and Special Laws 1919, Chap. 3, Sec. 2, Par. IV.

The Judge of the Municipal Court denied the motion for removal on the ground that the provision of the charter of the court above quoted does not apply to proceedings of this nature. Exceptions were taken to this ruling and certified directly to the Chief Justice under Private and Special Laws 1919, Chap. 3, Sec. 4.

The ruling was correct; and for two reasons.

In the first place, by the express terms of the section authorizing removals, it is confined to "any action wherein the debt or damage demanded exceeds twenty dollars," that is, it is restricted to actions at law with an ad damnum, to judicial writs in the ordinary form, made returnable at a regular term of court. The motion for removal is required to be filed at that return term.

The proceeding brought to compel a father to contribute to the support of his wife and minor children, R. S., Chap. 66, Sec. 9, does not come within the category of "actions" as used in the removal statute. It is a summary process, without ad damnum, made returnable either in term time or vacation and requiring speedy consideration by the court, whether Supreme Judicial, Superior, Probate or Municipal. It falls in line rather with certain other special proceedings that have been held not to be actions. Thus the term "actions" has been held not to include a petition pending before the Board of County Commissioners for the location of a highway,

Webster v. *County Commissioners*, 63 Maine, 27; nor an appeal from an award of damages made by a City Council for land taken in the laying out of a street, *Rines* v. *Portland*, 93 Maine, 227; nor a petition to the County Commissioners for the establishment of gates at a railroad crossing, *Grand Trunk Ry. Co.* v. *County Commissioners*, 88 Maine, 225; nor proceedings in insolvency, *Belfast* v. *Fogler*, 71 Maine, 403; nor a proceeding for assessing the amount of just compensation for private property taken for public uses, *Kennebec Water District* v. *Waterville*, 96 Maine, 234, 249.

In the second place, if the right of removal in this proceeding existed it would follow that there should also be the same right of appeal as in actions in the Municipal Court. But this court has decided that no appeal lies. *Cotton* v. *Cotton*, 103 Maine, 210. After reciting the history of the statutes giving this summary remedy against the father, and considering the nature and purpose of the petition, the court say: "If the defendant could secure the opportunity for delay afforded by exercising a right of appeal to the Supreme Judicial Court and thus vacating the order of the court below, it is obvious that one of the vital purposes of the statute would necessarily be defeated and in many instances the ravages of hunger and disease would outrun the benevolence of the statute. Such orders are ordinarily of a temporary character subject to revision by the Court which makes them, and no injustice is likely to result from the exercise of such power by the lower Courts." This reasoning as to the delay caused by appeal applies with equal force to the delay caused by removal. The spirit of the proceeding forbids both.

Exceptions overruled.

ALFRED B. CRABTREE et als., In Equity *vs.* WILLIAM M. AYER, et als.

Hancock. Opinion November 17, 1922.

An act of the Legislature creating a district and authorizing the construction of a bridge, where no constitutional provision is violated, is valid. The expediency, wisdom, or popularity of the purpose of such an act are not matters for the court. The constitutionality of such an act as to future maintenance of such a bridge not determined as it is not before the court. A poll tax is not a property tax, and is assessed upon every male inhabitant regardless of the purposes of taxation, or the amount thus raised.

In the instant case it is held that with the expediency, wisdom, or popularity of the proposed public work the court is not concerned.

That the act of the Legislature, creating the district and authorizing the construction of the bridge, violated no constitutional provision.

That the proceedings of the board were in accordance with the act.

That the constitutionalty of the act as to the future maintenance of the bridge is not now before the court.

That a poll tax is not a property tax and would be assessed upon every male inhabitant within the district whether the bridge were built or not.

On appeal. This is a bill in equity brought by fifteen taxable inhabitants of the towns composing the so-called Hancock-Sullivan Bridge District and other towns in the County of Hancock, against the members of the State Highway Commission individually and as members thereof, and the County Commissioners of the County of Hancock, individually and as County Commissioners, and the trustees of the so-called Hancock-Sullivan Bridge District, praying for an injunction both temporary and permanent, enjoining said defendants from directly or indirectly attempting to do any acts toward the construction or contracting for construction of any bridge between the towns of Hancock and Sullivan, in said county, and from borrowing money and issuing negotiable notes and bonds of said District, or otherwise directly or indirectly pledging or attempting to pledge the credit of the people or territory within the limits of the towns of Hancock, Sullivan, Sorrento, Gouldsboro and Winter Harbor, and

from obtaining any loan or loans of money or in any manner pledging the credit of the County of Hancock to pay said county's proportion of the cost or estimated cost of said bridge. A hearing was had upon the bill, answer and proof, and the temporary injunction was denied and an appeal taken to the Law Court. Appeal dismissed. Decree below affirmed with additional costs.

The case is stated in the opinion.

Fellows & Fellows, for plaintiffs.

Ransford W. Shaw, Attorney General and Wm H. Fisher, Deputy Attorney General, for State Highway Commission.

Wm. E. Whiting, County Attorney, for County Commissioners of Hancock County.

W. B. Blaisdell and Hale & Hamlin, for all other defendants.

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

SPEAR, J. This is a bill in equity brought by fifteen taxable inhabitants of the towns composing the so-called Hancock-Sullivan Bridge District and other towns in the County of Hancock, against the members of the State Highway Commission individually and as members thereof, and the County Commissioners of the County of Hancock, individually and as County Commissioners, and the Trustees of the so-called Hancock-Sullivan Bridge District, praying for an injunction both temporary and permanent, enjoining said defendants from directly or indirectly attempting to do any acts toward the construction or contracting for construction of any bridge between the towns of Hancock and Sullivan, in said county, and from borrowing money and issuing negotiable notes and bonds of said District, or otherwise directly or indirectly pledging or attempting to pledge the credit of the people or territory within the limits of the towns of Hancock, Sullivan, Sorrento, Gouldsboro and Winter Harbor, and from obtaining any loan or loans of money or in any manner pledging the credit of the County of Hancock to pay said county's proportion of the cost or estimated cost of said bridge.

Upon hearing the bill was dismissed with costs and an appeal taken to the Law Court. The cause was fully heard in Chambers by Mr. Justice DEASY and his carefully drawn opinion, upon the law and the facts involved, so fully covers all the issues raised that we substantially adopt it as the opinion of the court.

With the expediency, wisdom or popularity of the proposed public work the court is not concerned. These are matters solely for the legislative branch of the government. The only questions to be considered are whether the act of Legislature violates the Constitution and whether the proceedings of the Board are, or are not in accordance with the act. If the legislative enactment is unconstitutional or if the Board in any vital matter has failed to follow its requirements an injunction should issue. Otherwise, not.

By Chapter 120 of the Special Laws of 1921 the Legislature incorporated the Hancock-Sullivan Bridge District. By this act it has declared that the District should be entitled to the benefits of the provisions of the General Law relating to bridges. Public Laws of 1915, Chapter 319 and amendments. A Bridge Board was created consisting of ten trustees elected by the towns composing the District, the County Commissioners and the Highway Commissioners, each subordinate board having one vote. The Bridge Board was given the right and charged with the duty of determining whether public convenience and necessity require the bridge, and in the event of an affirmative decision, to approve plans. Thereupon the bridge is to be built and paid for twenty per cent. by the District, thirty per cent. by the County and fifty per cent. by the State. The board has decided the bridge to be necessary.

The petitioners are admittedly taxpayers of the County and District and interested as such.

It is contended that the act of the Bridge Board in determining that public convenience and necessity require the building of the proposed bridge is void for the reason that no public notice was given of the meeting held for the purpose.

It is admitted that notice was given to all members of the Bridge Board. This is the only notice required by the express terms of the act.

The legislative enactment provides that "The State Highway Commission shall appoint times and places for meetings of said Board and give such reasonable notice thereof as they shall see fit." This requires some notice, but it does not contemplate public notice.

If public notice had been intended it would seem that the Board (not the Highway Commissioners) would have been charged with the duty of giving it. If the Legislature had contemplated public notice it could have easily, and would have undoubtedly provided for "such reasonable *public* notice thereof as they shall see fit."

But it is claimed that without apparent legislative intendment the word "public" should be read into the act. This may be true when necessary to save a legislative act from vitiation by reason of unconstitutionalty. In this case it is we think not necessary for reasons hereinafter set forth.

No question is raised that the Legislature could have authorized the building of the bridge wholly at the expense of the State. It must also be agreed that the Legislature may create taxing districts and make the cost of any public work wholly or in part a charge upon the same, provided that the district receive special benefit from such public work.

This doctrine (recognized in all jurisdictions) is established in Maine in the case of the Forestry District (109 Maine, 476). The *Rumford & Mexico Bridge District,* (115 Maine, 157) and the *Portland Pier Site District,* (120 Maine, 15.) Numerous cases might be mentioned upon which the court has not been called upon to pass. Indeed every town is an example. A town is but an administrative and taxing district created by the State. The Legislature has the same right to create districts that it has to organize towns and counties.

But this power of the Legislature is not unlimited. The district must receive some special benefit from the public work to be paid for by it other than the benefits that it enjoys in common with the rest of the State. There must be some sort of proportion between the benefit and the burden.

Different courts agreeing as to the correctness of the above-stated principle have prescribed different tests to determine whether it is violated.

Is the statute "palpably arbitrary and a plain abuse?" (*Houck* v. *Drainage District U. S. Supreme Court,* 60 L. Ed., 273). "Indefensibly unfair?" (*Cleveland* v. *Tripp,* 13 R. I., 62) "a flagrant misuse of legislative power?" (234 Mass., 621). "Unreasonably disproportionate?" (*Hamilton* v. *Portland Pier Site District,* 120 Maine, 15). These differing phrases are identical in meaning.

Although it is well settled that the powers of the Legislature are absolute except as limited by the constitution either expressly or by necessary implication (*Laughlin* v. *Portland,* 111 Maine, 489) it would too greatly prolong this opinion to discuss in detail the article or articles of the constitution that such unreasonable disproportion would violate. It would contravene the spirit of fairness and equality that throughout pervades our fundamental law.

See Maine Constitution Art. 1, Secs. 6 and 21. Art. 9, Sec. 8 and the 14th Amendment to the Federal Constitution.

Suffice it to say that a law imposing upon a taxing district a burden of taxation "indefensibly unfair," "a plain abuse," "a flagrant misuse of legislative power" or to use the milder but substantially equivalent language of the Maine Court "unreasonably disproportionate to benefits" would be held unconstitutional and acts under it enjoined. Otherwise, not.

The constitution, of course, does not require taxation to be exactly proportionate to benefits. Such a requirement would paralyze the taxing power.

Turning to the case at bar and applying the above principles, no plain abuse or flagrant misuse of legislative power appears. No unreasonable disproportion of burden and benefit is shown. The Legislature determined that the County of Hancock would be benefited by the proposed bridge in a greater degree than the rest of the State, and the district in a greater degree than the rest of the county. Its decision is not so plainly, palpably and flagrantly erroneous as to overcome the presumption of constitutionality and justify the interposition of the court.

The petitioners cite and rely upon *Dyer* v. *Farmington*, 70 Maine, 515. In that case the Farmington Village Corporation having voted to raise $35,000 to aid a railroad was by the court's injunction restrained from so doing. We think that the reasoning of the opinion in the Dyer case has not been fully approved by later cases. The decision, however, was undoubtedly correct. The tax burden and local benefit were unreasonably disproportionate. Other distinctions between that case and the present appear in *Mayo* v. *Fire Co.*, 96 Maine, 553.

There is no difference in principle between the present case and that of the Portland Pier Site District which was required by legislative act to pay more than its equal share of the cost of establishing a public pier. Nor is any difference in principle perceived between this case and the law requiring towns to maintain public roads. In the absence of proof of unreasonable disproportion an injunction will not on this ground be granted.

It is further said that no public notice was given of the meeting of the Bridge Board whereat the bridge was determined to be required by "public convenience and necessity." We have already seen that

public notice was not made necessary by the terms of the act. It is contended that if such notice to taxpayers were not expressly or impliedly required, the Legislative Act is unconstitutional because violative of the Fourteenth Amendment to the Federal Constitution which guarantees that no persons shall be deprived of property without "due process of law."

This point cannot be sustained. If the Legislature had itself determined the necessity of the public work as was done in the case of the Portland Pier Site District no notice to taxpayers would have been required. The "due process" clause of the constitution does not apply to an act of the Legislature creating a taxing district. It was not made essential by the conditional requirement that the fact of necessity be determined by a board.

"But the Legislature has the power to determine, by the statute imposing the tax, what lands, which might be benefited by the improvement, are in fact benefited; and if it does so, its determination is conclusive upon the owners and the courts, and the owners have no right to be heard upon the question whether their lands are benefited or not, but only upon the validity of the assessment, and its apportionment among the different parcels of the class which the Legislature has conclusively determined to be benefited." *Spencer* v. *Merchant U. S. Sup. Court*, 31 L. Ed., 768. See also *Branson* v. *Bush*, U. S., 64 L. Ed., 220.

It is true that the United States Supreme Court has held that where the property to be benefited and therefore the territory to be included in a taxing district is left to the determination of a board or commission, "the inquiry becomes in its nature judicial in such a sense that property owners are entitled to a hearing or an opportunity to be heard before their lands are included." *Hancock* v. *Muskogee*, U. S., 63 L. Ed., 1083 and authorities cited.

But there is a clear though perhaps close distinction between that case and the present where the only question left to the board was the determination of "public convenience and necessity."

The petitioners contend and cite many authorities to the effect that they are entitled to notice and an opportunity to appear and contest the "legality, justice and correctness" of the proposed tax assessment against them. But if the benefit is reasonably proportionate to the tax burden the proposed assessment is legal and in theory of law just. This the petitioners have the opportunity of

contesting and in this proceeding are contesting. When any tax is assessed they will have an opportunity to be heard upon its "correctness" i. e., its equality according to the just value of property within the taxing district. R. S., Chap. 10, Secs. 74-79. *Sears* v. *Street Commissioners*, 173 Mass., 356.

By Section 10 of the act the District is charged with seventy per cent. of the cost of maintaining the bridge and the county with thirty per cent. Counsel for the petitioners by their illuminating argument and brief contend that even if the county and district may be required to contribute to the building of the bridge, the provision respecting maintenance is unconstitutional and void. They cite the case of *Hammett* v. *Philadelphia*, 65 Penn., State 146. This case holds that while the abutters upon a public street may be compelled to pay for its original construction, they cannot under the constitution be charged with its maintenance. The ground for the distinction seems to be in effect that it is necessary to "draw a line somewhere." Later Pennsylvania Court decisions have approved the *Hammett Case*, (69 Penn. St., 364, 3 Atlantic 220, 23 Atlantic 1102).

We are not impressed with the soundness of the Pennsylvania Courts' reasoning and it does not seem to have been followed or approved by other courts.

But it is not necessary now to decide whether this distinction is or is not well founded, or whether the charge upon the district for maintenance is reasonably proportionate to benefits. These problems are not now before the court.

The parts of the act relating to construction and maintenance respectively are independent and separable and even if one part is invalid, the other if constitutional must stand. *Hamilton* v. *Portland Pier Site District*, supra.

The final objection is that poll taxpayers are required to pay some part of the expense. This in our opinion does not vitiate the act. A poll tax is not a property tax, and would be assessed upon every male inhabitant of the district whether the bridge were built or not.

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

EDITH D. RENT, Admx. *vs.* PORTLAND CANDY COMPANY.

Cumberland. Opinion November 22, 1922.

Evidence of negligence of defendant held to be abundantly sufficient to sustain the verdict in favor of plaintiff. Exceptions cannot be sustained unless it affirmatively appears that the excepting party has been thereby prejudiced.

In the instant case there was clearly sufficient evidence to warrant the jury in finding the defendant's servant negligent. But the plaintiff's intestate was also negligent. He was negligent in jumping from a moving trolley car. He was negligent in crossing a street directly in front of a rapidly-moving automobile. But when he was struck he had safely passed these perils and had reached the grass ground on the opposite side of the street beyond the part of the road devoted to travel by vehicles. The automobile swerved to its left and fatally injured the plaintiff's intestate when he had reached a point outside the travelled way.

The defendant says that this was due not to his negligence, but to his care. He was trying, he says, to save the intestate from the consequences of his own negligence by going around him. But the jury may have found that the accident was due to the defendant's recklessness in trying to make a curve in the road without slackening speed: not to solicitude for the safety of one traveller but indifference to the safety to all.

Defendant excepted to a ruling of the presiding Justice, not because the ruling was erroneous, but because without further explanation it was misleading. But even if the instructions were misleading, or even erroneous, exceptions cannot be sustained unless it affimatively appears that the excepting party had been thereby prejudiced.

The defendant complains that the instructions unexplained may have misled the jury as to the duty of an automobile driver who sees that an approaching electric car is slowing down to make a stop. But the defendant emphatically denied that he saw the electric car slowing down. No explanation was necessary to adapt the instruction to the evidence.

To hold that the omission to explain was prejudicial and thus exceptionable we must find that the jury not only misunderstood the law, but also disregarded the evidence. That the jury went so far astray we cannot assume.

On exceptions and motion for a new trial. This is an action of tort for personal injuries brought by plaintiff as administratrix. The general issue was pleaded and also under a brief statement contributory negligence was set up. The plaintiff's intestate was a

passenger on an electric car running from Yarmouth to Portland. Francis P. Duffy, agent of defendant corporation, was driving an automobile truck from Portland to Yarmouth. As the electric car reached a position nearly opposite the residence of Dennis B. Hamilton in the town of Cumberland, and was slowing down to make a stop at a regular stopping place, plaintiff's intestate alighted from the car and having crossed to the other side of the street was struck by defendant's truck and so seriously injured that he died in a few moments without recovering consciousness. The case was tried to a jury and a verdict for forty-five hundred dollars was rendered for plaintiff. Defendant filed a general motion for a new trial, and also excepted to certain parts of the charge to the jury, and refusals by the presiding Justice to give requested instructions. Exceptions overruled. Motion overruled.

The case is sufficiently stated in the opinion.

Bradley, Linnell & Jones, for plaintiff.

Hinckley & Hinckley, for defendant.

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

DEASY, J. An automobile truck owned by the defendant and driven by its servant in the course of his employment ran into and caused the death of the plaintiff's intestate. This occurred on the Federal Road so called in the town of Cumberland on May 19th, 1921. At the place where the accident happened the electric trolley line follows the eastern side of the macadam road. A white post nearby marks a regular stopping place of the trolley cars.

The verdict was for the plaintiff. The defendant brings the case forward on motion and exceptions.

MOTION.

The evidence was conflicting, but the jury were warranted in finding and evidently did find the following to be facts:—

William S. Rent the plaintiff's intestate was a passenger on a southbound electric car. After the car had begun to slow down but while it was still moving at the rate of four miles an hour or more he jumped off on the west or street side. He stepped a few feet on to the macadam and stopped for an instant. He evidently saw the

defendant's truck which was then about seventy-five feet south of him. The truck was being driven northerly toward him at the rate of thirty-five or forty miles an hour. After a moment's hesitation he ran across the macadam and had reached the grass ground on the western side of the road when he was run into by the truck and fatally injured. The truck driver did not apply his brakes until after the accident had occurred. He swerved to the left until his left hand wheels were in the ditch. He says that he did this in an unsuccessful effort to avoid running into the plaintiff's intestate. For brevity we hereinafter refer to the defendant's servant, the driver of the truck, as the defendant.

The jury were abundantly justified in finding the defendant negligent. Not to speak of his failure to use his brakes his speed alone, as testified to by witnesses that the jury were entitled to believe, was sufficient to warrant such finding.

But it is apparent that the plaintiff also failed to exercise due care. Jumping from a moving trolley car is prima facie evidence of negligence. *Shannon* v. *R. R. Co.*, 78 Maine, 59. So also is crossing a street in front of an on-rushing automobile less than two seconds away. But the plaintiff's intestate had passed these perils. He had reached a point outside of and beyond the part of the road devoted to travel by vehicles. He was on the grass ground at the side of the road and undoubtedly for one fleeting instant, supposed that he was safe from pursuit by motor cars.

The defendant, however, says that in turning to the left to the very edge and beyond the edge of the macadam road he was doing the duty which the law enjoins upon him; that he was in a sudden and perilous emergency taking what he in good faith believed to be the last and only clear chance to save the plaintiff's intestate from consequences of his own negligence.

But assuming that his turning to the left and going outside the part of the road dedicated to vehicular travel may be thus justified, the defendant did not apply his brakes until after the collision. This is admitted. The defendant contends that the use of brakes would have been futile. The plaintiff claims otherwise and that even if there is doubt that the use of brakes would have been effectual, the victim was entitled to the benefit of the doubt. Moreover, the jury who saw and heard the defendant and his witnesses were not bound to accept his explanation of the accident. The jury may have deter-

mined that the accident was due to an attempt to make the curve in the road at reckless speed. They may have believed that the defendant showed by his conduct not solicitude for the safety of one traveller, but indifference to the safety of all.

The verdict is not manifestly erroneous.

EXCEPTIONS.

The plaintiff requested and the presiding Justice gave the following instructions:

"If you find that the defendant at the time of the accident was approaching a regular stopping place of an interurban electric railroad, with an approaching electric car in sight, which car was slowing down to make a stop at its stopping place, it was the duty of the defendant to so control its automobile that it could stop it, and to stop it, if necessary, to avoid injury to passengers alighting from the electric car."

The defendant's counsel concedes that this is a correct statement of abstract law. It is indeed a literal excerpt from the opinion of the court in the case of *Wetzler* v. *Gould*, 119 Maine, 279.

But at the trial he contended and now contends that as applied to the facts in the present case the instruction requested and given, without further explanation, is misleading.

But even if the instructions are misleading, or even erroneous, exceptions cannot be sustained unless it affirmatively appears that the excepting party has been thereby prejudiced. *Smith* v. *Booth Bros.*, 112 Maine, 304.

The defendant complains that the instruction unexplained may have misled the jury as to the duty of an automobile driver who sees that an approaching electric car is slowing down to make a stop. But the defendant emphatically denies that he saw the electric car slowing down. No explanation was necessary to adapt the instruction to the evidence.

To hold that the omission to explain was prejudicial and this exceptionable we must find that the jury not only misunderstood the law, but also disregarded the evidence.

We cannot assume that the jury went so far astray.

Exceptions overruled.
Motion overruled.

BATH MOTOR MART *vs.* JOHN MILLER et al.

Lincoln. Opinion November 22, 1922.

To sustain a common law lien for repairs it must appear that the work was done by contract with or by authority of the owner. An action may be maintained though brought in an assumed name. In replevin the party having the better title prevails, as it may be a question of relative rather than of absolute rights.

In order to lay the foundation for a common law lien for repairs it must appear that the work was done by contract with or by authority of the owner.

A duly-recorded Holmes note, covering an automobile, gives a title and right of possession superior to the common law lien of a party who after the record of the note, by request of the signer thereof makes repairs upon the car.

The Bath Motor Mart (corporation) holding a Holmes note covering an automobile may maintain replevin for the car notwithstanding the note was given to it under the name Rockland Motor Mart, it appearing the name Rockland Motor Mart is not the name of a separate corporation or partnership, but is a name adopted by Bath Motor Mart in carrying on a branch of its business.

On report on agreed statement. An action of replevin for an automobile. Defendants pleaded title in one Addison L. Shute and claimed a common law lien for repairs ordered by him. The question involved was as to whether defendants, without knowledge of the Holmes note given to plaintiff by said Shute before the repairs were made, have a common law lien for such repairs made without the authority or knowledge of plaintiff. Judgment for plaintiff. Damages assessed at one dollar.

The case is stated in the opinion.

Charles T. Smalley, for plaintiff.

Harold R. Smith, for defendants.

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

DEASY, J. Action of replevin for an automobile. The defendants plead title in one Addison L. Shute and claim a common law lien for repairs ordered by him.

The plaintiff holds a Holmes note signed by said Shute, duly recorded before the repairs were made or contracted for. The lien is not claimed under R. S., Chap. 96, Sec. 56. The conditions imposed by that statute do not appear to have been complied with. It is not shown that the plaintiff knew that the repairs were being made, or that the defendants before making the repairs had actual knowledge of the Holmes note. Upon the above facts gleaned from the agreed statement the plaintiff is entitled to judgment.

In order to lay the foundation for a common law lien for repairs it must appear that the work was done by contract with or by authority of the owner. "If the party comes into possession of goods without due authority he cannot set up a lien against the true owner." II Kents Comm. 639. "A lien is a qualified ownership and can only be created by the owner or by some person by him authorized." *Doe* v. *Monson*, 33 Maine, 432. See also *Hollingsworth* v. *Dow*, 19 Pick., 230. *Clement* v. *Gould*, (Vt.), 18 Atl., 452. *Small* v. *Robinson*, 69 Maine, 427.

It is urged that when the plaintiff entrusted the motor to the conditional purchaser, with implied knowledge that it was to be used, and would in the natural course of events require repairs, it presumptively clothed him with authority to have repairs made upon the credit of the car itself. But in most cases such a presumption would do violence to the real understanding of the parties to the note. Moreover, the authorities are opposed to this theory.

Small v. *Robinson*, 69 Maine, 428; *Sargent* v. *Usher*, 55 N. H., 287; *Hollingsworth* v. *Dow*, supra.

The Holmes note runs to the Rockland Motor Mart. The plaintiff is Bath Motor Mart. For this reason the defendants say that the action must fail. If Rockland Motor Mart were the name of an independent corporation or partnership, no assignment appearing, there might be merit in this defense. But the case fairly shows that Rockland Motor Mart was merely a name which the plaintiff adopted in carrying on the business of its Rockland branch.

An action could have been brought in the name of Bath Motor Mart upon the note payable to it though under an assumed name. *Jones* v. *Home Furnishing Co.*, 41 N. Y. S., 71, 7 Cyc. 567, 14 C. J.— 324— With no less reason the present action is maintainable.

Counsel for the defendants complains that the agreed statement contains no express allegation that the plaintiff ever had title to the automobile or the right to its possession.

But we are concerned with relative not absolute rights. The facts above recited show that the plaintiff has the prior and better title.

Judgment for plaintiff.
Damages assessed at one dollar.

AUGUSTA D. BOYD, Executrix *vs.* ANDREW JENSEN.

Cumberland. Opinion November 23, 1922.

A valid title based upon the non-payment of a tax cannot be acquired by a party seeking to maintain such a title who was under an obligation to pay such tax. Failure by the plaintiff to pay a tax which defendant is under a legal obligation to pay is not laches of which defendant can take advantage.

One who is under an obligation to pay a tax is precluded from acquiring a valid title based upon its non-payment.

Failure on the part of the plaintiff to pay a tax which the defendant is under legal obligation to pay is not laches that the defendant can take advantage of.

The defendant by stipulation in his mortgage of real estate agreed to pay the taxes upon the mortgaged property. In default of such payment the property was sold for taxes. It was bought by a third party, who sold to the defendant.

The plaintiff executrix of the mortgage foreclosed the mortgage and brought this real action. Plaintiff held entitled to recover.

On exceptions. A real action brought by the executrix of the will of Charles H. Boyd. In July 1913, defendant owned a parcel of real estate situated in Westbrook and on July 31, 1913 gave to plaintiff's testate a mortgage on it with covenants of warranty and agreement to pay taxes. The property was sold for non-payment of taxes assessed in 1913, and a deed given to one Theodore Kerr. It was sold a second time for non-payment of taxes assessed in 1914, and a deed given to one William Hebert. Subsequently said William Hebert for a valuable consideration quitclaimed the property to defendant, the original mortgagor. After the death of mortgagee in 1920, plaintiff was appointed executrix and foreclosed the mortgage

and after the expiration of the equity of redemption brought this action to oust defendant who refused to surrender the premises. The case was heard by the presiding Justice without a jury who found for plaintiff and defendant excepted. Exceptions overruled.

The case is stated in the opinion.

Philip G. Clifford, for plaintiff.

Wade L. Bridgham, for defendant.

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

DEASY, J. On exceptions by defendant to ruling of single Justice who heard the case without a jury.

A real estate mortgage given by the defendant to Charles H. Boyd in 1913 was in 1920 foreclosed by the plaintiff as executrix of the mortgagee. The right of redemption having expired the plaintiff brings this real action to recover the property.

The defendant sets up in defense a tax deed to one William Hebert, and a deed from Hebert to himself. It is conceded that the tax was duly assessed, the property properly advertised and sold and the sale therefore valid. The tax for non-payment of which the sale was had was assessed in 1914. This the defendant was under obligation to pay. His mortgage contained an agreement binding him to pay this tax. He now seeks to take advantage of his failure to keep his contract.

The law applicable to this situation is thus stated by the Maine court in *Dunn* v. *Snell*, 74 Maine, 24: "One whose duty it is to pay the taxes upon land to prevent a sale of the same, cannot acquire a title by such sale and conveyance as against the real owner, but the vendee's deed will be treated as void from the beginning." See also *Varney* v. *Stevens*, 22 Maine, 331 and *Burgess* v. *Robinson*, 95 Maine, 127.

In other jurisdictions many other cases to the same effect are found. It is unnecessary to cite them. Several such authorities are collated in a note to *McAlpin* v. *Zitser*, (Ill.), 10 N. E., 902, which thus felicitously states the principle: "One who is under a legal or moral obligation to pay a tax is precluded from acquiring a valid title based upon its non-payment."

The case discloses that the property was also sold for the tax of 1913 and bought by one Theodore Kerr. This is immaterial. Hebert

acquired a title which was good against all persons including Kerr. Property acquired by tax deed is subject to taxation precisely as is property acquired in any other way. Hebert's title was complete, but the defendant having acquired it is estopped to set it up.

There is no merit in the defendant's contention that the plaintiff's action is barred by laches. Failure on the part of the plaintiff to pay a tax which the defendant is under legal obligation to pay is not laches that the defendant can take advantage of.

Exceptions overruled.

IN THE MATTER OF THE ESTATE OF JOHN CASSIDY, DECEASED.

Penobscot. Opinion November 25, 1922.

Under the succession tax statute where a contingency creates uncertainty regarding the ultimate succession to the title to property remaining after a trust ceases, the tax assessment must be deferred until uncertainty has become certainty, by a contingent interest becoming vested either in possession, or in right.

The literal words of the succession tax statute, having regard to the interdependency of its parts as a single law, manifestly, in cases where the interests passing are incapable of being valued and taxed without delay, must yield to a construction which is both reasonable and practicable.

In order to levy the excise it is essential that the succession should be ascertainable, either in point of actual fact, or, the precise fact not being available, then, theoretically, in accordance with such method, if there be any, as shall have been legislatively defined.

Where, as in the instant case, a contingency creates uncertainty regarding the ultimate succession to the title to property remaining after a trust ceases, the tax assessment must be deferred until uncertainty has become certainty, by virtue of a contingent interest becoming vested in possession, or at least vested in right.

There is no uncertainty regarding that which an annuitant already has received, and the right of succeeding to or receiving this is assessable immediately. Certain, too, is it that hereafter the beneficiary will be paid four thousand dollars annually for life. What the will gives additionally is conditioned on the exercise of a trustee's discretion, and that which may never pass is not

presently liable to the payment of a succession due. The present value of the future beneficial interest which is certain should be ascertained, and a tax fixed thereon and collected. The case should then be held open for the making of further assessments, from time to time, if there shall be occasion.

On report. This is an appeal by the State of Maine, and Lucile C. O'Brien, one of the annuitants, from the decree of the Judge of the Probate Court in the county of Penobscot in the assessment of inheritance tax in the estate of John Cassidy, late of Bangor, deceased. Under the provisions of the will of testator the whole estate was given to trustees in trust to pay certain annuities during the lives of his children and the life of the survivor. The trust then ceases and the property so held in trust is thereupon to "vest in and become the property of" all the lineal descendants, if any, then living, of testator, "in same manner and in same proportions as shall then be provided by the then existing laws of the State of Maine, for the descent among the lineal descendants of intestate property, real and personal." If no lineal descendants of testator be then living, all of said estate to pass to and become vested in testator's sister, Ellen Herlihy, if living, otherwise to be divided among those persons who shall then constitute her lineal descendants under the laws of the State of Maine, as they shall then exist for the descent of intestate property, real and personal.

John Cassidy died March 25, 1918, leaving four children and two grandchildren surviving him, also a sister, Ellen Herlihy, who has six children and three grandchildren now living.

The Judge of the Probate Court assessed an inheritance tax on the interest of each life annuitant, and further decreed that inasmuch as it cannot now be determined who the person or persons are to whom the balance of the estate descends, no further tax is assessable at this time.

From the decree the State of Maine appealed claiming that it was not impossible to assess a tax upon the remainder of the estate at this time, and that it was not necessary to determine absolutely who the persons are who will take the remainder of said estate in order to determine the amount of the tax to be paid upon said remainder.

Lucile C. O'Brien, one of the annuitants, also appealed, raising the question, among others, as to whether the assessment was properly made on the theory that the appellant is to receive during her lifetime ten thousand dollars annually, instead of four thousand dollars

annually for certainty, as provided in the will, and more annually to the maximum of ten thousand dollars, in the discretion of the trustees, the payment of this six thousand dollars annually additional being discretionary with the trustees, thus becomes uncertain and contingent. The State's appeal is dismissed. That of the annuitant is sustained. Both cases are remitted to the Supreme Court of Probate for appropriate decrees.

The case is fully stated in the opinion.

Ransford W. Shaw, Attorney General and Philip D. Stubbs, Assistant Attorney General, for the State of Maine.

Fellows & Fellows, for Lucile C. O'Brien, one of the Appellants.

Ryder & Simpson, for the Estate of John Cassidy.

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

DUNN, J. Mr. John Cassidy created a testamentary trust embracing his entire estate, both his will and a codicil having relation to the subject. By the will he invested a discretionary power in trustees to pay annuities, none in excess of four thousand dollars, for support and maintenance, so long as any of his children should live. Immediately following this provision in that document is a paragraph in these words:

"In the event that any of the beneficiaries do not draw yearly to the amount of four thousand dollars, then the Trustee shall retain the remainder yearly, and give credit to the beneficiaries for that amount, and they shall also allow Savings Bank interest on such remainder from year to year, and hold the accumulations together with the accrued interest at the above rate, as the property of each beneficiary, and for the benefit of each of the beneficiaries in case they should need it in the future. All the same to be subject to the demand of either of the beneficiaries at any time. I make this provision for accumulating any part of the four thousand dollars that shall be needed, as aforesaid, because I deem that my Trustees can more safely invest the fund and make it less difficult for my beneficiaries."

The codicil mentioned broadens discretion to the extent of permitting the payment of ten thousand dollars, rather than four thousand dollars. It leaves the quoted clause, concerning the

accumulating of unused balances, not only unchanged, but ratified, in common with other provisions of the will, by a general confirmatory phrase.

When the trust ceases, the property so held is to "vest in and become the property of" all the lineal descendants, if any, then living, of the testator, "in the same manner and in the same proportions as shall then be provided by the then existing laws of the State of Maine, for the descent among lineal descendants of intestate property, real and personal." If no lineal descendants of testator be then living, all said estate is to "pass to and become vested in" testator's sister, Ellen Herlihy, if living; otherwise it shall be divided among those persons who shall then constitute her lineal descendants, under the laws of the State of Maine, as they shall then exist for the descent of intestate property, real and personal."

The testator died in 1918. Four children, two grandchildren, and a sister survived him. The sister has six children and three grandchildren.

In dealing with the question of succession taxes, the Penobscot Probate Court, after assessing what it determined, less any exemption, to be the amount of each annuitant's right to succeed to or to receive that which had been left for him, postponed further action awaiting the removal of uncertainty as to those persons who, in the course of events, will take the now contingent remainder. Appeals were made, for different reasons, one by the State of Maine and the other by an annuitant. The cases are here on report.

THE STATE'S APPEAL

is meritless. The exaction imposed by the statute upon "all property . . . which shall pass by will . . . to any person," is not, strictly, a tax on the property passing, but an excise or duty, with exemptions and rates determinable with reference to the particular succession, which is enforced against the privilege of so succeeding to or receiving the title to property. R. S., Chap. 69, Sec. 1; *State* v. *Hamlin*, 86 Maine, 495. Viewed from a somewhat different angle, the privilege charge which sovereignty makes is well hit off by the expression that it is the transmission from the dead to the living, and not the thing transmitted, that is subject to the tax, 127 A. S. R., 1037. In order to levy the excise, it is essential that the succession

should be ascertainable, either in point of actual fact, or, the precise fact not being available, then, theoretically, in accordance with such method, if there be any, as shall have been legislatively defined.

Where, as in the present case, the remainder over is contingent, and, at the time of hearing, the court could not know whether the remainder would go to lineal descendants of the decedent, or to his sister, or to that sister's lineal descendants, it was only too plain that the particular succession would remain unascertainable until, ultimately, time should remove the uncertainty. On the other hand, the statute book may be searched in vain for any grant of power making an interest of this nature presently taxable, or, rather, presently liable for the payment of a tax. It would be grave error to suppose that the authorizing of compromises by the attorney general and executors or trustees,—not where there is doubtfulness in respect to the eventual takers—but where, for reasons readily conceivable, the present value of an actual interest cannot be computed—contemplated a present taxing by a judicial decree. R. S., Chap. 69, Sec. 2; 1921 Laws, Chap. 175. A compromise must find its source within the statute and without a court's decree. Nor does the direction of Section 9 of Chapter 69, R. S., that taxes shall be paid in, and in some instances before, two years after the granting of letters testamentary or of administration, affect the already indicated conclusion of this opinion. The literal words of the statute, having regard to the interdependency of its parts as a single law, manifestly, in cases where the interests passing are incapable of being valued and taxed without delay, must yield to a construction which is both reasonable and practicable. The tax of the first section of the statute is put by the eighth section upon the actual value of the property, as a judge of probate shall find it to be. Other sections, (Sections 15, 16) have relation to the payment of assessments laid, and still another, (Section 11) renders fiduciaries liable to the State, upon their official bonds, for failure of payment. Clearly, from the context of the statute as a whole, the meaning of the Legislature was, that the prescribed rates should be applied, not upon a mere possible interest, but upon a beneficial interest, within the time appointed, when consistently possible.

The tax then, let it be said in repetition, must be laid upon and subtracted from a definitely existing interest; the bare possibility of an interest will not suffice. The duty must be upon that which has

passed by the will, within the statute's contemplation, and not on that which may never pass. Which is but another way of saying, that where a contingency makes succession uncertain, the tax assessment must be deferred until uncertainty has become certainty, by virtue of a contingent interest becoming vested in possession, or at least vested in right.

Courts elsewhere, in analogous situations, and commentators on similar statutes, take a like view. *Howe* v. *Howe*, 179 Mass., 546, 55 L. R. A., 626; *Re Hoffman*, 143 N. Y., 327, 38 N. E., 311; *Re Roosevelt*, 143 N. Y., 120, 25 L. R. A., 695; *Re Dows*, 167 N. Y., 227, 52 L. R. A., 433; *Billings* v. *People*, 189 Ill., 472, 59 L. R. A., 807; *Note, 127 A. S. R., 1035, 1076.*

THE OTHER APPEAL

raises the question whether an assessment was rightly based on the theory that the appellant will receive ten thousand dollars yearly.

Payments thus far have been at that rate. To the trustees it now seems reasonable that they should continue so to pay. This is consequential, respecting the pending issue, with regard to what has been done, only. For, that deliberate judgment of the trustees, which must rule what shall be done in the varying conditions of the future, if such conditions there shall be, may cause the amount of annual payments to fluctuate. The gauge of a decree concerning futurity, as we have seen, must be found in an assurance of actuality, and not on likelihood.

What this will gives, beyond the sum of four thousand dollars annually, is conditioned upon the exercise of a discretion. In brief, reads the will, four thousand dollars to each beneficiary, by way of withdrawals for indicated purposes, the trustees so approving; otherwise, withdrawals for those purposes to the extent that the trustees shall sanction, with the amount of the difference between the aggregate of the withdrawals and four thousand dollars to be kept, interest bearing, in readiness for the beneficiary.

The codicil, in effect, struck out the word "four" and put "ten" in its stead in the annuity creating clause. There is no pretension of doing more. The testator is left saying still, in substance, four thousand dollars, or the equivalent thereof, in every year; the trustees supervising what shall be expended in a named way. And, in further

empowerment of the trustees, if you shall deem four thousand dollars inadequate for a beneficiary in any year, expend as much additionally as you will from my estate, but not more than ten thousand dollars, inclusive of the four thousand. To this conclusion do the testator's words lead. So leading they call up again the feature of uncertainty.

It was not the purpose of the Legislature, it may be said another time, upon the prompting of the fit suggestion of counsel in argument, to compel the payment of a tax on a privilege which as to vesting, actually or in right, yet remains impossible of determination. One should not be obliged to pay for that which may never be his. *Re Roosevelt,* supra; 26 R. C. L., 201, 202; 37 Cyc., 1574, 1580. And no such unjust result necessarily need be attained. That which the beneficiary has received is certain. A tax assessment and payment must be made accordingly. Certain, too, in the eye of the statute, is the annual payment of four thousand dollars to the beneficiary for life. The present value of that beneficial interest should be ascertained in the manner that the statute denotes, and the tax thereon fixed and collected. The case should then be held open for the making of further assessments, from time to time, if there shall be occasion.

The State's appeal is dismissed.
That of the annuitant is sustained.
Both cases are remitted to the Supreme Court of Probate for appropriate decrees.

AMELIA F. PRAY *vs.* FLORENCE MILLETT.

York. Opinion November 25, 1922.

A female plaintiff in an action for alienation of the affections of her husband by a female defendant, must allege and prove, that the action was brought within three years after the discovery of the offense, to be entitled to the special remedy created by the statute.

Where a special remedy is created by statute for enforcing a created right it is subject always to the conditions and limitations which legislative wisdom incidentally defines.

One woman suing another woman, by virtue of a statutory provision, for alienating her husband's affections, must allege and prove, as an essential prerequisite for laying a claim to the remedy provided, that the action was "brought . . . . within three years after the discovery of the offense."

On exceptions and motion for new trial. This is an action on the case, alleging alienation of affections of the husband of plaintiff by defendant, brought under Sec. 7, Chap. 66, of the R. S. The defendant pleaded the general issue, and the case was tried to a jury, and a verdict for $10,666.00 was returned for plaintiff. At the close of the testimony the defendant moved for a directed verdict for defendant on the ground that plaintiff had not proved that action was brought within three years after discovery of the offense, which motion was denied, and defendant excepted, and also filed a motion for a new trial. Motion sustained. New trial granted.

The case is fully stated in the opinion.

Willard & Ford, for plaintiff.

Edward S. Titcomb and Emery, Waterhouse & Paquin, for defendant.

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

DUNN, J. In this case one woman has sued another woman for alienating her husband's affections and recovered a verdict. The statute upon which proceedings are based, in prescribing a mode for enforcing the right which it creates, directs that action shall be "brought . . . . within three years after the discovery of the offense." R. S., Chap. 66, Sec. 7.

A special remedy given by statute upon particular facts is subject always to the conditions and limitations which legislative wisdom incidentally defines. Hence a plaintiff so circumstanced must allege and prove every fact thus made a prerequisite for laying a claim to the remedy provided. *Cape Elizabeth* v. *Lombard*, 70 Maine, 396; *Peru* v. *Bartlett*, 100 Maine, 213; *Karahalies* v. *Dukais*, 108 Maine, 527; 36 Cyc., 1188.

For the reason that the statutory provision relied on constitutes it an essential part of the cause that she would make, this plaintiff must allege and prove the alienation of the husband's affections as of a day within three years of the date of the writ, or, alleging the alienation as of a day before that time, then she additionally must allege and show that the discovery thereof by her was within three years of the bringing of the action. Her allegation of the alienating is laid within three years of the writ's date, but she falls far short of showing, either by direct evidence or by inference from the circumstances in evidence, that her discovery of the alienation was within that time. Indeed, that the plaintiff could first have maintained an action against the defendant, for the loss of the husband's consortium, sooner than three years before the suing out of the writ, is so clearly established by the proof as to justify the assertion that the statement scarcely is disputed on the record.

This plaintiff married one William Pray. Eventually they made their home at Everett in Massachusetts. While living together there, fifteen or more years ago, an attending physician commended the defendant for employment, she being a nurse and masseur. Mr. Pray employed her. She cared for him and his wife, intermittently, for a time. Through two summers the defendant was hired to assist Mrs. Pray with the housework at the latter's farm in Lyman, Maine. Upon returning to Massachusetts at the end of the second season, the defendant became a clerk in a Boston store. Afterward Mr. Pray left for Georgia to spend a winter. His wife neither accompanied nor came to him. When he was there the defendant also went to Georgia. She says that her going was at Pray's request to act as his nurse, Mrs. Pray approving. Defendant was back home again, following a stay of several months in the South, before Pray was. The next winter these two went to Georgia together. In a different town than that in which they formerly were they occupied the same suite at a hotel, the defendant coming to be well known in

the community as Mrs. Pray. In the following summer they were at the farm in Lyman. The next winter found them in Georgia. Mrs. Pray's time was passed partly in Massachusetts and partly in California. Matters went along without any especial variance until Pray's death in 1921, except that he and the defendant were in Portland the last two winters that he lived, a small boy relative of the woman's living with them. During these winters they stayed at two hotels, and at one of them at least they were registered by him as "William Pray and party." Defendant says that Pray paid her for her services as "nurse and housekeeper," . . . . "but not by salary."

Mrs. Pray's own testimony, to say nothing at the moment of corroboration that it has, convincingly demonstrates that this action was begun tardily. There is much meaning in her words. Says she, in rehearsing marital experiences: "We had no trouble before that woman came to massage him, in any way, manner, or shape." Twice had Mrs. Pray been to the South with her husband, but "I ain't been the last ten or twelve years because he has had her." Again, "A man went down there to see him, to see Mr. Pray, and when he got there he found her there and he didn't stay. He came back and came right down to the house and told me how it was down there, what she was doing," . . . . "eight or nine years or ten" ago. Mrs. Pray, for several seasons prior to the period that the statutes fixes, did not summer at her Lyman home, "where we was, he and I, always, until he got in with this woman." The reason why she did not is that her husband and the defendant were there. Mrs. Pray went to Lyman, three or four years before the trial, and the trial occurred within six months of the writ's date, "to see about getting hold of something that they were taking away." Her husband met her at the door. The defendant was there, "but she kept up-stairs and didn't come down where I was." A neighbor testifies that Mrs. Pray, in 1918, said that she and her husband had been living apart for fifteen years, the defendant being the cause. And, without designing to set up a limiting bar, the defendant adds that Mrs. Pray, refusing to accept the explanation that was proffered on the first home-coming from Georgia, accused her of living with Pray as his wife.

No extrinsic facts are interposed. There is no showing that Pray after the alienating had returned his affections to his wife, and that the affections were alienated by the defendant once more. The evi-

dence is all one way. It is of the absolute continuance of the alienation. And continuousness would effect only the subject of damages. To be sure there is evidence that, within the three years which the law gives for the commencement of an action, the Prays executed a separation deed containing a trust provision for Mrs. Pray's support. Prudence doubtless prompted the wife to have assurance that she would have a home and be supported in Everett while the defendant was "off with him." Recognizing the fact of an existing condition the deed does not detail its cause, nor yet does it recite the length of the existence of that condition. But the effect of the testimony is that, years before the document was entered into, the plaintiff had had a suspicion aroused in her mind. Being thus put upon her guard she in diligence could have ascertained facts which doubtless would have proved her case. The record is indicative that she did so learn, but in sheer neglect of a given right and remedy she remained inactive. Even when credibly and truthfully told about doings in the South, which being told about she believed, she still remained quiescent. When at last by means of pretext and connivance the title to the old home at Lyman—that home which was hers before her marriage to Pray— was vested in the name of this defendant, then a desire to avenge long-endured unhappiness fired the plaintiff's soul. She herself says that it was the knowledge of that conveyance which prompted suit.

The situation at the close of the testimony justified the requested directing of a verdict for the defendant. An exception was marked against the refusal to so direct. Argument, however, seems to relate the more to a general motion for a new trial. The result will be the same whichever is pressed.

It is not strange that the jury sympathized deeply with the plaintiff in her hard case. But it is regrettable that sympathy was permitted to sway the jury's judgment. Unfortunately a decision was reached in utter disregard of the evidence relating to the time within which the plaintiff, after discovering the alienating, commenced this action.

The verdict must be set aside.

Let the mandate be,

Motion sustained.
New trial granted.

STATE *vs.* HENRY BEAUDETTE.

York. Opinion November 25, 1922.

Under the statutes of this State the possession of intoxicating liquors intended for unlawful sale is an offense, and two methods of procedure are provided, one by complaint, and the other by indictment, and an auxiliatory remedy is also available by search and seizure process. On conviction the punishment is the same, whichever form of prosecution is followed. After prosecution by one method, a prosecution by another, the offense being one and the same, would be in violation of the constitutional provisions, both Federal and State.

Constitutional assurances, on the part of the Nation and of this State alike, are offended when one is brought into danger of punishment for the same offense more than once.

The statutory provisions inhibiting the possession of intoxicating liquors intended for sale define a single crime and two methods of proceeding.

On exceptions. The respondent was indicted for having in possession intoxicating liquors with intent for sale, and pleaded in bar a former acquittal of the same offense, in a search and seizure process, to which plea the State filed its general demurrer, which was joined by respondent, and sustained by the presiding Justice, the plea being adjudged bad, and respondent excepted. After sustaining the demurrer the respondent was ordered to plead over to the indictment and thereupon pleaded not guilty. Exceptions sustained. Judgment for respondent.

The case is fully stated in the opinion.

Edward S. Titcomb, County Attorney, for the State.

Leroy Haley, for respondent.

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

DUNN, J. Possession of intoxicating liquor intended for sale in this State is a misdemeanor. R. S., Chap. 127, Sec. 27. Prosecutions may be by indictment. R. S., Chap. 127, Sec. 40. Or by

complaint; municipal, police, and trial Justice courts having jurisdiction to try and punish. R. S., Chap. 127, Sec. 40. An auxiliatory remedy, available upon complaint to any subordinate court, is contained in a provision authorizing a not unreasonable first-instance search for liquor alleged, on a complainant's belief, to be kept with wrongful intent. If found, the liquor is to be seized and held, pending decision regarding its forfeiture; while he who is charged as being guilty of the keeping is required to be arrested and brought to trial. R. S., Chap. 127, Sec. 29. On conviction, the punishment is the same, whichever the form of the prosecution. Laws of 1917, Chapter 291.

The Municipal Court in Biddeford issued a search warrant against a place occupied by one Beaudette. Intoxicating liquors were there found and seized. Beaudette was arrested, tried, and acquitted. Subsequently a grand jury indicted him for having had the identical liquors in his possession. He interposed a plea of former jeopardy. A demurrer to that plea was sustained. Exceptions were reserved. Conformably to the court's direction, the respondent pleaded over, and the trial proceeded to a verdict. R. S., Chap. 82, Sec. 58. Now the exceptions are argued.

There are instances in the criminal law of two offenses in one transaction, as operating a factory, inexcusably, on the Lord's Day, and, in the operating of the factory, then employing children under a specified age. R. S., Chap. 126, Sec. 35; Chap. 49, Sec. 20. The purposes of these two statutes are unrelated. The first is designed to aid in keeping the Christian Sabbath holy. The second is to guard the young against work in manufacturing or mechancial establishments. A conviction of one of these offenses would be no bar to a conviction of the other, because they are entirely distinct.

Regardless of great similarity in the facts, there may be a marked difference in two crimes. *State* v. *Jellison,* 104 Maine, 281. The same evidence in both cases may justify the conviction of a husband for maintaining a liquor nuisance and the prosecution of his wife for being a common seller of intoxicating liquors. *Com.* v. *Welch,* 97 Mass., 593. The act of maintaining a liquor nuisance is distinct from that of the illegal possession of liquor, though essentially the same in origin. *State* v. *Wold,* 96 Maine, 401. So the offense of keeping a tippling shop and being a common seller of intoxicating liquors are separate matters. *State* v. *Inness,* 53 Maine, 536. The same is true of making a single sale and being a common seller of

liquor. *State* v. *Coombs*, 32 Maine, 529; *State* v. *Maher*, 35 Maine, 225. Or of keeping liquor for sale and a sale of the same liquor. *Taylor* v. *State*, (Ga.), 62 S. E., 1048. A person thus tried a second time is not put twice in jeopardy "for the same offense."

Beaudette should not be brought into danger of punishment for the same offense more than once. If, as he set up, he had already been tried and acquitted of the offense, then upon proving that fact, he was entitled to go free from the charge laid against him the second time. U. S. Con., Fifth Amendment; Con. of Maine, Art. 1, Sec. 8. The test to be applied in a situation of this kind is not one of mere evidence; that is, if the same evidence supports both charges. Nor is it whether more proof might come in on a second trial. Rather, it is whether the two offenses are essentially independent; and, hence, distinct.

It would be putting a strain upon language and violating fundamental principles to say that this respondent failed to make proof, not only of his own identity, but, additionally, of the offenses which both prosecutions embraced. There was, to be sure, a slight diversity of circumstances in the two cases. In the first place, the prosecution was upon what, in accustomed phrase, is styled a search and seizure warrant; the attributed crime being that of having possessed the seized liquors illegally. In the indictment there was no reference to a search and seizure. None was necessary. But the offenses remained unchanged in nature,—the unlawful possession of the same liquor, at the same place and time, being the gist in each instance. The statute defines a single crime and two methods of proceeding. One method is by an indictment or complaint seeking nothing else but the punishment of the offender; the other looks to the punishment of the wrong doer and the confiscation of his liquor.

Beaudette must be considered to have been once put in jeopardy, by the trial on the search and seizure process, for the same offense for which he now stands indicted. It would offend constitutional assurances, on the part of the Nation and of this State alike, to presume to prosecute the indictment. *U. S. Con.*, supra; *Con. of Maine*, supra. Therefore this case must go back bearing the entry of

Exceptions sustained.
Judgment for respondent.

LIZZIE BURNER *vs.* JORDAN FAMILY LAUNDRY.

Androscoggin. Opinion November 25, 1922.

If negligence is not alleged in the declaration it is not an issue. Yet, if evidence of negligence, sufficient to support a verdict, is admitted without objection, a verdict based upon such evidence may be allowed to stand. The declaration being amendable upon seasonable objection, the case having been tried as if amendment had been made, the amendment is considered as made. Differentiation between matters raised on a demurrer, and those raised in a case fully tried upon a plea of general issue.

Two separate and distinct acts of negligence on the part of the defendant were involved in the case. One was specifically alleged in the declaration, the second was not. At the close of the declaration there was a general allegation of negligence on the part of the defendant from which plaintiff claimed she had sustained injuries. The case was tried upon a plea of the general issue. Without objection, so far as the record discloses, evidence was offered in support of both the first and second acts of negligence. If requested at the time of the trial an amendment would have been allowable specifically alleging the second act of negligence. The case having been fully tried as if the amendment had been made we rule that the amendment may be considered as made. Hence an instruction, to the effect that there was no variance between allegation and proof, is not erroneous.

On exceptions. An action to recover for personal injuries sustained by plaintiff in the employment of defendant in its laundry.

The plaintiff at the time the injury occurred was removing laundry from the drying machine situated on the second floor of the building.

The machine was connected by two belts with the main power shaft on the floor below where the power was turned on. The machine was provided with a lever to throw off the belt when desired onto a loose pulley. The power was usually turned on on the floor below each day after dinner a few minutes before one o'clock. When work was suspended on the day of the injury at noon, a fellow employee of the plaintiff had charge of the drying machine, and neglected to throw off the belt onto the loose pulley by means of the lever.

The plaintiff returning to the laundry after dinner resumed her work a few minutes before one o'clock in removing laundry from this drying machine, and while so engaged the power was turned on below and the drying machine started and injured the hand of plaintiff.

The case was tried to a jury and a verdict for $239.46 was rendered for the plaintiff. Defendant excepted to the refusal of the presiding Justice to give a requested instruction, and also excepted to an instruction. Exceptions overruled.

The case is fully stated in the opinion.

Frank A. Morey, for plaintiff.

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

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

PHILBROOK, J. This is an action to recover compensation for an accidental injury sustained by the plaintiff while in the employ of the defendant. The jury awarded a verdict in favor of the plaintiff and the defendant brings the cause before this court upon a bill of exceptions. The record of the testimony is not made part of the exceptions but from the evidence incorporated in the bill we learn that the plaintiff, in support of her case, offered testimony to the effect that she was injured a few moments before one o'clock in the afternoon while she was in the act of taking out laundry from a drying machine, so called. It appears that the drying machine was situated upon the second floor of the laundry building and that this machine was connected by a belt and pulley with the main power shaft, which, in turn, was connected by a belt with the shaft on the floor below where the power was turned on. There was also a lever on this machine which, when properly adjusted, would throw off the belt from the drying machine, so that when the power was turned on, and while the main shaft was revolving, the drying machine would not revolve. The evidence also showed that the plaintiff had been employed by the defendant for five weeks and, during this time, had worked on the second floor of the laundry building. The witnesses for the defendant testified that the power was always turned on down-stairs at five minutes before one o'clock in the afternoon, by Mr. Foss, the manager, and that on the day of the accident the power was started as usual at the same hour. The plaintiff testified that a Mrs. Mahern and another employee came into the room where the

dryer was located, about twenty minutes of one, that they talked a few moments before taking the clothes out of the dryer, and while thus taking out the clothes she received the injury of which she complains. There was evidence tending to show that this same Mrs. Mahern, a fellow employee of the plaintiff, had charge of the drying machine and that, when work was suspended at noon, on the day of the accident, Mrs. Mahern neglected to throw off the belt from the drying machine, by the use of the lever, so that when the power was turned on, at the close of the noon hour, the drying machine started simultaneously with the starting of the main shaft. There was evidence tending to show that if Mrs. Mahern had disconnected the belt from the dryer, by use of the lever, when work stopped at twelve o'clock, then the dryer would not have started simultaneously with the turning on of the power and this accident would not have occurred. It also appeared that the drying machine, upon which the plaintiff received her injury consisted of a circular galvanized iron container which opened by lifting a cover allowing it to stand upon its hinges, and while the plaintiff was taking the clothing out of the dryer it started to revolve, when the power was turned on, causing the cover to fall and hit the plaintiff's hand. It appeared that Mr. Foss had no knowledge that the plaintiff was at work at the dryer when he turned on the power, nor any knowledge that Mrs. Mahern had allowed the belt to remain on the dryer during the noon hour, but that he turned on the power, down-stairs, as he had always done. It also appeared that it was the daily custom to suspend work at twelve o'clock, noon, and resume at one o'clock. It was admitted that the defendant was not an assenting employer under the employers' liability act, and that it employed more than five persons in the same business. Therefore, the defendant could not avail itself of the defenses (a) that the employee was negligent; (b) that the injury was caused by the negligence of a fellow servant; (c) that the employee had assumed the risk of the injury.

At the trial the defendant duly and seasonably requested the following instruction, which request was refused, and the ruling of refusal is made the subject of

EXCEPTION I.

"If you find that the accident was caused by the failure of defendant company to throw off the belt from the dryer before putting on

the power, and not by the sudden turning on of the power, then your verdict should be for the defendant."

In the course of his charge the presiding Justice gave the jury the following instruction which is made the subject of

EXCEPTION II.

"By reason of the manner in which the declaration is drawn, and by reason of the general allegation of lack of care, and negligence on the part of the defendant company which has not been objected to or taken advantage of by the defendant, I must instruct you that the plaintiff could recover if she proved any acts of negligence of any kind on the part of the defendant company. So that, if there were other acts of negligence of which the defendant was guilty, of which you find he was guilty under the instructions of the court, other than the turning on of the power unexpectedly, which is the specific thing set forth here, although it is not alleged in the declaration except as the last clause of the declaration may be held to so allege it, if you find any other acts than that, still I must instruct you that the plaintiff might recover. Now that would only apply, gentlemen, to the question of whether or not the leaving on of the power, the lever or whatever it was, by Mrs. Mahern, when she left at dinner time, was also an act of negligence, although it is not specifically set forth in the declaration. Those are the only two things that are claimed here on either side, gentlemen, which might be considered acts of negligence, and I must instruct you if you find under the instructions of the Court that the defendant was negligent in either of these particulars, why, then she might recover, although the second one is not specifically mentioned in the declaration."

In the argument of the defendant's counsel he states "The instruction of the court as to the effect of the declaration practically disposes of the question of variance which is involved in the defendants requested instruction." (Exception I.) "Upon the correctness of this instruction" (Exception II) "rests the determination of whether the defendant's request" (Exception I) "should or should not have been given. A decision on the former proposition is conclusive as to the latter. We will therefore only discuss the instructions of the court as given."

It follows that there exists necessity only for us to discuss Exception II. To that end it first becomes proper to quote such parts of

the declaration as give rise to discussion. The plaintiff, in her allegation of negligence on the part of the defendant, first says "that while she was engaged in the discharge of her duties, in the exercise of due care and in a prudent and proper way, suddenly the defendant corporation started the machine without her knowledge, and thereby caused the covering of the rolls aforesaid to fall suddenly with great force and violence upon her right hand in the vicinity of the knuckles, and that her hand was held there, jammed, and bruised as aforesaid, until the machine could be stopped and her hand released." After stating the extent of her injuries, her expenses thereby incurred, and her loss of capacity to labor, she further declares, "that this injury happened to her solely through the want of care and negligence of the defendant corporation, and through no want of care or negligence on her part."

The defendant claims that by the instruction of the court it is established that two separate and distinct acts of negligence were involved in the case; first, the sudden turning on of the power, without warning; second, the failure to disconnect the machine from the power. It says that the first was specifically alleged in the declaration while the second was not; that the court further gave the jury to understand that there would have been a variance, and that defendant's requested instruction (Exception I) would have been proper if it were not for the fact that the declaration contained a general averment of negligence at the conclusion thereof. This practically narrows the question for discussion to this form, what effect has this general averment upon the admission of evidence of negligent acts, or perhaps it would be better to say, the evidence of negligent acts, having been admitted without objection, which is the case here so far as the record discloses, will a verdict based upon such averment and evidence be allowed to stand.

The duty of the defendant was to use such reasonable care in conducting its business as not to injure others. A breach of that duty without justification or sufficient excuse, not necessarily the particular manner of the breach, gives to an injured party the cause of action. *McKinnon* v. *B. R. & E. Company*, 117 Maine, 29. If requested at the time of trial, an amendment to the declaration would have been allowable alleging negligence of the defendant in not properly disconnecting the belt which communicated power from the shaft to the dryer. The case having been tried as if the

amendment had been made, evidence being admitted, without objection so far as the record discloses, as to negligence in not disconnecting the belt, we think an amendment may be considered as made. *Clapp* v. *C. C. P. & L. Company*, 121 Maine, 356; *Wyman* v. *American Shoe Finding Company*, 106 Maine, 263.

The defendant relies upon *Ferguson* v. *National Shoemakers*, 108 Maine, 189, and *Chickering Admr.* v. *Lincoln County Power Company*, 118 Maine, 414, but these are cases where the declaration was challenged by demurrer, they do not apply to a case fully tried upon a plea of general issue and upon questions of fact which might be raised under an allowed or allowable amendment to the declaration. Hence, they are not conclusive authority as to the legal contentions raised by the bill of exceptions in the case at bar.

Exceptions overruled.

ROBAIN ARSENAULT *vs.* BROWN COMPANY.

Androscoggin. Opinion November 28, 1922.

Res adjudicata, as a defense, sustained from plaintiff's declaration and the evidence.

In the instant case the clean cut issue, upon the pleadings, is whether the plaintiff's declaration and the evidence present a case of res adjudicata. The defendant introduced no evidence, but relied upon the charge of the presiding Justice in a former case, introduced by the plaintiff as an exhibit, as sufficient to reveal a clear case of res adjudicata.

The contention is well founded. Res adjudicata is a rule of law established for the purpose of putting an end to litigation and to prevent the trying of a case piece meal.

Hence, the general rule that if a party has tried an issue or had an opportunity to try it, he is concluded upon the plea of res adjudicata and cannot proceed to any part of his case again.

On exceptions. This is an action of assumpsit on account annexed, upon a quantum meruit, under special contracts for cutting, hauling and landing pulp wood. At the close of the testimony a non-suit

was ordered, and plaintiff excepted. The defendant pleaded the general issue with brief statements alleging that at a prior term of the Supreme Judicial Court for the County of Androscoggin, an action was entered in which the plaintiff, the defendant and the cause of action were the same as in this action, and that after a trial by a jury, evidence being introduced by both plaintiff and defendant, a verdict was returned for plaintiff, hence the claims and matters in this action are res adjudicata. Exceptions overruled.

The case is stated in the opinion.

Frank A. Morey, for plaintiff.

Benjamin B. Sanderson and Frederick R. Dyer, for defendant.

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

SPEAR, J. The present action involves a claim upon a quantum meruit under special contracts for cutting, hauling and landing a certain quantity of pulp wood, and for the stumpage charged therein, upon failure to perform the contracts.

At the close of the testimony the presiding Justice ordered a non-suit and the case comes upon exceptions. The issues may be most clearly presented by reciting so much of the declaration and the pleadings as are directly involved. The declaration avers that the plaintiff "under and by virtue of a contract with the defendant had cut for it 650 cords of wood in the winter of 1918 and 1919, and the defendant promised to pay him for cutting said wood seven dollars per cord, and that the plaintiff agreed that he would deliver it at a certain place agreed upon between them in the contract, but that the plaintiff was unable to make delivery of the wood at the time required through conditions for which he was not responsible, and by the requests of the defendant, and he says that the total amount for cutting said wood, which the defendant owes, was $4,554.97, and the plaintiff was charged by the defendant $4.00 a cord for the stumpage on 695.3 cords of wood amounting to $2,780.12, and making a total of $7,617.92 on both of these items, and that the defendant promised to pay the plaintiff the said amounts, and the plaintiff further alleges that he brought suit against the defendant company in September, 1919, at a time before the 650 cords of wood were actually driven to the place of destination, and the plaintiff alleges that this item was included in the suit

referred to, but that owing to the fact that there had not been a delivery, that the consideration of that item, except for any benefits that the company might have had at that time, was actually eliminated from the case and the consideration of the jury. Now the plaintiff alleges that after September, 1919, to wit: in May, 1920, the defendant took possession of the said wood and drove it to its place of destination, and that the plaintiff herein is entitled to receive from the defendant the amounts above stated less any amount that the defendant may have incurred in driving said wood to its destination.

"Wherefore an action hath accrued to the plaintiff to have and receive of the said defendant the sum of $7,617.92 with interest thereon from May 15, 1920, until this date, to wit the sum of $334.13, making a total of $7,952.05."

The plea is the general issue with several brief statements of defense, of which the following is pertinent and decisive of the issue, namely:

"And for further brief statement of subject matter of defense to be used under the general issue above pleaded, the said defendant further says that at the April Term, 1920, of the Supreme Judicial Court for the County of Androscoggin, the State of Maine, an action was entered in which this plaintiff, this defendant, and the cause of action were the same as in the present action; that at said April term, 1920, said action was tried before a jury, and after the introduction of evidence by the plaintiff and defendant, a verdict was returned by the jury for the plaintiff in the sum of $2,775.58; that thereafter judgment was rendered on said verdict; that no appeal was or has been taken from the said judgment; that said judgment rendered, was a final judgment of a court of competent jurisdiction; that said judgment is still in full force and effect, and has been satisfied; that there was no evidence of fraud in the said action or in the judgment rendered therein, and the defendant claims that by reason of the judgment rendered in said prior action, the plaintiff is estopped from recovering judgment in the present action; and that the claims and matters in this suit, by the said action are res adjudicata."

The clean cut issue, upon these pleadings is whether the plaintiff's declaration and evidence present a case of res adjudicata. The defendant introduced no evidence, but relied upon the charge of

the presiding Justice in the former case introduced by the plaintiff as an exhibit, as sufficient to reveal a clear case of res adjudicata.

We are of the opinion that its contention is well founded. Res adjudicata is a rule of law established for the purpose of putting an end to litigation and to prevent the trying of a case piece meal.

Hence the general rule that if a party has tried an issue or had an opportunity to try it, he is concluded upon the plea of res adjudicata and cannot proceed to try any part of his case again. While numberless cases can be cited in support of the general rule, the case of *Blodgett* v. *Dow*, 81 Maine, 197, as clearly and succinctly states the law as any case to be found, as follows:

"When it appears by the pleadings, that the subject matter in controversy was directly and necessarily in issue in the action, a general judgment, either on a general verdict of the jury or a general award of referees, while it stands unreversed, is a bar to another action for the same cause. The parties are estopped by it. But when the pleadings are such that the subject is not directly in issue, but may or may not be put in issue in the action, and the judgment does not disclose whether, in fact it was or not, the fact may be proved by parol; and this we understand is the distinction. *Cunningham* v. *Foster*, 49 Maine, 68; *Walker* v. *Chase*, 53 Maine, 258; *Cromwell* v. *County of Sac*, 94 U. S., 351; *Campbell* v. *Rankin*, 99 U. S., 261.

"Here, in the action of the plaintiffs v. *Rollins*, the note in suit was specially described in the first count in the writ, and went to the referees for adjudication. There is nothing in the record showing it was withdrawn. The judgment on the general award estops the plaintiffs and cannot be explained by parol. If, at the hearing, the plaintiffs for any reason, were not prepared to litigate the note, they should have seen to it, that it appeared by the judgment, that it was withdrawn."

The Justice in the former case correctly stated the plaintiff's form of action as follows:

"The plaintiff comes into court and by his writ—and I want to call attention to this at this time, because it may have some bearing in the discussion and instructions which I shall give you through the charge—you will notice from the writ that the plaintiff does not bring an action upon contracts, that is upon special contracts which it appears were entered into between the parties, but he brings

what is termed in law an action of assumpsit on an account annexed, simply charging the defendant company for labor performed in the cutting of a certain amount of wood, and claims that he is entitled to certain compensation therefor just as though there never had been any special contract between the parties so that, as a matter of fact, he is not bringing a suit on a contract but for labor done."

In other words the plaintiff's claim was one of quantum meruit to recover for services rendered under special contracts. The form of action constitutes an admission on the part of the plaintiff of the breach of his contracts. *Viles* v. *Lumber Co.*, 118 Maine, 148. It was, therefore, incumbent upon him to prove in the end, taking into consideration the contracts and his breach thereof, to what extent his services benefitted the defendant. *Viles* v. *Lumber Co.* supra. His form of action also opened the door to the defendant to offer evidence of whatever damages it had sustained in consequence of the breach, *Viles* v. *Lumber Co.*, supra, which, in the end, was to ascertain the benefit it had received from the services of the plaintiff under the contracts. The plaintiff and the defendant, therefore, each seek to establish the same result, the benefit to the defendant. It appears from the plaintiff's declaration, in the present suit and the charge of the Justice in the former suit, when read together, that, under the above rules of law, the very items, for which the plaintiff now seeks to recover, were submitted to the jury in the former suit, under the plaintiff's quantum meruit claim, that is, how much he was entitled to recover, upon all the wood he cut under his contracts, including the 650 cords and the stumpage now in suit.

As we read the charge of the presiding Justice in the former trial that was the precise question presented to the jury.

The plaintiff alleges in his declaration that the charge took away from the jury all consideration of the 650 cords "except for any benefits that the Company might have had at that time." But under the law governing this class of cases, the real issue in the case was the benefits the defendant had received under the special contracts. It was incumbent upon the plaintiff to show the extent of the benefits, taking into consideration the contracts, and the plaintiff's admitted breach thereof, the defendant being entitled to the advantage of his contracts.

The charge put the issue as follows:

"Now with reference to the stumpage claimed a rather difficult question arises under this form of action, and the evidence possibly may not be very clear to you as to just how the matter stands. The evidence with reference to the amount of wood that was left in the stream is only by estimate, approximately six hundred cords, and it is not clear as to how much of it has been delivered at a point where the defendant company could obtain it, or get it out, save it. Under this form of action if, up to the time of the beginning of the action in September, 1919, the plaintiff had performed any labor on this six hundred and fifty cords of wood that he has proven to you as of any value to the defendant company I think he would be entitled to recover, and I so instruct you."

Thus the exact question of what benefits were received by the defendant for services of any kind, upon the 650 cords involved in the present suit, was submitted to the jury in the former suit with specific instructions that the plaintiff would be entitled to recover therefor. These instructions were amplified in the following paragraph of the charge and made perfectly clear.

"And in determining what deduction there should be you may consider that, as to whether or not he has, in his manner of delivering this six hundred and fifty cords done it in such a way by leaving it in the woods so it will be destroyed from rotting, or delivering it at such a time it has been carried out, was a sheer loss, so the company will never get any benefit, if there is such an amount you will have a right to deduct the stumpage value from that amount, from the amount he would otherwise be entitled to. But so much of it as you find he has done any work on that the company can receive any benefit from, or had received any benefit from up to September, 1919, why, you may find what the value of that, or the benefit, was, taking into consideration whether there was any damage suffered by the defendant company through his failure to carry it out."

The question of the plaintiff's whole claim upon all the wood he had cut, under his contracts, including the 650 cords on the one hand and the deductions to which the defendant was entitled as damages for breach of contract, on the other, was clearly and fully submitted to the jury and must be regarded as res adjudicata.

The charge also properly and clearly presented to the jury the issue of stumpage, in its connection with the contracts and deductions for a breach thereof. It said:

"So too this question of stumpage, of allowing four dollars a thousand, must be determined upon this question of benefit. . . . But proceeding as he does upon a quantum meruit for value of services he had rendered the question of stumpage reduction would depend upon whether or not they were damaged by the wood being lost."

It is accordingly apparent from the above language that the question of what the defendant was entitled to have allowed him and deducted for stumpage on account of the plaintiff's breach of the contracts, was clearly and legally submitted on the true issue of benefits received by the defendant upon the whole transaction, and must also be regarded as res adjudicata.

The jury found, upon all the questions involved in the former case, including the 650 cords and the stumpage, that the plaintiff was entitled to $2,775.58 for the benefits he had conferred upon the defendant in the entire transaction. It would be impossible to find out what the jury considered in deciding the former case. All the issues were before them that are in the present case. The presumption is that in the former case they considered all and balanced all, and drew their conclusions therefrom. The verdict was general and must be held to have embraced all the issues that are found in the present case.

Exceptions overruled.

A. C. TRIPP

vs.

PARK STREET MOTOR CORPORATION.

Androscoggin. Opinion November 30, 1922.

In an action of assumpsit a promise must be alleged, for without such allegation or its equivalent such an action cannot be maintained. All proceedings at nisi prius in the Supreme Judicial Court, when a demurrer is filed, joined and ruled upon, and exceptions taken, except in dilatory pleas, are suspended awaiting the decision from the Law Court on such exceptions. For the plaintiff to amend or the defendant to plead over in the Supreme Judicial Court before having the validity of his exceptions determined would be a waiver of his exceptions.

In the instant case no promise or undertaking or its equivalent being alleged in the declaration the demurrer should have been sustained. A promise to repay was as essential an allegation of fact for recovery by the plaintiff as that of breach and rescission. Without such allegation or its equivalent an action of assumpsit cannot be maintained.

When a demurrer is filed, joined and ruled upon in the Supreme Judicial Court and exceptions taken the case under Sec. 36, Chap. 87, R. S., must be marked "Law" and go to the Law Court upon the questions raised by the demurrer, without further proceedings at *nisi prius*, until decision is received back from the Law Court.

For the plaintiff to amend or the defendant to plead over before having the validity of his exceptions determined would be a waiver of his exceptions.

The conferring upon the presiding Justice by Chapter 73, Public Laws, 1859, to the right to allow amendments or the defendant to plead anew before exceptions are filed and allowed to his rulings on a demurrer was not intended to change the course of proceedings on demurrer as determined by Chapter 211, Public Laws, 1856.

The dicta contained in *Wakefield* v. *Littlefield*, 52 Maine, 21, is not controlling and not followed by more recent decisions of this court.

On exceptions. This is an action of assumpsit to recover the value of an automobile, the value of a note, and cash, given by

plaintiff to defendant in an exchange of automobiles, plaintiff having rescinded the transaction alleging breach of warranty.

The defendant demurred specially to the declaration on the ground that no promise was alleged. The demurrer was joined, argued, and overruled, and defendant given leave to plead over, and defendant excepted. Thereupon the presiding Justice directed that the case proceed to trial, but the defendant declined to plead over, and also declined to participate or take any part in the trial of the case.

The case went to trial, plaintiff introducing his evidence, and after a charge to the jury a verdict for $456.75 was rendered for plaintiff. The defendant excepted to the ruling of the presiding Justice overruling the demurrer, and also excepted to the ruling directing the parties to proceed to trial. Exceptions sustained.

The case is stated in the opinion.

Frank A. Morey, for plaintiff.

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

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

WILSON, J. The declaration in this case sets forth a "trade" involving an exchange of automobiles at an agreed value for each car, and an additional payment by the plaintiff of the sum of one hundred and fifty dollars in cash together with his promissory note for one hundred dollars. It also contains an allegation that the automobile obtained by the plaintiff of the defendant in the trade was represented by the defendant to be in first-class condition; and further sets forth that the automobile received by the plaintiff was not in first-class condition and that for this reason the plaintiff rescinded the contract of exchange and took back the automobile received by him to the defendant and demanded back a certain Studebaker car given by him to the defendant in the exchange, also the sum paid by him in cash and his promissory note, which the defendant refused to return; whereupon the declaration concludes that the plaintiff "is entitled to receive of the defendant the sum of two hundred dollars for his Studebaker car, one hundred and fifty dollars in cash so paid, and the one hundred dollar note which represents the value of the note he gave. Wherefore an action hath accrued to the plaintiff to have and recover of the defendant the sum of four hundred and fifty dollars aforesaid."

The defendant at the first term filed a special demurrer setting forth as the special ground of demurrer that the declaration did not allege any promise or its equivalent on the part of the defendant to pay said sum to the plaintiff. The demurrer was overruled and according to the bill of exceptions the parties were directed to proceed to trial, the defendant being given the privilege of pleading over, which it refused to do, but filed its exceptions both to the overruling of the demurrer and to the order of the presiding Justice directing the parties to proceed to trial. The case went to trial before a jury without any pleadings being filed by the defendant or any issue joined and without the defendant participating therein and verdict was rendered for the plaintiff. The case now comes before this court on the defendant's exceptions.

We think both exceptions must be sustained. The bill of exceptions agreed to by both parties describes the action as one of assumpsit, and it must be so considered. The plaintiff upon his allegations might have retained the car he received and sued on the contract for a breach of warranty, but he elected to rescind and sue to recover back the consideration given in exchange in the form of an action of assumpsit as for money had and received. As to whether such an action will lie where the consideration paid was partly in the form of a chattel, partly in cash and partly by a note, whether negotiable or not does not appear, it is not necessary to consider. *Hall* v. *Huckins*, 41 Maine, 574, 578.

Without specifying other defects in the declaration which might be taken advantage of on the demurrer, it should have been sustained on the ground specified, viz.: that no promise was alleged. The action of assumpsit as the derivation of the word implies is founded on an undertaking or promise, and a promise or its equivalent must be alleged as one of the essential facts to the maintenance of such an action, whether based upon a special contract or in the common form of indebitatus assumpsit. Chitty on Pleading, Vol. 1 pages 301, 302; *Bean* v. *Ayers*, 67 Maine, 488; *Brown* v. *Starbird*, 98 Maine, 292; *Coffin* v. *Hall*, 106 Maine, 126, 128; *Hopkins* v. *Erskine*, 118 Maine, 276.

The case of *Chickering* v. *Power Co.*, 118 Maine, 414, 417, relied upon by the plaintiff in his brief is not in point. That was an action of tort, and the court held that to sustain that form of action it was sufficient to set out the facts from which the legal duty, relied upon

by the plaintiff as a basis for his recovery, arose; that it was not necessary to set forth in terms what that duty was.

In an action of assumpsit, however, as in the case at bar, the legal obligation springs from the promise, in this case implied by law from the facts, to repay the purchase or exchange price, and not from the breach and rescission alone. The promise to repay, though implied, is as much a necessary fact to be alleged as the breach and rescission. Without such allegation, or its equivalent, which is not found in this declaration, an action of assumpsit in any form will not lie.

Having sustained the defendant's exception to the overruling of the demurrer, a disposal of the case here does not require consideration of the second exception; but the question raised by it involves a matter of procedure over which some uncertainty and confusion has arisen, viz.: whether upon exceptions being taken to the ruling on a demurrer in the Supreme Judicial Court, the case is at once marked "Law" on the docket and continued until the Law Court shall have passed on the issues raised by the demurrer, or whether the case shall be proceeded with at nisi prius to a verdict on the facts as though no exceptions had been taken, as in the Superior Courts and in the Supreme Court in the case of dilatory pleas. Chap. 82, R. S., Secs. 58, 94.

The question raised by this exception involves the interpretation of Sec. 36, Chap. 87, R. S. Notwithstanding the dicta in *Wakefield* v. *Littlefield*, 52 Maine, 21, that the better practice in such cases is to proceed with the trial and settle the disputed facts before the validity of the demurrer is finally determined, the language of the statute and its legislative history, and the construction placed upon it by the court in more recent cases indicate clearly, we think, that when a demurrer is filed and joined in the Supreme Judicial Court, whether sustained or overruled, and exceptions are once taken and allowed, the case is then marked "Law" on the docket and is continued and no further action is taken at *nisi prius* until a decision is received from the Law Court upon the issues raised by the demurrer, when at the next term, on or before the second day, unless the time be further extended by the court, the plaintiff may amend if the demurrer be sustained, or the defendant may plead anew, if it be overruled, provided it was filed at the first term, or if filed at a later term a stipulation was made at the time of filing

and assented to by the court and plaintiff, that the defendant might plead anew. *Fox* v. *Bennett*, 84 Maine, 338.

Under Chap. 219, Sec. 4, Public Laws, 1823; Secs. 17 and 18, Chap. 96 R. S., 1841, and Chap. 242, Public Laws, 1852, Sec. 8, it may well be that doubts had arisen as to the proceedings in case of exceptions to rulings upon demurrers. In 1856, however, Public Laws, Chapter 211, which Act forms the basis of Section 36, Chapter 87 of the present Revision of the Statutes, the proceedings upon demurrers in the Supreme Judicial Court was definitely determined. Under this act, in the light of later legislation, it was clearly contemplated that upon the filing of exceptions to the ruling of the court at *nisi prius* upon a demurrer, the case was continued and any amendment by the plaintiff or pleading over by the defendant awaited the decision of the Law Court upon the issues raised by the demurrer.

This is rendered more certain by Chapter 55, Public Laws, 1857, which declared that the ruling of the presiding Justice at *nisi prius* on a demurer shall be final, unless exceptions are taken, and so the law is found in the revision of 1857, Chapter 82, Section 19.

Until the enactment of Chapter 73, Public Laws, 1859, the ruling of the presiding Justice at *nisi prius* settled the case, unless his ruling were reversed by the Law Court on exceptions, when the plaintiff might amend or the defendant plead anew if the provisions of the act were complied with, unless, of course, the Law Court found that his demurrer was frivolous. By Chapter 73, Public Laws, 1859, the presiding Justice at *nisi prius* was given the same power, before exceptions were filed and allowed to his ruling on a demurrer, to allow amendments, or the defendant to plead anew, as the Law Court had under Sec. 19, Chap. 82, R. S., (1857), but it was optional with the parties whether they would request the right to amend or plead over without filing exceptions, and discretionary with the Justice ruling at *nisi prius* whether he would grant it; and the law so remained through the several revisions to the present day, except that the court may now, since Chapter 115, Public Laws, 1915, extend the time for the payment of costs and filing of amendments and new pleadings.

It was not intended by Chapter 73, Public Laws, 1859, to change the course of proceedings on demurrer. By amending or pleading anew the party so doing and going to trial must be held to have

waived his right to except; and by excepting without amending or pleading over the legislature evidently intended that he should be accorded the right to have the sufficiency of the declaration determined before proceeding further at *nisi prius*.

Although the question has not been directly in issue the court has in several instances indicated the above as the course of procedure under this provision of the statutes. See *Smith* v. *Hunt*, 91 Maine, 572; *Copeland* v. *Hewett*, 93 Maine, 556; *Cole* v. *Cole*, 112 Maine, 315; *Gilbert* v. *Cushman*, 113 Maine, 525; *Stowell* v. *Hooper*, 121 Maine, 152.

It is not sufficient to warrant the interpretation contended for by the plaintiff to say that the case should first proceed to a verdict in order that the decision of the Law Court may be final; for such might not be the result in the Supreme Judicial Court under Sec. 36 of Chap. 87, R. S. Even if the defendant could plead anew and go to trial without waiving his exceptions, a sustaining of his exceptions by the Law Court after verdict against him would only send the case back for a new trial under an amended declaration, if amendable. Such might be a sufficient answer under Sec. 94, Chap. 82; but not under Sec. 36, Chap. 87, R. S.

The exceptions to the order of the court directing the parties to proceed to trial is, therefore, sustained, leaving the plaintiff to his right to amend under the statute.

Entry will be:

Exceptions sustained.

HERBERT L. RAND et al. *vs.* SAUL MICHAUD.

Aroostook. Opinion December 11, 1922.

In an action for deceit, if the language used in the alleged false representation, when understood according to its usual meaning, is such as to influence the other party in inducing him to enter into the contract, such representation being false and known to be false by the maker, and made with an intention that the other party should be influenced by it and rely upon it, who was influenced by it and relied upon it, such a representation is a material one, and a question of law. Whether such representation is false to the knowledge of the maker, or positively stated by him as a fact, without knowledge of its truth or falsity, which is equally fraudulent if the statement is untrue, are questions of fact for the jury.

In the instant case although the expressions relied upon do not constitute direct representations of title to the buildings in the plaintiffs, yet if they were intended to produce the belief in the defendant that the plaintiffs had such title, they may be rightfully understood as a representation to that effect. The court is of the opinion that the letters of September 13, 22, and 23 are susceptible of the construction contended for by the defendant, and the question of law must be answered in the affirmative.

Whether the assertions were actually so understood by defendant, and relied upon by him, as material influences inducing him to purchase the property, and whether the plaintiff, H. L. Rand, intended for the defendant to so understand them, are questions of fact for the jury.

The intention of the seller in making the representations is a material fact, he either knowing them to be false, or what would be equally fraudulent in law, knowing that he was affirming as to the existence of a fact, about which he was in entire ignorance; and he may testify directly on that point.

The plaintiffs cannot escape liability by the use of ambiguous language in their letters on the ground that they intended no fraudulent misstatement of facts, if the defendant would reasonably infer the fraudulent meaning from the language used.

The record thus presents questions of fact for the jury.

On exceptions by defendant. An action of assumpsit on a promissory note for three thousand dollars given by defendant to plaintiffs. The defendant under the general issue and a brief statement con-

tended that the consideration for said note consisted of five hundred dollars the balance of the purchase price of sporting camp equipment and accessories, and the remaining twenty-five hundred dollars of the consideration was the purchase price of the camps themselves; that the plaintiffs knowingly had falsely represented to the defendant that they were the owners of the sporting camps, which were erected upon land, title to which was in some third party; that relying upon such false representations he was induced by the plaintiffs to purchase said camps for the sum of twenty-five hundred dollars and to execute and deliver to the plaintiffs the note in question for three thousand dollars, and that such facts afforded a defense pro tanto to the note. At the conclusion of the evidence the presiding Justice directed a verdict for plaintiffs and defendant excepted. Exceptions sustained.

The case is fully stated in the opinion.

Doherty & Tompkins and Cook, Hutchinson & Pierce, for plaintiffs.

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

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

MORRILL, J. The only question for decision is whether the record presents an issue which should have been submitted to the determination of a jury. We think the question must be answered in the affirmative.

The plaintiffs declare upon a promissory note for $3000; as special matter of defense the defendant says that a part of the consideration for the note, viz.: $500, was in payment of a balance due from the defendant to the plaintiffs for personal property sold by the latter to him; as to the balance of the note he alleges that it "was in payment for certain sporting camps agreed to be sold by the Plaintiffs to the Defendant; that for the purpose of inducing the Defendant to purchase said camps, and to execute and deliver said note to the Plaintiffs, they did knowingly and falsely represent to the defendant that they were the owners of and had title to said camps, and had good right to sell and convey the same to him; that relying upon the truth of said representations, and in ignorance of the fact that they were untrue, the Defendant was induced to purchase said camps from the Plaintiffs and to execute and deliver to them the aforesaid note; that, in truth and in fact the said camps were not the property of the Plaintiffs, nor did they have good right to sell and convey the same to the Defendant."

It is conceded that false representations of title to land may be actionable and may be the foundation of an action for deceit. *Burns* v. *Dockray,* 156 Mass., 135. *Atwood* v. *Chapman,* 68 Maine, 38; even though the conveyance which the complaining party to the transaction has been induced to accept contains no warranty respecting the matter to which the false representation relates. *Brown* v. *Blunt,* 72 Maine, 415, 418.

The defendant under the pleadings occupies the position of a plaintiff in an action for deceit.

The record discloses that in August 1920, the plaintiffs were in occupation of, and managing certain camps, resorted to by sportsmen, known as the "Titus Camps," located on the east side of Eagle Lake in Aroostook County; the personal property they held under a bill of sale with full covenants of title, dated December 3, 1919, from one George W. Cooper, which contained the following clause, "Also, all my interest in and to the Titus Camps." They occupied the real estate as assignees of a lease dated March 1, 1917, for a period of four years, given by David Pingree and others to Leonard A. Pierce and others, which on December 19, 1919 had been duly assigned by the lessees with the written consent of the lessors, to the plaintiffs who assumed all the covenants and stipulations of the original lessees. This lease demised the land, and buildings and improvements thereon at the date of the lease, and contained a provision prohibiting the assignment of the lease, or the surrender of the premises to other parties without the written consent of the lessors, or the use of the premises for any other purposes than as "sportsmen's lodges."

The lease also provided that the lessees would "at the termination of this lease peaceably deliver up to the said lessors, their heirs and assigns, the said premises and the buildings and improvements thereon; and, in consideration of this lease, will leave on the said premises as the property of said lessors, and their heirs and assigns, without any cost or liability on the part of said lessors for betterments or improvements of any kind, any *further* buildings, erections, additions or improvements that may be placed upon the said premises by said lessee during the term of this lease; and it is hereby agreed that all said *further* buildings, erections, additions and improvements, without the necessity of any further act by either of the said parties hereto, *become the property of the said lessors and their heirs and assigns.*"

There is no evidence that any "further buildings, erections, additions or improvements" were placed upon the leased premises after the date of the lease. It is therefore clear that the only title to the real estate which the plaintiffs had at the time of the transactions in question, was as assignees of the unexpired term of the lease.

Late in August 1920, one of the plaintiffs, Mr. H. L. Rand, began negotiations with the defendant, at first to put the property in the latter's hands for sale on a commission basis, finally resulting in a sale by plaintiffs to defendant and the delivery of a bill of sale, with full covenants of title, dated October 2, 1920, describing the property sold as follows:

"The following goods and chattels, to wit:

"All the personal property in and about and connected with the Titus Camps, so called, situated on the shore of Eagle Lake, Aroostook County, Maine; also all our interest in and to the Titus Camps; also one large motor boat on the lake as used by us and one canoe.

"Being the same camps sold to us by George W. Cooper by Bill of Sale dated December 3, 1919.

"Said Titus Camps are situated in Section twenty-three of Township sixteen, Range six, W. E. L. S., Aroostook County, Maine, on land owned by David Pingree and others."

No assignment of the lease was given, but by arrangement with the lessors, Michaud was permitted to take possession of the camps with the understanding, conditionally, that at the expiration of the lease March 1, 1921, he should have a renewal for another term of four years, at the same rental; this arrangement was subsequently carried into effect.

The alleged misrepresentations are contained in letters from H. L. Rand to the defendant. The negotiations began with a letter dated August 27, 1920, in which Mr. Rand said: "Before I left Eagle Lake I intended to have a talk with you regarding my property there. I have come to the conclusion, after a careful study of the situation, that I cannot continue to run that place, and that it is best for me to sell my interest in it for the best price I can get. . . . . As far as I am concerned I should like to leave this place in your hands to sell on a commission basis."

To this letter defendant replied under date of August 31, 1920: "Your letter of 27th received contents noted but not fully understood, what do you want for the place your interest and others if their are

any, as I understand you are with your brother. I probably would be interested myself if I could buy them cheap enough. . . . . What do you pay for the lease and who to?"

Under date of September 13 Mr. Rand wrote: "You may have the *camps* at the close of the season for $2500 *which does not include furnishings.* We will sell you the furnishings at a very fair price. I am sure there would be no disagreement between us on that phase of the trade. . . . I am sure you can make of those camps the best in the State of Maine. If I could go there and run them myself, I would not sell the outfit for less than $10,000; but since I cannot afford to leave my school, and boys' camps, you are to greatly benefit yourself *by buying the buildings for half the cost of erecting the central lodge or club camp* today. A stone mason told me last summer that the fireplace in that central building could not be built for $1000. *The camp, known as the governor could not be replaced* for $1500. *So you see when you get the buildings* for $2500 all but one building and the fireplace are being presented to you."

On September 22, the wife of H. L. Rand met the defendant on the premises and a price was agreed upon, $2500 for the camps and $1500 for the furnishings as the defendant testifies, $4000 for the entire property as Mrs. Rand testifies; and a telegram, having reference to sending the papers, was sent to Mr. Rand. Acknowledging receipt of the telegram, on the same day Mr. Rand wrote: "I will send papers as soon as I can have them made out. I cannot give you a warranty deed because the camps are built on leased land, but *there is no doubt about your title to the property.*" On the following day, September 23, Mr. Rand wrote, after referring to a call upon his attorney, "Regarding a warranty deed he told me just the same as Mr. Doherty of Houlton did, that is, that the paper which you will receive is really *a warranty deed but is written in a different form because the buildings are on leased land.*" The remainder of the correspondence relates to negotiations with the lessors to permit the lease to remain in the name of the Rands until expiration March 1, 1921, while the defendant was in possession, and then to renew the lease in the name of defendant.

The defendant contends that these letters conveyed to him the affirmation that the plaintiffs had the title to the buildings which constituted the "camps," and that their title to the buildings was perfect; he contends that such representations related to a material

fact, directly affecting the value of the property, were false and known to the plaintiff, H. L. Rand, to be false; that they were made with the intention that the defendant should rely on them, and that he did rely on them as material influences inducing him to purchase the property, and suffered damage thereby.

If the language used, when understood according to its usual meaning, is susceptible of the construction contended, the representation was material, which is a question of law; *Caswell* v. *Hunton*, 87 Maine, 277; *Greenleaf* v. *Gerald*, 94 Maine, 91; whether it was false to the knowledge of the maker, or positively stated by him as a fact without knowledge of its truth or falsity, which is equally fraudulent if the statement is untrue, are questions of fact for the determination of the jury.

Although the expressions relied upon do not constitute direct representations of title to the buildings in the plaintiffs, yet if they were intended to produce the belief in the defendant that the plaintiffs had such title, they may be rightfully understood as a representation to that effect. *Nash* v. *Minn. Title Ins. & Trust Co.*, 159 Mass., 437, 440. It is enough to furnish the foundation of liability if language was used in regard to the title which the user intended should be understood as a representation that their title to the buildings was perfect, when the plaintiffs knew that under the lease they had no title thereto. id. 163 Mass., 574, 580.

Whether the expressions relied upon were susceptible of the construction contended for by the defendant, viz.: that the title to the buildings was in the sellers and that they were to be included in the sale, is a question of law.

The letter of September 13 is certainly susceptible of being construed as a direct, unconditional offer to sell for $2500 the camps, not including the furnishings, and as an affirmative representation that the "camps" included the buildings; the assertion in the letter of September 22,—"there is no doubt about your title to the property"—although it may be said to involve a matter of opinion (*Atwood* v. *Chapman*, 68 Maine, 40) was positively made by a person who was in a position to know the truth or falsity of the statement. It was made absolutely as a fact, (*Burns* v. *Dockray*, 156 Mass., 135, 137) and in connection with the preceding letter was susceptible of construction as representation that the seller's title to the buildings included in the "camps" was valid; the letter of

September 23 is likewise susceptible of construction as an assertion that the buildings were included in the sale, otherwise what need of reference to the buildings. The question of law must be answered in the affirmative.

Whether these assertions were actually so understood by defendant, and relied upon by him, as material influences inducing him to purchase the property, and whether the plaintiff, Herbert L. Rand, intended for the defendant to so understand them, are questions of fact for the jury. *Sherwood* v. *Marwick*, 5 Maine, 295, 300. *Page* v. *Bent*, 2 Met., 371.

The intention of the seller in making the representations is a material fact, he either knowing them to be false, or what would be equally fraudulent in law, knowing that he was affirming as to the existence of a fact, about which he was in entire ignorance. *Stone* v. *Denney*, 4 Met., 151. Whenever one's actual feelings or intentions are in issue, as distinguished from his manifestations of them, he may testify directly on that point. *Edwards* v. *Currier*, 43 Maine, 474. *Faxon* v. *Jones*, 176 Mass., 206, 209.

The plaintiff, Herbert L. Rand, testifies that the word "camps" meant to him a business, and that when he made the proposition that he would sell the "camps" or his interest in them for $2500, "that included the advertising and the good will and the catalogues and everything that I had about that camp—the business of the camps." We do not find that he makes any explanation of the other expressions in the letter of September 13 as to the advantage and benefit Michaud would obtain in buying the buildings; he denied however that, when he wrote this letter of the 13th, and the following one of the 22d, he knew that he had no title to the camps. He also makes explanation of other language used in his letters.

Mr. Justice Knowlton in *Nash* v. *Minn. Title Ins. & Trust Co.*, 163 Mass., 579-80, aptly states the law as to the admissibility and weight of such testimony:

"Of course one will be presumed to have intended his language to be understood according to its usual meaning, and in ordinary cases, in the absence of a reasonable explanation of his mistake, his testimony that he meant something different from what he said will have but little, if any weight. But inasmuch as the question involved is what was his state of mind, and his actual intent as distinguished from his apparent intent, he is entitled to explain his language as

best he can, if it is susceptible of explanation, and to testify what was in his mind in reference to the subject to which the alleged fraud relates."

If, however, the chance of making a profitable sale led the plaintiff, H. L. Rand, to affirm absolutely as a matter of fact that the title was good, and that he was selling the buildings, and the purchaser relied upon such statements and was misled thereby, such statements are fraudulent. *Burns* v. *Dockray*, 156 Mass., 135, 137. The plaintiffs cannot escape liability by the use of ambiguous language in their letters, on the ground that they intended no fraudulent misstatement of facts, if the defendant would reasonably infer the fraudulent meaning from the language used. *Downey* v. *Finucane*, 205 N. Y., 251; 98 N. E., 391; 40 L. R. A. N. S., 307.

The record thus presents questions of fact for the jury, who saw the witnesses and could judge of the weight to be given to the testimony.

The plaintiffs further contend that the ruling should be sustained because the defendant, if his other contentions are sustained, has failed to show that he suffered damage. *Brown* v. *Blunt*, 72 Maine, 415. But the issue whether upon this record the buildings were of any value in excess of their value under the lease, and the determination of such value, is peculiarly the province of the jury.

Exceptions sustained.

HAROLD H. PURVES *vs.* JULIA A. MARTIN.

Washington. Opinion December 11, 1922.

The purchaser under an oral contract for the sale of land cannot recover payments already made, if chargeable with non-performance, the seller not being in fault; but if the seller refuses to perform the contract, the purchaser not being in fault can recover the payments he has made.

In the instant case the issues, whether George A. Martin was the duly authorized agent of his wife, the defendant, in the transaction in question; or, if not, whether she afterwards ratified his acts, were clearly for the determination of the jury.

Upon the other issue, whether the defendant refused to perform the contract, the buyer not being in fault, as the plaintiff contends, or whether the plaintiff abandoned the contract, the defendant being ready and able to perform, as the latter contends, the record presents a square conflict of testimony, both as to the terms of the contract and as to subsequent interviews between the plaintiff and George A. Martin.

Questions of fact were thus presented for the determination of the jury, upon whom is imposed the duty of judging of the credibility of the witnesses.

Assuming Mr. Martin's version of the contract to be correct, the defendant being unable at the expiration of sixty days after September 29, 1917 to fulfill the contract on her part, could not compel the plaintiff to then perform his part of the contract at the peril of forfeiting what he had paid.

On exceptions by plaintiff. This is an action to recover five hundred dollars paid by plaintiff to defendant under an oral contract made by plaintiff with the husband of defendant for the purchase of real estate, supposed to be owned by defendant, said sum being paid on the day the contract was made as a deposit on the trade, and interest on said sum. The plaintiff contended that the defendant refused to perform the contract, and the defendant claimed that while she was ready, willing and able to perform her part of the contract, the plaintiff had not fulfilled his part of the contract and had abandoned it. At the conclusion of the evidence the presiding Justice directed a verdict for the defendant and the plaintiff excepted. Exceptions sustained.

The case is sufficiently stated in the opinion.
Reed V. Jewett, for plaintiff.
Herbert J. Dudley, for defendant.

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

MORRILL, J. On or about September 29, 1917, the plaintiff made an oral contract with one George A. Martin, husband of the defendant, to purchase certain real estate, supposed to be owned by the defendant, and on that day paid George A. Martin five hundred dollars as a deposit on the trade. He now brings this action to recover said sum of five hundred dollars, with interest, on the ground that Mrs. Martin refused to perform the contract. The presiding Justice directed the jury to return a verdict for the defendant, and the case is before us upon plaintiff's exceptions. Two questions are presented:

1. Whether there was evidence for the jury that George A. Martin was the duly authorized agent of his wife in the transaction; or, if not, whether she afterwards ratified his acts.

These issues were clearly for the determination of the jury, especially so, in the light of the testimony of the defendant, that shortly after September 29 her husband told her "that he had made a deal with Mr. Purves and wanted to know about it," and that she did not object to it. *Roberts* v. *Hartford,* 86 Maine, 460. *Maxcy Mfg. Co.* v. *Burnham,* 89 Maine, 538.

2. Did the defendant refuse to perform the contract, the buyer not being in fault, as the plaintiff contends, or did the plaintiff abandon the contract, the defendant being ready and able to perform, as the latter contends?

The parties agree that the purchase price of the entire property was $4000, of which $2000 was to remain on mortgage; they do not agree as to when the trade was to be completed by the payment of $1500. The plaintiff says, upon preparation and execution of the papers in the course of two weeks; the defendant says, in sixty days; and her husband testifies:

"When the time was up, he (Purves) was sitting in my office, and I walked over across and says to him, 'Mr. Purves, the time is up. What are you going to do about it?' He says 'I can't do anything.' He told me previous to this that his sister was going . . . that he expected her to take hold with him; but he couldn't raise the money and that is all there was to it.

"Q. After paying you the five hundred dollars, did he make any further tender of money? A. No.

"Q. Made no offer to pay any more?

"A. No, he never mentioned it. He never mentioned the trade at all until I went across the hall there. He was sitting over there by the radiator, and I walked up and asked him what he was going to do; that the time was up.

"Q. Did Mr. Purves make any request of you to deliver him the deeds of this property?

"A. Never mentioned it to me."

The plaintiff squarely denies this conversation.

It is settled law that when the non-performance of an oral contract for the sale of land is on the part of the buyer, he cannot recover payments already made, the seller not being in fault; but if the seller refuses to perform the contract, the other party not being in fault can recover the payments he has made. *Kneeland* v. *Fuller*, 51 Maine, 518; *Plummer* v. *Bucknam*, 55 Maine, 105.

The record presents a square conflict of testimony between the plaintiff and George A. Martin both as to the terms of the contract and as to subsequent interviews between them. Aside from the state of the title hereafter to be considered, questions of fact were thus presented for the determination of the jury, upon whom is imposed the duty of judging of the credibility of the witnesses.

But the record discloses an undisputed fact not mentioned by counsel. The witnesses agree that the entire parcel was included in the contract. On September 29, 1917, Mrs. Martin owned only seven undivided eighths of the property and did not acquire title to the remaining one eighth until after February 28, 1918. Assuming Mr. Martin's version of the contract to be correct, the defendant was not able at the expiration of sixty days after September 29 to fulfill the contract on her part. She could not compel the plaintiff to then perform his part of the contract at the peril of forfeiting what he had paid. She could not require him to accept and pay for a defective title. The plaintiff appears to have been disposed not to insist upon a strict performance of the contract within the time limited according to his version,—"in the course of a couple of weeks,—" and the defendant probably was entitled to a reasonable time after the contract was made in which to perfect the title. *Dresel* v. *Jordan*, 104 Mass., 407, 414. But the case shows that Mr. Pickard, who held

title, as Trustee, to the one eighth part lacking to complete Mrs. Martin's title, was licensed by the Judge of Probate for Washington County on November 13, 1917, to sell and convey said interest; this date is well within the sixty days limited for performance according to Mr. Martin's version of the contract, and the defendant had failed to perfect her title when her husband peremptorily demanded performance by plaintiff. There is no evidence that either she or her husband after her title was perfected offered to perform.

Exceptions sustained.

ALEXIS MORNEAULT, In Equity *vs.* JULIE SANFACON et als.

AND

JULIE SANFACON et al. *vs.* ALEXIS MORNEAULT.

Aroostook. Opinion December 11, 1922.

In a bill in equity attacking the terms and execution of a deed, upon the issue of forgery, and of fraud, the evidence must be clear and convincing, precise and indubitable.

The issues in this case between the parties to the bill in equity are of fact only, with the burden upon the plaintiff to establish his contention in contradiction of the terms of his deed.

The quantum and quality of the evidence falls far short of the standard necessary to sustain a charge of forgery, or to overturn a deed upon the charge of fraud.

The relief which the defendants seek in their answer should, as a general rule in chancery practice, be sought by a cross-bill. But all parties interested in the subject matter being before the court and the action of the court to establish their rights being sought by the pleadings, the cause may be retained for an affirmative decree, to the end that further litigation be avoided.

The conduct of the defendant, Morneault, in the action at law, in permitting other parties to connect with and take water from the pipe laid by him from plaintiffs' aqueduct to his buildings was clearly an invasion of the plaintiffs' rights, and entitles them to recover at least nominal damages.

On report. This is a bill in equity brought to cancel or reform a deed, dated January 15, 1914, wherein the complainant, and Flavie Morneault were grantors, and Julie Sanfacon and Fred A. Soucis, two of the defendants, were grantees, granting certain rights to lay and maintain an aqueduct leading from two springs or wells on the farm of grantors to the residence of Florent Sanfacon, husband of Julie Sanfacon, and the use of water by Florent Sanfacon at his residence, and the use also by his son-in-law, Fred A. Soucis. Complainant alleges that the defendant, Florent Sanfacon, procured his signature to said deed through fraud and deceit, and further alleges that the said Florent Sanfacon, fraudulently and without authority, added the name of Flavie Morneault, the mother of the complainant, to said deed. The action of law seeks to recover damages caused or suffered by plaintiffs by reason of the defendant permitting other parties to connect with and take water from the pipe laid by him from the T in plaintiffs' aqueduct to his buildings.

At the conclusion of the evidence by agreement of the parties both causes were reported to the Law Court. In the cause in equity: Bill sustained without costs. Decree in accordance with this opinion. In the action at law, judgment for plaintiffs. Damages assessed at $1.00.

The cases are fully stated in the opinion.

Shaw & Cowan, for Alexis Morneault.

George J. Keegan and A. S. Crawford, Jr., for Julie Sanfacon, Florent Sanfacon and Fred Soucis.

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

MORRILL, J. This litigation arises from a grant of certain rights to lay and maintain an aqueduct, by Alexis Morneault to Julie Sanfacon and Fred A. Soucis by deed dated January 15, 1914. The first action is in equity seeking a cancellation of the deed; the second is at law to recover damage for alleged interference with the easement granted.

On the homestead farm of Morneault are two springs from which his buildings were formerly supplied with water by a log aqueduct; in course of time the logs became rotten and for many years that source of water supply for the buildings was discontinued. In

May, 1913 Florent Sanfacon applied to Morneault for permission to lay a pipe from the springs to the former's premises, and it is undisputed that an oral agreement of some kind was made, with the understanding that later it should be reduced to writing. Relying upon the oral agreement Sanfacon proceeded to lay a one-inch pipe from the springs about 3600 feet towards his premises; at the end of the one-inch pipe he inserted a T and from that point laid a three-quarters-inch pipe to his premises, a distance of about 1200 feet; the expense was approximately $800. Later the deed in question was given; the date when it was actually executed is in dispute. Two years later Morneault laid a three-quarters inch pipe from the T to his own buildings in accordance with the original agreement.

In his bill in equity the plaintiff, Morneault, alleges two grounds for the relief which he seeks; first, that the signature of his mother, Flavie Morneault, who held a mortgage on the farm for her support, and is now dead, is not genuine, that she never executed the deed; second, that through the fraud of Florent Sanfacon he was induced to sign an instrument which varies materially to his damage from the original oral agreement. He does not complain that the deed was made to Julie Sanfacon, wife of Florent, nor that their son-in-law, Fred A. Soucis, was joined as grantee.

The defendants by answer deny all fraud and allege that the deed of January 15, 1914, "sets out the exact and entire contract between the plaintiff and his wife (mother) and the defendants with reference to the right of the defendants to take water from said wells, except that said deed does not in express terms grant to said Fred A. Soucis, the right to take water for the use of his store and residence, which right the plaintiff admits in his bill was to be granted to said Soucis under the aforesaid preliminary agreement, and in that respect, and that only, said deed does not conform to said preliminary verbal agreement."

The issues between the parties are of fact only, with the burden upon the plaintiff to establish his contention in contradiction of the terms of the deed. Upon the issue of forgery, and of fraud, the evidence must be clear and convincing, precise and indubitable. It would be unprofitable to attempt to analyse the evidence within the limits of this opinion. It must suffice to say that upon an examination of the record the inconsistencies and improbabilities of the

plaintiff's position appear so great that he must fail in his contentions. Upon his own testimony his only substantial contention is that he understood the deed to be a lease "for all the time so long as he maintained the pipes in good order." The quantum and quality of the evidence falls far short of the standard upheld in *Colby et al* v. *Richards et al.*, 118 Maine, 288 as necessary to sustain a charge of forgery, and in *Parlin* v. *Small*, 68 Maine, 289 as necessary to overturn a deed upon the charge of fraud.

This finding would usually require that the bill be dismissed; but the defendants conclude their answer with a prayer for relief:

"That in the event that the Court shall construe said deed as not conferring upon the Defendant, Fred A. Soucis, the right to take water for the use of his store and residence, then the Court will order and decree that the Plaintiff make, execute and deliver to said Fred A. Soucis a good and sufficient deed conveying said right."

Relief of this character should as a general rule in chancery practice be sought by a cross-bill. *Andrews* v. *Gilman*, 122 Mass., 471, 474. *Forbes* v. *Thorpe*, 209 Mass., 570, 583. But, cases have arisen in which to avoid further litigation, all parties being before the court and the action of the court to establish their rights being sought by the pleadings, the cause has been retained for an affirmative decree. In *Fife* v. *Clayton*, 13 Vesey, Jun., 546, Lord Eldon held that a defendant to a bill for specific performance, proving an agreement different from that insisted on by the plaintiff, may have a decree upon his answer, submitting to perform; the Lord Chancellor expressed a willingness "to follow a precedent that will save expense, and is right in principle."

In *Vanderveer* v. *Holcomb*, 17 N. J., Eq. 87 it was held that "the court dispenses with the necessity of a cross-bill, where the whole matter is before the court, and the party is not thereby deprived of any of his substantial rights by a decree in the existing suit."

And in *Elliott* v. *Pell*, 1 Paige, Ch. 263, it was held to be "the settled law of this court that a decree between co-defendants, grounded upon the pleadings and proofs between the complainant and the defendants, may be made; and it is the constant practice of the court to do so, to prevent multiplicity of suits." For other cases dispensing with a cross-bill, see note to last case cited, in Book 2, N. Y., Chancery Repts., Co-op., Ed. 640.

In the present case the plaintiff has inserted the following prayers in his bill:

> "That the Court may determine what the contract was between the parties and declare and decree the terms of the same so that the rights of both parties under the original contract relating to said water be secured.
>
> "That the Court make such orders and decrees as are necessary to protect the rights of all parties in this bill."

We think, therefore, that to end litigation and declare the rights of the parties, the bill should be sustained without costs. The defendants may prepare a decree providing for a modification of the deed of January 15, 1914, expressly granting to Fred A. Soucis the right to take water through the pipe in question for the use of his store and residence, as claimed in defendants' answer. The defendant, Florent Sanfacon, frankly states in his testimony that he was to have the surplus water from the springs beyond what was required by the plaintiff for his private personal use. It may be doubtful whether this priority in the use of the water is secured to the plaintiff by the deed of January 15, 1914; the decree will, therefore, provide for such further modification as will secure to said plaintiff, and his grantees occupying said buildings, such priority of use. A deed may be prepared in accordance with this opinion for execution by Mr. Morneault and a copy annexed to and made a part of the decree, for the approval of the court.

Action at law. It is contended that the defendant, Mr. Morneault, has permitted other parties to connect with and take water from the pipe laid by him from the T to his buildings. Under the findings which we have made as to the rights of the parties, this action was clearly an invasion of the plaintiffs' rights, and entitles them to recover at least nominal damages. The plaintiffs claim as damages the expense of replacing the three-quarters-inch pipe from the T to their premises with a one-inch pipe, after their line was frozen upon their side of the T. But we are not satisfied that the interruption of their service was due to defendant's acts; it may quite as probably have been due to a defective plan adopted in laying the pipe, or to insufficient covering. We think that they must be satisfied with

nominal damages; but this action has established their rights, and if a substantial invasion thereof continues, it may be the subject of equitable relief.

In the cause in equity the entry will be

Bill sustained without costs.
Decree in accordance with this opinion.

In the action at law,

Judgment for plaintiffs.
Damages assessed at $1.00.

ELDORA M. NEVELLS *vs.* MYRON CARTER et als.

Hancock. Opinion December 11, 1922.

One entering upon land claiming title, though under a parol grant only, and holds open, exclusive, adverse, and uninterrupted possession thereof for twenty years, acquires title. An occupation of land under a parol gift from the owner is an occupation as of right. Possession under a claim of title, with or without deed, is adverse.

In the instant case the tenants must rest their claim of title upon an actual entry as of right, and adverse possession, inasmuch as a parol grant of real estate is ineffectual to change the ownership of the property.

If the jury believed the witnesses who testified in behalf of the tenants, they were warranted in finding a parol grant of the disputed premises in the year 1885 by Coleman Carter to his son Edbert, an entry by Edbert under such grant, the performance by the latter of the consideration for such grant, and the continued possession and control of said premises as of right, claiming title thereto for twenty years in the lifetime of Coleman.

Notwithstanding Edbert permitted his father and mother to live upon the place until Coleman's death in 1906, the jury was warranted in finding and must have found that from 1885 to his death in 1906, Coleman was the tenant of Edbert, and recognized the latter's claim as of right, to the place.

Coleman's possession was therefore Edbert's possession, and is available to the latter, and to his heirs, for the purpose of creating a prescriptive title in Edbert against Coleman, and his heirs other than Edbert, the period of twenty years having fully expired in the lifetime of Coleman. Having once become Edbert's tenant, before Coleman could dispute the former's title he must have

at least repudiated the tenancy, and there is no evidence that from September or October, 1885 until his death in March, 1906, Coleman ever surrendered or disavowed his tenancy under Edbert or his occupancy under him.

On plaintiff's motion for new trial. This is a real action to recover nineteen twenty-first parts of certain real estate to which demandant claims title as an heir of Coleman Carter, who died March 15, 1906, and as grantee of the widow and five heirs of said Carter.

The tenants, who are the widow and next of kin of Edbert E. Carter, the remaining heir of Coleman Carter, who died April 27, 1907, claim title by an oral grant of the demanded premises by Coleman to his son, Edbert, in the year of 1885, with the agreement and understanding that the son, Edbert, should make all needed repairs on the buildings on the premises, and rebuild them if necessary. The defendants contended that Edbert entered into possession of the premises in the fall of 1885, and performed all agreements by him made by way of repairs and reconstruction, assumed the control and management of the farm, and continued that possession and control under claim of right until his death in 1907, and that such control and management has since been continued by his son, Myron. The defendants pleaded the general issue, and under brief statements disclaimed liability for rents and profits, and also set up the statute of limitations, and laches on the part of the plaintiff. The jury returned a verdict for the defendants and the plaintiff filed a general motion for a new trial. Motion overruled.

The case is fully stated in the opinion.

Howard M. Cook and Coggan & Coggan, for plaintiff.

Hale & Hamlin, for defendants.

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

MORRILL, J. Real action to recover nineteen twenty-first parts of certain real estate to which demandant claims title as an heir of Coleman Carter, who died March 15, 1906, and as grantee of the widow and five other heirs of said Carter.

The tenants are the widow and next of kin of Edbert E. Carter, the remaining heir of Coleman Carter, who died April 27, 1907. They claim title by an oral grant of the demanded premises by Coleman to his son, Edbert, in the year 1885, in consideration that Edbert would make needed repairs and reconstruction of the buildings on the

premises; they contend that Edbert entered into possession in the fall of 1885, made the repairs and reconstruction as he had agreed to do, assumed the control and management of the farm at that time, and continued that possession and control under claim of right until his death in 1907, and that such possession and control has since been continued by his son, Myron.

Under instructions to which no exceptions were taken, the jury found for defendants, and the case is before us upon a general motion for a new trial.

It must be considered as settled law that where one enters upon land claiming title, though under a parol grant only, and holds open, exclusive, adverse, and uninterrupted possession thereof for twenty years, he thereby acquires title. *Sumner* v. *Stevens*, 6 Met., 337. *Webster* v. *Holland*, 58 Maine, 168, 169. *Jewett* v. *Hussey*, 70 Maine, 433, 436. *Shirley* v. *Lancaster*, 6 Allen, 31, 32. An occupation of land under a parol gift from the owner is an occupation as of right. *Stearns* v. *Janes*, 12 Allen, 582, 584. Possession under a claim of title, with or without deed, is adverse. *Ashley* v. *Ashley*, 4 Gray, 197, 200.

The principle is thus stated by Chief Justice Shaw in *Sumner* v. *Stevens*, supra, and we here quote his language because the quotation in *Jewett* v. *Hussey*, supra, contains typographical errors which confuse the meaning:

"A grant, sale or gift of land by parol is void by the statute. But when accompanied by an actual entry and possession, it manifests the intent of the donee to enter and take as owner, and not as tenant; and it equally proves an admission on the part of the donor, that the possession is so taken. Such a possession is adverse. It would be the same if the grantee should enter under a deed not executed conformably to the statute, but which the parties, by mistake, believe good. The possession of such grantee or donee cannot, in strictness, be said to be held in subordination to the title of the legal owner; but the possession is taken by the donee, as owner, and because he claims to be owner; and the grantor or donor admits that he is owner, and yields the possession because he is owner. He may reclaim and reassert his title, because he has not conveyed his estate according to law, and thus regain the possession; but until he does this, by entry or action, the possession is adverse. Such adverse possession, continued twenty years, takes away the owner's right of entry."

It is thus clear that a parol grant of real estate is ineffectual to change the ownership of the property; the tenants must rest then their claim of title upon an actual entry as of right, and adverse possession. The evidence in relation to the grant is immaterial, except as it bears on the character of Edbert's occupation. The testimony as to his subsequent acts and the acts of the present tenants must be examined to determine whether they constitute actual, open, exclusive, and adverse possession of the real estate by Edbert and his widow and heirs for twenty years or more. *Duff* v. *Leary*, 146 Mass., 533, 540.

If the jury believed the witnesses who testified in behalf of the tenants, they were clearly warranted in finding that in the year 1885 Coleman Carter made a parol grant of the disputed premises to his son, Edbert, upon Edbert's agreement to make necessary repairs and reconstruction of the buildings; that Edbert in September and October of that year assumed possession and control of the property, and made the promised repairs and reconstruction of the buildings, expending approximately as much as the property without the buildings was worth; that he continued in control and possession of the demanded premises until his death in 1907, notwithstanding his business and residence was in Cambridge, Mass.; that his family spent their summers there, and that Edbert paid the taxes and furnished any money needed on the place; that in June, 1904, he sent his son, Myron, to live on the place and that since the death of Edbert in 1907 Myron has occupied the place and had actual possession thereof for the present tenants.

But it is urged that upon this theory Edbert permitted his father and mother to live on the place until Coleman's death in 1906, thus, it is said, constituting the owner "the agent for the disseizor in thus acquiring title against himself by adverse possession." We think, however, that the jury was warranted in finding that at all times after 1885 Coleman Carter recognized Edbert's claim of right and possession, and occupied in subordination to it. The statements of Coleman Carter, to the effect that,—"The place belongs to Bert and Annie"—"Bert owns the place"—"I am glad I gave Bert my place,"—"I hope that I shall never be sorry that I gave Bert my place," and his statement that he could not give security for an old debt because he had transferred his property to his son,—were competent evidence as bearing upon the question of adverse posses-

sion in Edbert under a claim of right. They tended to establish such adverse possession with the knowledge of Coleman, to whom knowledge must be brought home, (*Motte* v. *Alger*, 15 Gray, 322, 325) and to show his acquiescence in such adverse claim. *Stearns* v. *Hendersass*, 9 Cush., 497, 503. The jury were warranted in finding and must have found that from 1885 to his death in 1906 Coleman was the tenant of Edbert, and recognized the latter's claim as of right, to the place. Coleman's possession was therefore Edbert's possession, and is available to the latter, and to his heirs, for the purpose of creating a prescriptive title in Edbert against Coleman, and his heirs other than Edbert, the period of twenty years having fully expired in the lifetime of Coleman. *Cobb* v. *Robertson*, 9 Tex., 138; 122 Am. St., 609. Having once become Edbert's tenant, before Coleman could dispute the former's title he must have at least repudiated the tenancy. *Davis* v. *Williams*, 130 Ala., 530; 30 So., 488; 89 Am. St., 55. Note pages 73, 87. *Carson* v. *Broady*, 56 Neb., 648; 71 Am. St., 691; *Saunders* v. *Moore*, 14 Bush, (Ky.), 97, 100; in some states it is held that he must first surrender the premises, or there must be an eviction or something equivalent thereto, and such has been recognized in this state as the law. *Ryder* v. *Mansell*, 66 Maine, 167, 170. There is no evidence that from September or October 1885 until his death in March 1906 Coleman ever surrendered or disavowed his tenancy under Edbert or his occupancy under him. Although Edbert's claim was equitable under an oral grant, of which the consideration was fully performed by him, it thus ripened into a legal title before Coleman's death. *Wheeler* v. *Laird*, 147 Mass., 421.

Motion overruled.

INHABITANTS OF ATHENS *vs.* FRANKLIN WHITTIER.

Somerset. Opinion December 14, 1922.

Under Sec. 10, Chap. 4, R. S., the records of the assessment of taxes may be amended in accordance with the fact, if under oath, and the word "Assessors" may be substituted for the word "Selectmen" after their signatures, if the same persons hold both official positions. The commitment of a supplemental list of taxes to the collector, to which list the powers of the original warrant has not been extended, does not prevent the town from maintaining in its own name an action for such taxes, such a proceeding being independent of the collector. The allegation that the tax was assessed by a supplemental assessment not necessary.

Under Par. IX, Sec. 6, Chap. 10, R. S., as amended by Chapter 105, Public Laws, 1919, if an honorably-discharged soldier possesses property of greater value than five thousand dollars, so much of it as is not otherwise exempt from taxation must be assessed.

Under Sec. 10, Chap. 4, R. S., the records of an assessment may be amended in accordance with the fact, when made under oath, and the selectmen who also acted as assessors in any year may amend their records of tax assessment by substituting the word Assessors for that of Selectmen after their signatures.

The listing of the property at the end of the original list of assessments under a heading "Property not Taxed," under the circumstances shown to exist in this case, was an omission from the original list within the meaning of Sec. 36, Chap. 10, R. S.

An allegation that the tax was assessed by a supplemental assessment is not necessary in an action of this kind. In this form of action, technical defenses have never found favor with the courts.

On report. This is an action brought under Sec. 64, Chap. 11, of the R. S., to recover taxes assessed against the defendant for the year 1920. The defendant, an honorably-discharged soldier of the Civil War, was more than seventy years old on April 1, 1920.

On April 1, 1920, he was possessed of property of a value in excess of five thousand dollars. The assessors of plaintiff town for the year of 1920, who were also selectmen and overseers of the poor, at the time the original assessment of taxes was made for that year, understood that no tax was assessable against defendant because he did

not have five thousand dollars worth of property which was taxable. Subsequently the assessors were advised that as the defendant had property exceeding five thousand dollars in value, he should be taxed. On July 30, 1920, a supplemental tax, to recover which this action was brought, was assessed against the defendant, which assessment was signed by the three persons who held the three official positions of selectmen, assessors, and overseers of the poor, in the plaintiff town, but after their signatures to such assessment appeared the word "Selectmen" and the word "Assessors" did not appear. At the conclusion of the evidence, by agreement of the parties, the case was reported to the Law Court. Judgment for plaintiff in the sum of $95.63, and for its costs.

The case is stated in the opinion.

Butler & Butler, for plaintiff.

J. F. Holman and L. L. Walton, for defendant.

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

WILSON, J. An action brought under Sec. 64, Chap. 11, R. S., to recover taxes assessed against the defendant for the year 1920. It comes before this court on report.

The defendant is a veteran of the Civil War and received his honorable discharge from the service. When the original tax list was made in May, 1920, by the assessors of the plaintiff town the name and property of the defendant did not appear among those assessed, but was added at the end of the list under the heading: "Property not Taxed. Resident Proprietors."

From the printed report it appears that at the time of the original assessment the assessors were not aware that the defendant possessed property of greater value than five thousand dollars; and also at the time held the view that under Par. IX, Sec. 6, Chap. 10, R. S., as amended by Chapter 105, Public Laws, 1919, unless an honorably-discharged soldier of the Civil War possessed *taxable* property of greater value than five thousand dollars it was exempt.

Later, after the assessment list was completed, and the warrant issued, committing it to the collector for collection, it was discovered that the defendant did possess property of greater value than five thousand dollars, though not all of it was subject to taxation; and

the assessors were also then advised, and correctly, we think, that under such circumstances Par. IX of Sec. 6, Chap. 10, R. S., as amended by the Public Laws, 1919, Chapter 105, did not exempt any property otherwise subject to taxation. *Inhabitants of Mechanic Falls* v. *Millett,* 121 Maine, 329.

Whereupon on July 30th, 1920, by a supplement to their original list of assessment, which bore the date of May 17th, 1920, the assessors of said town assessed his proportionate share of the State, County and Town taxes upon the defendant's taxable property, the same being of the value of twenty-one hundred and twenty-five dollars, and certified that said supplemental list was omitted from the original list by mistake, but did not extend the powers of the original warrant to said supplemental list as provided in Sec. 36, Chap. 10, R. S. Said assessors also committed the further error of describing themselves, when signing the supplemental list, as selectmen instead of assessors. The same persons for the year 1920 held both offices in said town.

At the hearing at *nisi prius* request was made to amend the record of the supplemental assessment by substituting the word assessors for the word selectmen. It clearly appears from the evidence, we think, that in assessing said supplemental tax they were in fact acting in their capacity as assessors and not by virtue of their authority as selectmen, and the signing of the supplemental list in the manner stated was by inadvertence.

However, under the stipulations reporting the case, it is agreed that if the assessors of the town have the right to amend the supplemental list by striking out the word selectmen and inserting the word assessors, it may be considered made. We think that under Sec. 10, Chap. 4, R. S., such an amendment, when made under oath, may be permitted by the court; *Whiting* v. *Ellsworth,* 85 Maine, 301; *Bucksport* v. *Buck,* 89 Maine, 320; *Bresnahan* v. *The Sherwin-Burrill Soap Co.,* 108 Maine, 124; and that this defect for the purposes of this case may be considered cured.

The chief ground upon which the defendant relies is that the assessors having included the name and description of the property of the defendant in the original list, though in the manner above stated, it could not later be made the subject of a supplemental assessment. In support of this contention he relies mainly upon *Dresden* v. *Bridge,* 90 Maine, 489. But there is a clear distinction between that case

and the one at bar. In that case the original list was held to include an assessment upon all the property the defendant possessed; and because the assessors later discovered that it was of greater value than they had at first supposed, it did not authorize the imposing of an additional tax in the form of a supplemental assessment. Under such circumstances there was no omission, simply an undervaluation. The same rule was applied in *Sweetsir* v. *Chandler*, 98 Maine, 145.

In the case at bar, however, there was no assessment of the property of the defendant in the original list. It appears at the end of the original list, it is true, but by so adding it under the head of "Property Not Taxed" the assessors were performing no duty imposed upon them nor were they complying with any provisions of the statutes. It was as much omitted from the original list as though it had not been added in this manner.

To even include property in the original list if erroneously done, does not make it a part thereof so as to preclude a supplemental assessment. *Rockland* v. *Ulmer*, 87 Maine, 357. *A fortiori* is the omission of property from the list of estates actually taxed and its addition thereto under the heading of "Property Not Taxed" an omission within the contemplation of Sec. 36, Chap. 10, R. S. That it was done by mistake in this instance cannot, we think, be questioned.

It is also further objected that the supplemental tax was not properly committed to the collector inasmuch as the powers of the original warrant were not extended to the supplemental list. A valid objection, no doubt, if this were a proceeding by the collector. But this is an action brought in the name of the town, independent of the collector, and by direction of the selectmen who may give such authority directly to the attorney for the town. *Rockland* v. *Farnsworth*, 111 Maine, 315, 322.

The only act to be performed by the collector which has any effect upon a suit of this nature, and that only upon the right to recover costs, is the demand before suit is brought. In this case, however, it is admitted by express stipulation that the tax was duly demanded of the defendant prior to the bringing of suit. So that any question which might have been raised on this ground must be considered waived. *Rockland* v. *Ulmer*, supra, page 361; *Rockland* v. *Farnsworth*, supra, page 321.

The only other question requiring consideration is one of pleading and proof. Objection was raised at the hearing to the admission of

the supplemental list as evidence on the ground that there was no allegation in the declaration that any such supplemental list was made; that the declaration only contains an allegation of what purports to be an original list. We do not think such an allegation essential. The only essentials to recover in this form of action are: assessors duly elected and qualified, jurisdiction of the assessors over property and person, a tax duly assessed on property subject to taxation and belonging to the defendant and the order of the selectmen that the suit be brought. All the necessary allegations are contained in this declaration. A legal assessment may be proven as well by a supplemental list as by the original one, if the necessary steps have been complied with. A supplemental list legally made becomes a part of the original list. *Eliot* v. *Prime*, 98 Maine, 48.

In this form of action mere technical defenses have never found favor with the courts. *Cressey* v. *Parks*, 76 Maine, 534; *Bath* v. *Reed*, 78 Maine, 276; *Rockland* v. *Ulmer*, supra. As this court said in *Greenville* v. *Blair*, 104 Maine, 444; "This action will not be defeated by any mere irregularities in the election of assessors, or collector, or in the assessment itself, but only by such omissions or defects as go to the jurisdiction of the assessors, or deprive the defendant of some substantial right, or by the omission of some essential requisite to the bringing of the action." Also see *Rockland* v. *Farnsworth*, supra.

It sufficiently appears in this case, we think, that the assessors of Athens for the year 1920 were lawfully elected and duly qualified, that they had jurisdiction for the purpose of assessment of taxes over the person and estate of the defendant, that they lawfully assessed and determined his share of the taxes imposed, and that the defendant is only asked to pay his fair share of the taxes thus determined. It does not appear that any omission or irregularity pointed out in the proceedings has occasioned the defendant any hardship, loss or injury.

It not appearing from the report that any vote was passed by the town under Sec. 1 of Chap. 11, R. S., that interest should run on unpaid taxes from and after a date specified, none is allowed. *Rockland* v. *Ulmer*, supra, page 361; *Snow* v. *Weeks*, 77 Maine, 429; *Cooley on Taxation*, 2d Ed. pages 17, 436. Entry will be

Judgment for plaintiff in the sum of $95.63, and for its costs.

CHARLES A. DAY et als., Petitioners for Mandamus

vs.

CHARLES D. BOOTH.

Aroostook. Opinion December 14, 1922.

Exceptions do not lie to the exercise of judicial discretion unless that discretion has been clearly abused. Neither do exceptions properly lie to either the granting or withholding of a writ of mandamus, it being a discretionary writ and not a writ of right, unless the ruling is based upon a question of law or upon a clear abuse of discretion on the part of the Justice in passing upon the facts.

In the instant case the Justice who heard the cause passed upon questions of fact only in his finding, and under the rule established in previous decisions the conclusion that the petitioners were entitled to the remedy sought followed.

In this class of cases the excepting party must show either an erroneous ruling in law or a clear abuse of judicial discretion. Failing in this the decision below stands.

On exceptions. This is a petition for mandamus brought under Sec. 22, Chap. 51, of the R. S., by Charles A. Day and Herbert D. Knox, as co-partners under the firm name of Charles A. Day & Company, owners of two shares of the preferred stock of the Municipal Service Company, a Maine corporation, against Charles D. Booth, the clerk of said corporation, to allow them to inspect the stock book of said corporation, and to take copies and minutes therefrom of such parts as concern their interests, and to make a list of the stockholders of said corporation, their residences and the amount of stock held by each. A hearing was had upon the petition, return to the alternative writ, replication and proofs, and the presiding Justice ordered the peremptory writ of mandamus to issue against the respondent, and plaintiff excepted. The exceptions were certified directly to the Chief Justice under Sec. 18, Chap. 107, of the R. S. Exceptions overruled.

The case is sufficiently stated in the opinion.

Ralph W. Crockett, for plaintiff.

Verrill, Hale, Booth & Ives, Charles D. Booth and Robert Hale, for defendant.

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

CORNISH, C. J. This is a petition for mandamus brought by a partnership stockholder against the clerk of the Municipal Service Company in the usual form, praying that the defendant be commanded to allow the petitioners to inspect the stock book of the corporation, to take copies and minutes therefrom of such parts as concern their interests, and to make a list of the stockholders, their residences, and the amount of stock held by each. This proceeding is based upon R. S., Chap. 51, Sec. 22, and the legal rights of stockholders under that section have been fully considered in previous decisions of this court. *White* v. *Manter,* 109 Maine, 408; *Withington* v. *Bradley,* 111 Maine, 384; *Eaton* v. *Manter,* 114 Maine, 259; *Knox* v. *Coburn,* 117 Maine, 409; *Bryer* v. *Wyman,* 118 Maine, 378; *Shea* v. *Sweetser,* 119 Maine, 400.

The Justice who heard the case found that the purpose and methods of the petitioners could not be deemed vexatious, improper, unlawful or inimical to the interests of either the corporation or its stockholders under the facts as disclosed in the evidence. This was a finding of fact and under the rule established in previous decisions the conclusion that the petitioners were entitled to the remedy sought followed. To clarify the situation as a matter of practice it is necessary to go further. Nowithstanding the fact that this court has entertained exceptions from the ruling of the sitting Justice in this class of cases, the proper scope and limit of such exceptions should not be overlooked.

It is a general and well recognized rule that exceptions do not lie to the exercise of judicial discretion unless that discretion has been clearly abused. The writ of mandamus being a discretionary writ and not a writ of right, exceptions do not properly lie to either the granting or withholding of that writ unless the ruling is based upon a question of law or upon a clear abuse of discretion on the part of the sitting Justice in passing upon facts. In *Eaton* v. *Manter,* 114 Maine,

259, and *Bryer* v. *Wyman*, 118 Maine, 378, questions of law were involved; while in *White* v. *Manter*, 109 Maine, 408, the first case arising under the present statute, and in *Withington* v. *Bradley*, 111 Maine, 384, 389, the question of abuse of discretion although not sharply stated was evidently under consideration by the court. In *Eaton* v. *Manter*, after discussing the discretionary power of the court and the facts on which the decision below was based, the court said: "Accordingly we hold that the power of this court was properly exercised in this case." A similar expression is used in *Withington* v. *Bradley*.

It is proper to state this rule now in definite and unmistakable terms so that the profession may not regard exceptions in this class of cases equivalent to an appeal. The excepting party must show either an erroneous ruling in law or a clear abuse of judicial discretion. Failing in this the decision below stands.

In the pending case no questions of law were reserved by the sitting Justice and no rulings were excepted to during the progress of the hearing. After stating his contentions as to the effect of the evidence, purely a question of fact, the bill of exceptions concludes: "To the ruling of the single Justice that the peremptory writ of mandamus should issue, the respondent excepts and prays that his exceptions may be allowed." This exception must be confined to the abuse of judicial discretion, and a careful examination of the evidence fails to support the claim. The entry must therefore be,

Exceptions overruled.

DON C. SYLVESTER et als. *vs.* ABBOTT WORTHLEY.

Aroostook. Opinion December 18, 1922.

If one of the parties to a contract request the other party to defer his performance of the conditions of the contract, and such other party acts upon such suggestion or request in good faith he is entitled to a corresponding extension of time beyond that specified in the contract, and if the party making such request by his own acts places the other party in a position where he is prevented from completing the contract within the specified time, he is estopped from setting up as a defense non-performance within the specified time.

A fair interpretation of the contract placed upon the defendant the duty of notifying the plaintiffs when he desired the various shipments to be made, the names of the consignees and the route over which they should be billed. The plaintiffs could not load at their own option but must await the direction of the defendant.

If the defendant, during the correspondence between the parties as to the fulfilment of the contract, asked for delay in shipment, and the plaintiffs acted upon such suggestion and request in good faith, they should be allowed a corresponding extension beyond the end of the contract month.

If the defendant's own acts placed the plaintiffs in a position where they were prevented from completing the contract within the specified time, then he is estopped from setting up non-performance within that specified time as a defense.

The jury must have found from the evidence that the plaintiffs were excused from shipping the three cars on September 30th, and in the opinion of the court the verdict was clearly justified.

On defendant's motion for a new trial. This is an action on account annexed to recover the contract price for six hundred ninety-six barrels of potatoes. On July 13, 1921, plaintiffs entered into a written contract with the defendant agreeing to sell and deliver to defendant during the month of September, 1921, twenty-five hundred barrels of potatoes in bulk at $4.50 per barrel, F. O. B. shipping point, defendant paying down $2500 at the time of the execution of the contract. On August 31, plaintiffs wired defendant that they were ready to commence shipping and asked for shipping instructions on one car. In his reply the defendant requested plaintiffs to defer for ten days the commencement of shipping, and also requested the

plaintiffs to sack the potatoes at his expense. On September 22, plaintiffs received shipping instructions for four cars, and on September 24, they received shipping instructions for the remainder of the 2500 barrels. Between September 24 and September 30 inclusive plaintiffs loaded eight cars, but the last remaining three carloads, to recover the contract price of which this action was brought, all the other carloads having been accepted and paid for, were loaded on October 1. The defendant denied liability on the ground that the plaintiffs were bound to load all the potatoes required under the contract within the month of September as required by the terms of their contract. The plaintiffs contended that by the delay in commencing to ship requested by defendant, and also the failure to seasonably give them shipping instructions, they were not able to procure cars and load all the potatoes within the month of September. The case was tried to a jury and a verdict for $1360.50 was rendered for plaintiff, and defendant filed a general motion for a new trial. Motion overruled.

The case is fully stated in the opinion.

W. S. Brown, for plaintiffs.

Powers & Guild, for defendant.

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

MORRILL, J. Non-concurring.

CORNISH, C. J. Plaintiffs are potato dealers in the County of Aroostook, Maine; defendant a potato dealer in Red Bank, New Jersey. This action was brought to recover a balance alleged to be due on the sale and delivery of potatoes under a written contract, dated July 13, 1920. The portions of the contract essential to this discussion are these:

"The party of the first part sells and the party of the second part purchases twenty-five hundred barrels (165 pounds each) U. S. No. 1 Cobbler potatoes in bulk."

"And for said potatoes, party of the second part agrees to pay the sum of $4.50 per barrel F. O. B. shipping point."

"Party of the first part are to ship said potatoes during the month of September, 1920."

"The obligation of the party of the first part is contingent upon strikes, car shortage, embargoes, unavoidable accidents beyond their control."

At the time of execution of the contract the defendant made the agreed initial payment of $2500, being one dollar per barrel for the specified quantity. There is no controversy as to the quality. Eight carloads were shipped and paid for. The defendant rests his defense against payment for the three remaining cars upon the single ground that under the terms of the contract the plaintiffs were bound to ship the entire quantity within the month of September, and that they broke their contract because these last three cars were not loaded until October 1st and billed out on October 2d, a delay which he says was without legal excuse.

The plaintiffs reply is, that even assuming that time was of the essence of the contract, the brief delay of twenty-four or forty-eight hours was caused by the previous requests of the defendant himself and therefore the plaintiffs must be allowed additional time for completion equivalent to the time of requested delay. The jury returned a verdict for the plaintiffs in the sum of $1360.50, and the case is before the Law Court on defendant's general motion for a new trial.

It is evident that a fair interpretation of the contract placed upon the defendant the duty of notifying the plaintiffs when he desired the various shipments to be made, the name of the consignees and the route or routes over which they should be billed. His was the first move and this move must be made seasonably in order that the plaintiffs could have a reasonable time within which they could make the shipments. The parties themselves must have so understood it. The plaintiffs could not load at their own option but must await the direction of the defendant. If therefore the defendant during their correspondence as to fulfilment of the contract asked for delay in shipment during the earlier part or middle of September, and the plaintiffs acted upon such suggestion and request in good faith, they should in law as well as in justice and fair dealing be allowed a corresponding extension beyond the end of the month. *Moore* v. *Bond*, 18 Maine, 142, 145; *Frommel* v. *Foss*, 102 Maine, 176. *McGowan* v. *Am. Tan Bark Co.*, 121 U. S., 575. If the defendant's own acts placed the plaintiffs in a position where they were prevented from completing the contract within the specified time, then he is estopped

from setting up non-performance before that specified date as a defense. Moreover, the possibility of car shortage was incorporated in the contract as a contingency affecting the plaintiff's obligation. This did not necessarily mean a car shortage during the entire month of September; but if at the defendant's request the shipments were delayed into the latter part of the month and then a car shortage developed the plaintiffs should not be injured thereby. Such an unfair advantage should not be permitted.

Such being the general principles of law governing the issues involved here, what does the record show as to the conduct of the parties?

The plaintiffs were diligent and alert, ready to perform when called upon, and even took the initiative which they were not called upon to take.

On August 31, one day before shipments could begin, they wired the defendant "Will load car on contract last of this week if can get car. Wire billing." Instead of wiring billing the defendant answered on August 31st, "Letter mailed yesterday. Kindly delay few days. Potatoes green." The letter of August 30th referred to in defendant's telegram states that he had sold the potatoes in Atlanta, Georgia, and the purchasers had asked when he would begin shipment and it continues: "I am advising them today that I feel that they should wait for another week or ten days so that the stock will carry safely and that we will not have any trouble regarding the shipments." He then asks that the potatoes be sacked and concludes; "As you are on the ground floor and know the conditions in Maine much better than I do I will be guided by what you say in regard to the shipping of these cars at the present time, but from what I have heard it seems to me that we should delay the shipments as above stated."

The telegram and letter taken together constitute a plain request to delay shipment a week or ten days. Plaintiffs complied with this request. In fact they could do nothing else as they had received no billing orders. The contract gave them thirty days in which to ship. If a week or ten days were cut off at the beginning at defendant's request, then the plaintiffs were entitled to a week or ten days extension to compensate for it. At that time the defendant himself evidently took the same view because in his letter to the plaintiffs he said he had told the Atlanta parties that "we will not have any

trouble regarding the shipments." By "we" Sylvester and Worthley are meant. When he speaks of the Atlanta parties in this letter he refers to them as "they." His idea as expressed to the Atlanta parties was that if he should ask delay of the plaintiffs, they would undoubtedly grant it and the plaintiffs and defendant could arrange the matter amicably and justly. This of course was the plaintiffs' idea also.

At the end of the asked for period of delivery the defendant expresses for the first time a desire to be relieved of his contract. Possibly he may have had that intention when the letter of August 30 and the telegram of August 31 were sent, because there is no evidence showing how he could then have known whether the potatoes were green or not, and it is admitted that on September 30 the market price of these potatoes had fallen to $2.25 per barrel, one half the contract price. A falling market is apt to be the mother of excuses. However that may be, on September 9 he wired plaintiff, "What would be your best terms to settle on our contract and not ship the potatoes, hurry answer." Plaintiffs wired this answer on September 13th: "Telegram received. Do not want to cancel contract. We will store potatoes for you until December 1, &c. . . . . We are all ready to ship five cars this week. . . . . If you don't wish us to store give us billing for five cars not later than September 15. Hurry answer." Eleven cars carried the entire lot, so that five cars whose billings were asked for by the plaintiffs would carry practically one half the lot by half of September, thus keeping up with the requirements of the contract.

Instead of sending billings for these five cars the defendant delayed the plaintiffs still further. On September 14 he wired that the Atlanta parties would pay a small sum to cancel the contract. If not, then he asked the plaintiffs to sack the potatoes in ten-peck bags, to start loading them next week, and his representative would be in Westfield to arrange shipments the next Tuesday. Nearly three weeks of the month of September had then passed and the plaintiffs were still unable to obtain any directions for shipment. They were ready and willing to perform but were powerless to do so because of the defendant's failure to give the necessary instructions. And this attitude on the defendant's part continued. On September 19 the defendant wired the plaintiffs: "Our Mr. Stryker will arrive Westfield Monday morning do you think potatoes will carry to Atlanta,

Georgia? Please confer with Mr. Stryker your advice is needed and will be guided by your opinion." This is rather a significant telegram. Without any reason therefor the defendant was apparently hoping to find some defect in the quality of the potatoes warranting a cancellation of the contract on that ground. Otherwise there was no necessity of sending Stryker to Westfield. All that the plaintiffs needed were billing orders which could be sent by telegraph. The defendant's hope, however, was blasted. Stryker wired him after arrival at Westfield on September 20: "Have seen Don Sylvester's potatoes. Found them dry and O. K." No fault could be found with the quality. That defense faded away. Stryker added to his telegram the following: "Have found you can ship by rail to Boston, then by boat to Savannah for seventy cents per cwt. all rail dollar nineteen cwt. Wire Don Sylvester shipping instructions."

On the same day, September 20, defendant wired the plaintiffs, "Secure through rate via. Boston steamer Savannah to Atlanta, Georgia, quick." Plaintiffs secured the desired information and wired defendant on September 21, "Through rate via. Boston to Atlanta, Georgia, dollar fourteen hundred," a slightly less figure than that quoted by Stryker. Finally on September 21, after all this backing and filling, the defendant wired an order to ship four cars by all rail route to Atlanta. This was the first shipping order that defendant had sent. Only nine days in September then remained in which to ship the entire lot, all through the defendant's fault.

On September 23 the defendant wired plaintiffs to "make the contract into eleven cars around 225 barrels each," with shipping instructions for the other seven. Up to the time that these last two telegrams were received, Sylvester testifies that he had supposed from the nature of the previous inquires made by defendant that the shipments would be by rail to Boston and thence by water, and he had made provisions for cars to ship to Boston and connect with a water route South. They were to be lined cars. But such cars were not allowed by the railroad company to go south and therefore when the orders came for all rail shipments a change was necessitated, and plaintiffs proceeded to order from the Railroad Company eleven cars for all rail shipment South. Only seven of the required kind were in the yard at that time. There was a car shortage. The other four were ordered of the Railroad Company by the plaintiffs at once, viz., on September 24. The earliest date at which they could get a

car set at the potato-house door was September 25. The plaintiffs then proceeded to load with all due diligence, viz., two cars on 25th, (26th was Sunday) one car on 27th, one car on 28th, two cars on 29th, two cars on 30th, making eight, all that were available, and to accomplish this they worked overtime. Three other empty cars, to make up the required eleven, arrived in the railroad yard on the afternoon of September 30, but too late under the rules of the road to be set that day. They were set and loaded the next day, October 1, and billed out on October 2.

On the strength of this enforced delay of only twenty-four or forty-eight hours, of which delay the defendant himself was the cause, the defendant refused to pay for the three cars loaded on October 1.

Under presumably proper instructions from the presiding Justice as to the legal rights of the parties the jury found in favor of the plaintiffs, thereby finding under the evidence that the plaintiffs were excused from shipping those three cars on September 30. That verdict instead of being clearly wrong is in our opinion clearly right. The plaintiffs acted honestly and diligently from start to finish. They may have been a bit too credulous in acquiescing in every request made by the defendant, but they undoubtedly expected the same honesty of purpose on his part and were dealing with him in a spirit of absolute fairness. At his request they sacked the potatoes at the agreed price of 25 cents per sack, a process not required by the contract and one consuming a considerable amount of time. From the time they obtained the first billing order on September 21 they rushed the sacking and loading with all reasonable despatch, and to penalize them because of compliance with defendant's requests for delay is not permitted by the law. The case falls well within the doctrine of extension of contract time already considered, and the entry must be,

Motion overruled.

MERRILL TRUST COMPANY *vs.* MILFORD H. BROWN.

Penobscot. Opinion December 18, 1922.

The holder of a negotiable instrument in due course may sue thereon in his own name, provided it is complete and regular upon its face, and taken in good faith and for value, without notice of any infirmity or defect in title, before it is due and without notice if dishonored. An antecedent or pre-existing debt constitutes value, and the holder who takes commercial paper before maturity for value, without notice of infirmity in title or consideration, is deemed a purchaser in good faith. Cross notes, bills or checks, though made for accommodation, are not accommodation, but business paper, if there is no restriction on use or negotiation. Failure to pay a cross note does not affect the original consideration.

Held:

1. That the holder of a negotiable instrument in due course is one who has taken the instrument under the following conditions, and may sue thereon in his own name:
   (a) That it is complete and regular upon its face.
   (b) That he became the holder of it before it was overdue and without notice that it had been previously dishonored, if such were the fact.
   (c) That he took it in good faith and for value.
   (d) That at the time it was negotiated to him he had no notice of any infirmity in the instrument or defect in the title of the person negotiating it.
2. That this check was complete and regular upon its face.
3. That the plaintiff became the holder of it before it was overdue and that it had not been previously dishonored.
4. That the plaintiff took it in good faith and for value.
5. At the time it was negotiated the plaintiff had no notice of any infirmity in the instrument or defect in the title of the person negotiating it.
6. Under the provisions of Chapter 257, Public Laws 1917, known as the Uniform Negotiable Instruments Act, an antecedent or pre-existing debt constitutes value.
7. One who takes an assignment of commercial paper before maturity, paying value, without notice of infirmity in title or consideration, is deemed a purchaser in good faith.

8. Cross notes, bills or checks, though made for the accommodation of the parties, are not accommodation, but business paper, provided there is no restriction on use or negotiation, the one note, bill or check being a consideration for the other received in exchange.
9. When the transaction is completed at the time of the exchange the question of original consideration is not affected by subsequent events, such as failure of one of the parties to pay his cross note when due.

On report. This is an action to recover the amount of a check dated May 16, 1921, drawn by defendant on the Union Trust Company of Ellsworth, payable to Harold A. Brown, and by him specially indorsed and deposited to his credit in plaintiff bank on May 17, 1921. The check was drawn and delivered to payee by defendant, at payee's request, in exchange for another check for the same amount drawn by payee on the City National Bank of Belfast, payable to defendant, which was dishonored by the bank on presentment, for want of funds. The drawers of said checks at the time the checks were drawn did not have in the respective banks funds to pay their respective checks. The defendant under the general issue and a brief statment set up as a defense fraud on the part of the payee; and also a failure of consideration. At the conclusion of the evidence, by agreement of the parties the case was reported to the Law Court. Judgment for the plaintiff for $1500, and interest thereon from the date of the writ.

The case is fully stated in the opinion.

Louis C. Stearns, for plaintiff.

Gray & Sawyer, for defendant.

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

PHILBROOK, J. This is an action brought by a special indorsee against the maker of a check, the Trust Company upon which it was drawn having refused to honor the same. The instrument bears date of May 16, 1921, the amount is fifteen hundred dollars, it is drawn upon the Union Trust Company, hereinafter designated the Ellsworth bank, directs that bank to pay the sum for which it is drawn to the order of Harold A. Brown, and by the latter specially indorsed to the plaintiff in these words, "Pay to the order of Merrill Trust Co."

The defendant pleaded the general issue, and for brief statement of special matter of defense, to be used under the general issue pleaded, declared that the check, upon which said suit is founded, was obtained from the defendant by misrepresentation and fraud of one Harold A. Brown, the payee named in said check, who transferred the same to the plaintiff, and that the defendant received no consideration therefor. He further declared that the plaintiff did not pay any money for said check, nor pay, nor part with any consideration therefor, and has not sustained nor suffered any loss or damage on account of said check, and is not an innocent holder for value.

The case is before us on report. The execution and endorsement of the check is not contested. Inspection of the instrument shows that it is complete and regular upon its face. The plaintiff became the holder of it not later than the day following its date. In *Asbury* v. *Taube*, 151 S. W., 372, it was held that title to a check was acquired by an indorsee before it was overdue when it was regular on its face, payable on demand, and was negotiated within two days after it was drawn. Under this rule we must find that the plaintiff, in the case at bar, became the holder of the check before it was overdue.

Under the provisions of Chapter 257, Public Laws, 1917, known as the Uniform Negotiable Instruments Act, a check is defined as a bill of exchange drawn on a bank, payable on demand, and, except as therein otherwise provided, the provisions of the act applicable to a bill of exchange, payable on demand, apply to a check. After declaring that the holder of a negotiable instrument in due course may sue thereon in his own name, the act further provides that a holder in due course is one who has taken the instrument under the following conditions:

1. That it is complete and regular upon its face.
2. That he became the holder of it before it was overdue, and without notice that it had been previously dishonored, if such were the fact.
3. That he took it in good faith and for value;
4. That at the time it was negotiated to him he had no notice of any infirmity in the instrument or defect in the title of the person negotiating it.

We have already seen that the check was complete and regular upon its face, and that the plaintiff became the holder of it before it was overdue. The record also establishes the fact that it had not

been dishonored before it was thus taken by the plaintiff in the regular course of its banking business. At the time when the plaintiff took the check, and gave credit to Harold A. Brown for the amount thereof, the latter was indebted to the plaintiff by reason of his overdraft. Section twenty-five of the Uniform Negotiable Instruments Act provides that an antecedent or pre-existing debt constitutes value, hence the check in suit, which was taken and credited to Harold A. Brown's account, thereby diminishing the amount of the overdraft, was taken for value. Was the check taken in good faith? In *Atlas National Bank* v. *Holme*, 71 Fed. Rep., 489, 19 C. C. A., 94, it was held that one who takes an assignment of commercial paper before maturity, paying value, without notice of infirmity in title or consideration, is deemed purchaser in good faith. Was the check taken without knowledge on the part of the plaintiff as to infirmity, fraud or irregularity between the original parties? Conceding, for the sake of argument, that it is a fraud on the part of a drawer to draw a check upon a bank where there are no funds to meet it. *E. & T. Banking Co.* v. *Cunningham*, 103 Maine, 455, yet the actual knowledge by the plaintiff necessary to defeat the action is so fully and forcibly discussed in *Mechanics' Savings Bank* v. *Berry*, 119 Maine, 404, that reference thereto, together with interpretation of the testimony most favorable to the defendant, makes plain the plaintiff's claim that it took the check without actual knowledge of previous infirmity, fraud or irregularity.

Finally, the defendant claims that the check in suit was given without consideration. The defendant, who drew the check, and Harold A. Brown, the payee therein named, are brothers. Harold is a horse dealer who had received a carload of horses upon which he owed the sum of fourteen hundred and eighty-seven dollars. According to the testimony of the defendant he was told by Harold that he (Harold) had an amount of money in the City National Bank at Belfast, but did not want the plaintiff bank to know that fact, that Harold requested the defendant to draw the check, which is the basis of this suit, on the Ellsworth bank, and offered to draw his (Harold's) check for a like amount, in favor of the defendant, on the Belfast bank. At that time the defendant said "Harold, of course you know that I haven't got fifteen hundred dollars in the bank," (meaning the Ellsworth bank). To which Harold replied, "Why, certainly, but this is all right. Now you give me your check and I will give

you mine and everything will be all right, because I don't want the Merrill Trust;" (The plaintiff) "to know I have this deposit down in the City National Bank at Belfast." The check in suit was accordingly drawn and in exchange therefor Harold drew his check on the Belfast bank, bearing the same date, and for the same amount as that named in the check which he received from the defendant, and made payable to the order of the latter. The defendant also testified that he had thus accommodated his brother on other occasions and such transaction "went all fine," saying, among other things, "I swapped checks with him for five hundred dollars about four months previous to that."

The law is well settled that cross notes, bills or checks though made for the accommodation of the parties, are not accommodation, but business paper, provided there is no restriction on use or negotiation, the one note, bill or check being a good consideration for the other received in exchange. Moreover, the transaction being complete at the time of the exchange, the question of original consideration is not affected by subsequent events, such as a failure of one of the parties to pay his note when due. *American National Bank* v. *Patterson*, 7 A. L. R., 1563 and annotations, pages 1569-71. See also *Dockray* v. *Dunn*, 37 Maine, 442.

We hold that judgment must be rendered for the plaintiff and, under section fifty-seven of the Uniform Negotiable Instruments Act, it may recover for the full amount of the check.

Judgment for plaintiff for $1500 and interest thereon from the date of the writ.

STATE *vs.* LINWOOD CASTNER.

Lincoln. Opinion December 22, 1922.

An indictment for statutory rape of a female over fourteen years of age must allege the three essential elements, of unlawful carnal knowledge, by force, and without her consent.

On motion in arrest of judgment after conviction it is

Held:

1. That the crime of rape against a female over fourteen years of age contains three essential elements: the unlawful carnal knowledge, force, and lack of consent.
2. The unlawful carnal knowledge and the lack of consent are sufficiently set forth in this indictment; but the allegation of force is not to be found.
3. The word "feloniously" is of general signification and means with criminal intent. At common law it is a technical word employed in indictments charging a felony, and it is not equivalent to the words of the statute "by force."
4. The allegation of assault in the first part cannot be brought forward to supply the defect. That allegation might afford a jury the right to bring in a verdict of guilty of assault and battery, but there is no sufficient allegation that the carnal knowledge was accomplished by force, and that is indispensable.
5. While frivolous technicalities are to be frowned upon, yet all the essential and vital elements of a criminal charge must be included in the indictment.

On exceptions. The respondent was indicted for rape, tried and found guilty. After conviction he filed a motion in arrest of judgment alleging that the indictment was fatally defective in that it did not contain a sufficient allegation that the carnal knowledge was accomplished by force. The presiding Justice overruled the motion and respondent excepted.

Exceptions sustained. Indictment quashed.

The case is stated in the opinion.

George A. Cowan, County Attorney, for the State.

M. A. Johnson, for the respondent.

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

CORNISH, C. J. After conviction of the crime of rape the respondent attacks the indictment by a motion in arrest of judgment. The

statute under which this indictment was brought reads as follows: "Whoever ravishes, and carnally knows, any female of fourteen or more years of age, by force and against her will, or unlawfully and carnally knows and abuses a female child under fourteen years of age, shall be punished by imprisonment for any term of years." R. S., Chap. 120, Sec. 16.

The indictment in question is based on the first part of the section and is in the following form, omitting immaterial portions: That the respondent "In and upon one Blanche M. Gross, a female of the age of more than sixteen years, to wit, of the age eighteen years, with force and arms, violently and feloniously did make an assault, and her, the said Blanche M. Gross then and there feloniously did unlawfully and carnally know and abuse against her will, against the peace of the State" &c.

Does this constitute a legal charge of rape? We think not. The indictment contains two distinct parts. The first part seems to be a sufficient charge of assault, "with force and arms violently and feloniously did make an assault." Then follows the allegation intended to cover the charge of rape, viz.: "And her, the said Blanche M. Gross then and there feloniously did unlawfully and carnally know and abuse against her will." This does not contain all the necessary elements of rape of a girl more than fourteen years of age. We are not considering statutory rape of a female under fourteen years of age where the element of force is not necessary, *State* v. *Townsend*, 118 Maine, 380, but the crime here was against one of greater age, which has the same elements as rape at common law. Those essential elements are threefold: the unlawful carnal knowledge of a female, by force, and without her consent. The unlawful carnal knowledge and the lack of consent are sufficiently set forth in this indictment, but the element of force is not to be found, and that is essential and vital because "the essence of the crime is said to be not the fact of intercourse but the injury and outrage to the modesty and feelings of the woman by means of the carnal knowledge effected by force." 22 R. C. L., page 1172. Nor is there any word in the allegation equivalent to force. "Feloniously" cannot supply it. That word is of general signification and means with criminal intent. At common law it is a technical word employed in indictments charging a felony. The word "ravish" used in the statute was not employed in the indictment. Nor can the allegation of assault in the first part

be brought forward to supply the defect. That allegation might afford a jury the right to bring in a verdict of guilty of assault and battery; *Commonwealth* v. *Thompson*, 116 Mass., 346; *Commonwealth* v. *McCarty*, 165 Mass., 37; but there is no sufficient allegation that the carnal knowledge was accomplished by force, and that is indispensable.

While frivolous technicalities are to be frowned upon, *State* v. *Littlefield*, 122 Maine, 162, yet all the essential and vital elements of a criminal charge must be included in an indictment.

Exceptions sustained.
Indictment quashed.

GEORGE RAY'S CASE.

Hancock. Opinion December 22, 1922.

The phrase "incapacity for work" as used in the Workmen's Compensation Act has come to mean through repeated judicial definition not merely want of physical ability but lack of industrial opportunity.

Loss of wages due to the workman's fault, subsequent to the accident or to his illness not connected with the accident, does not entitle him to greater compensation. The same is of course true of loss occasioned by general business depression. But greater physical disability due to the accident is "increased incapacity" and so, if traceable to the accidental injury, is the necessity of accepting less remunerative employment.

The petitioner suffered an industrial accident losing three fingers and after a period of presumed total incapacity for which he was compensated entered into an agreement with his employer for compensation for partial disability. This agreement was based upon the wages that Ray was then receiving as a stage driver. He later lost his job and was unable, owing to his crippled condition, to obtain employment except at a rate of wages greatly reduced. His physical condition was unchanged. The Chairman of the Industrial Accident Commission found that his "incapacity for work" had increased. In this finding there was no error of law.

On appeal. George Ray, the petitioner, while in the employ of the Frenchmen's Bay Packing Company, on July 17, 1920, received by accident an injury to his left hand necessitating the amputation of

the second, third and fourth fingers. He received for a period specific compensation for an assumed total disability. Later he entered into an agreement for compensation for partial incapacity. This proceeding was brought under Sec. 36, Chap. 238, Public Laws of 1919, for a review on the ground that his "incapacity has increased." His physical condition remained unchanged, but his incapacity to earn wages had increased he alleged. Upon a hearing the Chairman of the Industrial Accident Commission decreed that the compensation be increased to $5.85 per week, and an appeal was taken by respondents. Appeal dismissed. Decree affirmed.

The case is fully stated in the opinion.

Gray & Sawyer, for the plaintiff.

Andrews, Nelson & Gardiner, for defendants.

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

DEASY, J. This is an appeal by the defendants in a workman's compensation case. The act governing the case and which is herein referred to is Public Law of 1919, Chapter 238.

The petitioner suffered an industrial accident on July 17, 1920, losing three fingers of his left hand. In accordance with Section 16 he received for a period specific compensation for an assumed total disability. He then entered into an agreement with his employer and insurance carrier for compensation for partial incapacity. He now brings his petition under Section 36 for review on the ground that his "incapacity has increased."

His physical condition admittedly remains the same as when the agreement was made. But the petitioner affirms that while his mere physical condition is unchanged his incapacity to earn wages has increased, and that for this reason he is entitled to larger compensation.

The facts which, as the petitioner claims, entitle him to increased compensation are these: After the period of assumed total incapacity the petitioner as provided by Section 15 entered into an agreement with his employer and insurance carrier, approved by the commission, for compensation at $2.49 per week. At the time this agreement was made he was employed in driving a stage at $60 per month, or $13.85 per week. His wages before the injury were $18 per week. The difference is $4.15. Three-fifths of $4.15 is $2.49.

The agreement was made accordingly. But he lost the job as stage driver and says that notwithstanding diligent efforts he can obtain no employment by which he can earn more than a small fraction of $60 per month.

He admits that his physical capacity is unchanged, but says that his incapacity to earn wages has increased and that under Section 36 he is entitled on review to have his compensation increased.

The Chairman of the Industrial Accident Commission, deciding the facts finally, decreed that the compensation be increased to $5.85 per week.

The sections involved are Section 15 under which awards are made of compensation for partial "incapacity for work" and Section 36 which provides for reviews in case of increased or diminished incapacity.

The defendants contend that the word "incapacity" as used in Section 36 has the same meaning as the phrase "incapacity for work" in Section 15, to wit, physical disability. They therefore urge that there can be no review without proof of increased (or diminished) actual physical disablement. But the phrase "incapacity for work" appears in practically all Workmen's Compensation Statutes and has come to have a well-settled meaning. It includes according to nearly all authorities not merely want of physical ability to work but lack of opportunity to work.

"Incapacity for work means loss of earning power as a workman in consequence of the injury whether the loss manifests itself in inability to perform such work as may be obtainable or inability to secure work to do." Honnold on Workmen's Compensation, Vol. 1, Page 599.

"That 'incapacity for work' means inability to get work because of the injury, as well as inability to perform the work because of the injury, seems to be fairly established." L. R. A., 1916, A. 380 (Note).

"The House of Lords has . . . . in unequivocal terms, laid down the proposition that 'incapacity for work' may mean physical inability to do work so as to earn wages, or it may mean inability to earn wages by reason of inability to get employment." L. R. A. 1916, A. 381 (Note).

Among the cases supporting the authorities above quoted are *Sullivan's Case*, 218 Mass., 141; *Stickley's Case*, 219 Mass., 513;

Duprey's Case, 219 Mass., 189; *Gorrell* v. *Battelle,* (Kan.), 144 Pac., 244; *Jordan* v. *Decorative Co.,* (N. Y.), 130 N. E., 635; *Ball* v. *Hunt,* 5 B. W. C. C., 450; *MacDonald* v. *W. & C. Coal Co.,* 5 B. W. C. C., 478.

The statute adopts as the measure of compensation for partial incapacity the difference between the wages of the workman before the injury and "the wages that he is able to earn thereafter." Section 15.

The defendants contend that a workman is able to earn the going wages paid others for work that he has the physical capacity to do even though he can by no effort however diligent and persistent secure the opportunity to do such work.

We agree with the Massachusetts Court that this reasoning is unsound. *Sullivan's Case,* 218 Mass., 141.

The intent of the law is to secure to the workman a percentage of the wages which he has lost through incapacity caused by accidental injury. It measures the loss by the difference between his earnings before and what he is able to earn after the accident.

Loss of wages due to the workman's fault subsequent to the accident or to his illness not connected with the accident does not entitle him to greater compensation. The same is of course true of loss occasioned by general business depression. *Durney's Case,* 222 Mass., 461; *Jordan* v. *Decorative Co.,* 130 N. E., 634.

But greater physical disability due to the accident is "increased incapacity" and so, if traceable to the accidental injury, is the necessity of accepting less remunerative employment.

Turning to the facts in the pending case it appears that Ray's compensation was fixed by agreement with reference to the wages that he was earning when the agreement was made. The subsequent lessening of his earnings is not shown to have been due to any fault of his nor to general business depression but was apparently due rather to a general disinclination on the part of persons requiring help to employ maimed or crippled men when sound men are available.

The Chairman of the Industrial Accident Commission has found that Ray's incapacity has increased and determined the extent of the increase. We perceive no error of law.

Appeal dismissed;
Decree affirmed.

G. EDGAR HODGKINS *vs.* E. J. GALLAGHER.

Androscoggin. Opinion December 22, 1922.

In an action of tort for alleged slander, to sustain the defense of privilege, it must appear that the defamatory words were spoken in good faith, without actual malice and with reasonable grounds for believing their truth.

Words uttered by a United States Post Office Inspector in directing the dismissal of a post office employee are privileged. But the privilege is qualified. To be available as a defense it must appear that the words if defamatory were spoken in good faith, without actual malice and with reasonable grounds for believing their truth.

It does not appear that the defendant, if he uttered the defamatory words charged, had any reasonable ground for believing their truth. The defense of privilege is not established.

But as against the defendant's positive denial the testimony offered by the plaintiff does not prove by a preponderance that the defendant uttered the defamatory words charged.

On report. This is an action of tort to recover damages for alleged slander, the plaintiff alleging that in December, 1921, when he was employed as a clerk in the post office at Mechanic Falls, the defendant, then a United States Post Office Inspector, in speaking to the Postmaster, Mr. Millett, referred to him, the plaintiff, in asking for his dismissal by the postmaster, in the following language, "He is a thief— He has stolen between eighty and one hundred dollars from the Athletic." Defendant pleaded the general issue and also a brief statement under which he alleged that whatever he said was without malice and was privileged being spoken by him in his official capacity as a post office inspector. At the conclusion of the evidence by agreement of the parties the case was reported to the Law Court for the determination of the rights of the parties and to assess damages if the action was maintainable. Judgment for defendant.

The case is stated in the opinion.

Frank A. Morey, for plaintiff.

John F. A. Merrill, U. S. District Attorney, for defendant.

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

DEASY, J. This is an action of tort for alleged slander. It comes to this court on report.

The plaintiff was in December, 1921 employed in the Mechanic Falls Post Office by Frank A. Millett, Postmaster. The defendant was a United States Post Office Inspector. Acting by authority of his office he directed Mr. Millett to dismiss the plaintiff from service in the post office. In this connection it is alleged in the writ that he said referring to the plaintiff, "He is a thief— He has stolen between eighty and one hundred dollars from the Athletic" (Association).

This allegation is supported by the testimony of Mr. Millett. The defendant denies using the above or any similar language, and also pleads privilege.

The defense of privilege if at all necessary is not sustained. The defendant's privilege is a qualified privilege and is a defense only if the defamatory words were spoken in good faith, without actual malice (*Sweeney* v. *Higgins*, 117 Maine, 415) and with reasonable grounds for believing their truth. (*Toothaker* v. *Conant*, 91 Maine, 438; *Elms* v. *Crane*, 118 Maine, 264). The defendant was not actuated by malice. What he said was uttered in good faith. But the case does not disclose that he had any reasonable grounds for accusing the plaintiff of stealing. If he used the defamatory language as alleged, the defense of privilege is not established. But the defendant denies that he made use of the words charged. He admits that he directed the plaintiff's removal because he was "not satisfactory in the service" but disputes that he in any form of words accused him of crime.

Strict proof is required of the utterance by the defendant of the words set forth in the writ so far as they are essential to the charge. *Kimball* v. *Page*, 96 Maine, 489. The burden is upon the plaintiff. The Postmaster Millett testifies that the words were spoken as set forth. The Post Office Inspector Gallagher as positively denies the speaking of the words charged or any others of similar import.

Gallagher is interested as a party. Millett is frankly a partisan of the plaintiff and naturally so as the plaintiff has been for some years a member of his household. Neither Millett nor Gallagher is corroborated; neither is impeached; neither is contradicted except by the other.

We see no reason to hold that the testimony of Millett outweighs that of Gallagher. It is difficult for any of us to remember spoken words after months or even days have passed. What we remember is not the words spoken, but our interpretation of their import and meaning.

There is no evidence in the case proving or tending to prove the commission of any criminal offense by the plaintiff. We decide the case on the ground that he has not shown by preponderance of evidence that the defendant charged him with any such offense.

Judgment for defendant.

ABEL ORFF'S CASE.

Knox. Opinion December 22, 1922.

Under the Workmen's Compensation Act if a disorder existing before the accident has been so aggravated or accelerated by an industrial accident as to produce incapacity, the employee is entitled to compensation. The court must set aside the findings of the Commission if unsupported by legal evidence as an assertion of a fundamental legal proposition; but it cannot invade, save in case of fraud, the province of the Commission as a tribunal having exclusive right to determine facts.

Abel Orff having suffered an industrial accident entered into a duly approved agreement with his employer for compensation for "fracture of rib right side" caused by the accident. It afterwards appeared that his trouble was an internal cancer. This discovery, provided that the accident aggravated the cancerous condition and thus caused disability, changed the supposed character but did not negative the fact of the causal connection.

When the court holds that the findings of the Commission must be set aside because unsupported by legal evidence it is not deciding facts. It is asserting the fundamental legal proposition that a trier of facts acting in a quasi judicial capacity must not render decisions without evidence. But if the court should say to the tribunal having by statute the exclusive right to decide facts that it must accept certain even uncontradicted testimony as conclusive the court would be deciding facts and that, except in case of fraud, it has no power to do.

The insurance carrier on petition by it for review represented that the injury had ended and prayed that the compensation be ended. The burden was on the

petitioner (the insurance carrier) to prove that the incapacitating injury caused by the accident had terminated. The Commissioner found and decided that the evidence produced for the purpose did not prove the termination of the injury caused by the accident. This is a finding of fact that this court has no right to disturb.

On appeal. The petitioner while in the employ of the Rockland & Rockport Lime Corp., at Rockland, on May 8, 1921, accidently fell and struck his side against the handle of a wheelbarrow which he was using. An agreement was entered into under which petitioner was paid compensation at the rate of $15.00 per week for "fracture of rib right side." On January 6, 1922, the insurance carrier petitioned for a review alleging that the injury had ended and asked that compensation cease. Prior to the filing of the petition in review as a result of a medical examination a cancerous condition in the region of the pylorus was indicated and a cancer known as "Adeno Carcinoma" was found from which claimant died February 24, 1922. On February 7, 1922, a hearing on the petition was had, the petitioners in review contending that the cancer must have existed prior to the date of the accident and that there was not sufficient causal relation shown between the cancerous condition and the accident to bring the case within the meaning of the Compensation Act, but the Chairman of the Commission held otherwise, and in effect determined that the injury (incapacity) was not ended and ordered continued payment of compensation, and petitioners in review appealed. Appeal dismissed. Decree affirmed.

The case is fully stated in the opinion.

Edward C. Payson, for plaintiff.

Arthur L. Robinson, for defendants.

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

DEASY, J. On May 8th, 1921, Abel Orff suffered an industrial accident.

Under Act of 1919, Chap. 238, Sec. 30, an agreement was made between Orff and his employer for weekly compensation for "fracture of rib right side." This agreement was duly approved. Later the insurance carrier presented the petition for review now before us, setting forth the accident, the resulting injury, the agreement,

representing that "the injury for which the employee was compensated has ended" and praying "that compensation . . . . may be ended."

The Chairman of the Industrial Accident Commission upon hearing, in effect determined that the injury (incapacity) was not ended, refused to terminate the compensation and ordered its payment continued.

When the commissioner finds the facts *in favor* of a petitioner, in the absence of fraud, the finding is final if there is any legal evidence, however slender, to sustain it. It is when the commissioner decides facts without evidence or upon illegal or inadmissible evidence, that an error of law is committed which this court is required to correct. *Gauthier's Case*, 120 Maine, 78. *Mailman's Case*, 118 Maine, 176.

But where as in this case the finding and decree of the commissioner are *against* the petitioner, no such rule prevails. When the court holds that the findings of the commissioner must be set aside because unsupported by evidence, it is not deciding facts. It is asserting the fundamental legal proposition that a trier of facts acting in a quasi judicial capacity must not render decisions without evidence. But it would be a usurpation for this court to say to the tribunal having by statute the exclusive right to decide facts that it must accept certain testimony as conclusive.

Undoubtedly cases may arise wherein the court will be justified in interfering with a negative decision by a commissioner, but this is not such a case.

At the hearing the burden of proof rested upon the petitioner (insurance carrier) to prove that Orff's incapacity, so far as it was caused by the accident, had ended.

Cory v. *Hughes*, 4 B. W. C. C., 291; *Collieries* v. *Toone*, 6 B. W. C. C., 160; *Fischer* v. *Priebe*, (Iowa), 160 N. W., 48.

This burden the petitioner undertook to sustain by medical testimony to the effect that Orff is afflicted with a cancerous condition of the stomach not caused by the accident, but existing prior thereto and that it is to this diseased condition that his present disability is due.

But the man was entitled to compensation if the disability due to the cancer was aggravated or accelerated by the accident. *Patrick* v. *Ham*, 119 Maine, 519; *Car Corporation* v. *Weirick*, (Ind.), 133 N. E., 391; *Geizel* v. *Regina Company*, (N. J.), 114 At., 328; *Traction*

Co. v. *Ind. Com.*, (Ill.), 129 N. E., 135; *Glennon's Case*, 236 Mass., 542; *McGoey* v. *Garage Co.*, 186 N. Y. S., 697.

The medical testimony in this case does not negative, but on the other hand lends some support to the theory that Orff's cancerous affection was aggravated and its progress accelerated by the accident.

Dr. Spear said: "I would not say that this blow did not have something to do with the increasing rapidity of the growth, nor will I say that it did."

Dr. Hunt deposed—"It is possible that the injury did accelerate the growth of the cancer."

Dr. Wasgatt testified—"It seems quite probable that the blow might have accelerated it."

This evidence was not offered by the employee to prove that his disability was the result of the accident. That proposition had been in effect established by an agreement having the force of a judgment. Nothing else appearing the status thus established is presumed to continue. The testimony was introduced by the insurance carrier. The carrier attempted unsuccessfully to prove that the man's continued disability was due to a cancerous condition unaffected by the blow. Only thus could it have proved that the incapacitating effects of the accident had ended.

The Commissioner was justified in finding and presumably did find these facts: Abel Orff was on May 8th, 1921 afflicted with an internal cancerous growth. It was so to speak dormant. It caused no pain. He worked regularly and without trouble. But for the accident, disability might have been for some time postponed. Then the accident occurred. After it he suffered constant pain. By it he was incapacitated for work. It was in effect agreed that his incapacity was caused by the accident.

True his injury was diagnosed as a broken rib. True the cancerous condition was discovered after the making of the agreement. This changed the supposed character, but did not negative the fact of the causal connection.

The accident aggravating a diseased condition caused a disability which is not shown to have terminated.

This being presumably the basis of the commissioners finding and conclusion the entry must be,

Appeal dismissed.
Decree affirmed.

JOHN MCGUFFIE *vs.* STINSON HOOPER.

Hancock. Opinion December 22, 1922.

To constitute sufficient cause for a new trial where the knowledge of the alleged misconduct of a jury or a juror was not brought to the attention of the trial judge until after verdict, it must affirmatively appear that neither the party complaining nor his counsel had any knowledge of such misconduct before the verdict.

In order for misconduct of a jury or of a juror to be a sufficient cause for a new trial when the facts constituting the alleged misconduct were not brought to the attention of the trial judge until after verdict, it must affirmatively appear that neither the party complaining nor his counsel had any knowledge of such misconduct before the verdict.

Nothing in this case negatives the presumption that the verdict represents the jury's judgment, and for the judgment of the jury, upon issues of fact, we are not authorized to substitute that of the court.

On motions for new trial by defendant. This is an action to recover damages for the alienation of the affections of the plaintiff's wife by the defendant. The cause was tried to a jury and a verdict for $3,258.33 was rendered for the plaintiff. The defendant filed a general motion for a new trial, and also filed another motion for a new trial based upon alleged misconduct of one of the jurors.

Both motions overruled.

The case is stated in the opinion.

Wiley C. Conary, F. H. Ingraham and Alvah L. Stinson, for plaintiff.

Charles T. Smalley and Charles H. Wood, for defendant.

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

DEASY, J. This is an action to recover damages for alienation of affections. The verdict was for the plaintiff. The defendant moves for a new trial on general grounds and because of the alleged misconduct of a juror.

MISCONDUCT OF JUROR.

The plaintiff's wife was a witness for the defendant. It appears that during a recess, before her testimony was given, one of the jurors hearing the case, seeing her in tears, said in the hearing of certain others of the defendant's witnesses, "She is putting it on for effect."

Assuming that this is such misconduct as would otherwise warrant it, a new trial on this ground must be denied because the defendant did not until after the verdict notify the court of the incident and has failed to explain the delay.

If the defendant or his counsel knew of the misconduct before verdict and failed to promptly report it to the court it was, after verdict for the plaintiff, too late to take advantage of it. A litigant having information of facts warranting an order of mistrial who withholds such information and thus avails himself of the chance of a favorable verdict must be held to have impliedly agreed to abide the result if unfavorable. *Tilton* v. *Kimball*, 52 Maine, 500. *Fessenden* v. *Sager*, 53 Maine, 531. *Hussey* v. *Allen*, 59 Maine, 269. *Belcher* v. *Estes*, 99 Maine, 314.

True it is not shown that either the defendant or his counsel had any information as to the alleged misconduct until after verdict.

But it is well settled that a party moving for a new trial on the ground of a juror's misconduct, or for other similar cause, must show affirmatively that when the facts came to his knowledge, or that of his counsel, such facts were promptly reported to the court.

"A party seeking to set aside a verdict has been required and rightfully to negative the fact of such knowledge on his part."

Tilton v. *Kimball*, 52 Maine, 500.

"In order for misconduct of the jury to be cause for a new trial, it must affirmatively appear that neither the party complaining nor his counsel had any knowledge of such misconduct before the verdict." *Brooks* v. *Camak*, (Ga.), 60 S. E., 458.

See to same effect *Rollins* v. *Ames*, 2 N. H., 349; *Kinneberg* v. *Kinneberg*, (N. D.), 79 N. W., 337; *Grantz* v. *Deadwood*, (S. D.), 107 N. W., 832; *Wooters* v. *Craddock*, (Tex.), 46 S. W., 916; *New* v. *Jackson*, (Ind.), 95 N. E., 332; *Clack* v. *Subway Co.*, (Mo.), 119 S. W., 1014.

MOTION ON GENERAL GROUNDS.

Applying to this case well known principles often stated and unnecessary to reiterate, the verdict must stand.

Nothing in the case negatives the presumption that the verdict represents the jury's judgment and for the judgment of the jury, upon issues of fact, we are not authorized to substitute that of the court. The report of the evidence well illustrates the ancient proverb "many littles make a mickle." Of the defendant's individual acts shown, no one proves guilt or necessarily discloses impropriety of conduct. But the cumulative force of a long series of such acts justified the conclusion which the jury drew.

Both motions overruled.

STATE OF MAINE. *vs.* MYRTIE M. DORE.

Somerset. Opinion December 25, 1922.

A verdict of guilty to stand if the evidence consistently compels such a conclusion, being inconsistent with any reasonable hypothesis of the respondent's innocence.

Where, as in this case, the facts and circumstances in evidence demonstrate the inconsistency of any reasonable hypothesis of a respondent's innocence and consistently prove the latter's guilt to a moral certainty, the requirement of the law is met, and a conviction for the commission of crime is justified.

On appeal. Upon an indictment for manslaughter the respondent was tried by a jury and convicted, and from the refusal of the presiding Justice to grant a motion for a new trial, an appeal was taken. Appeal dismissed. Judgment for the State.

The case is sufficiently stated in the opinion.

James H. Thorne, County Attorney, for the State.

Percy A. Smith and George W. Gower, for the respondent.

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

DUNN, J. Beatrice Dore, aged sixteen years and single, died on September 18, 1921, sepsis or organic contamination following a criminal abortion being the cause. The government, suspecting the girl's mother of the producing deed, caused an indictment for manslaughter to be returned, and the mother was convicted. Against the propriety of that conviction she addressed a motion to the Justice presiding at the trial, and from an adverse decision made this appeal. The appeal is unsupported on the record.

The facts and circumstances shown were these, in brief: One day two weeks or so previous to that of the alleged crime the respondent asked a neighbor if she knew a doctor "who would help" a friend of hers "out of trouble," and the neighbor said that she did not. A niece of the respondent testified that she had told the respondent, several weeks before that time, that Beatrice was pregnant. Denying that she then had knowledge of the pregnancy, and insisting that the inquiry was without relation to her daughter, Mrs. Dore said that she questioned the neighbor because of something that her own mother had said.

Mrs. Olive Stevens witnessed that while she was at the Dores, on September 12th or 13th, Mrs. Dore said to Beatrice, in the hearing of the witness, that she had "disgraced . . . . the whole of us, ... ought to be horsewhipped, and would be sent to a hospital to be operated upon." The respondent disputed the making of any such statement, saying further that Mrs. Stevens had not been at her house within two months of the day that the latter fixed. But what Mrs. Stevens said had some circumstantial corroboration. Mr. Percy Richardson roomed in a house next to the Dore home, the open space or distance from the window in his room to a window in Beatrice's being but five or six feet. He knew the Dores. He testified that, three or four nights before that which was the last that Beatrice lived at home, while he was in his room and she in hers, he heard the girl's mother say: "You will disgrace the whole family, and you are not going to do it. I am going to have a doctor and see, that's what your father would say." "And," continued the witness, "then I couldn't understand just what she said, and I thought the girl was crying." The force of the testimonies of Mrs. Stevens and Mr. Richardson is not entirely in indirect reciprocal support, as will appear later.

Coming to the last night at home, another niece of Mrs. Dore's, this one living with her, testified that as Beatrice was on the way upstairs to bed her mother said: "I am coming into your room in a few minutes." And Beatrice replied: "No, you ain't; I ain't going to have people in my room." And the mother rejoined: "Yes, I am!" In the night, between two and three of the clock, Beatrice shrieked. And the witness heard the mother saying: "Keep still, they will hear you over to Shorey's!" And Beatrice sobbed and moaned: "Oh, mamma, it pains!" Mr. Richardson, the man in the nearby house, gave evidence that he heard Beatrice's exclamations indicative of suffering, sounding "as though somebody was all in despair." Other persons who were in the same house as he said that they heard no exclamation. And a man who had been in the street in the vicinity of the Dore place, but who had gone away before the time named by the other witnesses, said that he heard no noise in that house while he was about.

Excluding the possibility of the performance of the abortive act by a third person, Mrs. Dore said that her daughter's early morning outcry awakened her; that on going to the girl's room she found her in evident pain; and that she took her to a rear room on the first floor of the house, where she put her into a bed. After dressing herself completely, the respondent kindled a fire in a stove and, when water and a flatiron had heated, she gave the girl attention. Stepping to the yard she called to her son, who was sleeping in the house where Richardson was rooming, to hurry a call for Dr. Wilson to come to Beatrice in her "awful sickness." The young man reported that he was informed that the doctor was away from town for a month. Then, he was directed to hasten and bring his grandmother from her home a quarter of a mile away, and thence speed the automobile to a neighboring town for a doctor located there. He brought grandmother and the physician for whom he went came. To the doctor Mrs. Dore proffered explanation that Beatrice, being four months advanced in the period of pregnancy, had secretly arrested gestation. The girl herself, on the authority of the doctor, said that she had "been using a syringe, and this is the first time I have got any water up in the womb." The evidence of what the girl said was advanced, not as a dying declaration, but as a mere inquiry answering statement. No question touching the admissibility of the statement was suggested. Elsewhere similar statements have been excluded as

hearsay. *Com.* v. *Sinclair*, 195 Mass., 100; *Hays* v. *State*, 40 Md., 633; *People* v. *Davis*, 56 N. Y., 95; *Rex* v. *Thompson*, 3 K. B., 19. Ann. Cases, 1913A, 530. Being received without objection, what the girl is quoted as having said, weighs on review for its worth, as seemingly it weighed at the trial.

Later in the day Beatrice was removed to a hospital. There was evidence, again in the absence of objection, that she told at the hospital that, to prevent a child being born alive, she had injected water into her womb by means of a syringe. The fetus was expelled in the afternoon of the day of the girl's arrival at the hospital. Beatrice died about four o'clock the next morning. On the third day her body was exhumed. An anatomical examination revealed that Beatrice's life ended, following septicemia and attendant peritonitis, after a blunt instrument, at least nine inches in length, had been passed into her womb, and forced through the right side of its upper wall. Peritonitis, it is familiar medicolegal knowledge, is frequent in cases of instrumental violence. The perforating wound, which subsequent contracting of the uterus may have enlarged, was irregular in outline and of a size to admit a forefinger; it had been sealed by the placenta or afterbirth. There was a slight abrasion on the vagina near the womb's neck. Nothing indicative of other disposing or operative cause was disclosed.

Of course, the doctors could not absolutely define the perforation as attributable to a criminal operation. A witness testifying with great mental conviction may hesitate to swear that the fact could not possibly be otherwise than as he stated. Asking a person whether he will "swear" that his judgment or opinion is errorless is a kind of menacing question put at odd times, usually with emphasis in last resort, on cross-examination.

The government introduced a rubber bag of about a two-quart capacity, having a flexible rubber tube with a small hardened rubber nozzle attached, the tube being one-quarter inch in diameter and more than five and one-half feet in length, and the nozzle two and one-half inches long. Respondent said that this rubber bag and its appendages was a gravity or fountain syringe which Beatrice had had. The weight of the medical testimony clearly maintained that the syringe nozzle, at the end of the tubing, was too short to have reached to the womb's wall and caused injury. Also, that while a sufficient quantity of water introduced into a womb might precipitate labor

pains, it could not lacerate. The defense introduced a slender screw-driver, measuring eleven and five-eighths inches over all; the blade being six and one-half inches long. Mr. Dore, the husband and father, who was away from home on the night that the doctor was called, said that he found the screw-driver on the floor at the back side of her bed the day after his daughter's death. He kept the finding a secret, notwithstanding the searching of his house by the public authorities, until the respondent was held to bail; meanwhile using the implement about an automobile. The doctors were in substantial agreement that the screw-driver could have caused the injury. It would be difficult, if not impossible, said they for any woman, and especially one of unpracticed and unskilled hand, to pass an instrument into her own uterus, the neck being virtually in a virginal state, as was Beatrice's. Moreover, in the case of a self-insertion, the nervous sensation which contact with the wall would cause, would warn an operator to cease. On the other hand, if one person were employing mechanical means on another he could not be so guided, although the other was most willingly accessory.

The suggestion of a spontaneous rupture, assignable to the carrying of a child by Beatrice thirty-six hours previously, was too remote. A rupture due to natural causes manifests itself promptly. Assuming a rupture of that kind, with nature arresting damage by sealing the wound, a resulting hemorrhage through the cervical canal would be expected; whereas, a digital examination by the physician, as this girl was in bed at home, negatived the delivery of blood.

It would be at variance with recorded experience, as the defense asserts, for germicidal infection to develop and cause death within approximately twenty-four hours. This proposition is advanced as entitling the respondent to remain in the citadel of a reasonable doubt. But it encounters the insurmountable barrier that the government was not so limited in time. Mrs. Stevens testified that she heard the girl's mother say, not on the last night that the girl lived at home, but on one day four or five before the day of that night, that there must be an operation. And Mr. Richardson evidenced that he heard the mother talking and Beatrice crying three or four nights previously. The inference was warranted that it was on that night that the respondent, despairing of getting anyone else to do it, manipulated and operated to bring on her daughter's menstrual courses. The defense furnished testimony that injuring a womb's

wall would tend to retard the beginning of a uterine expulsion. Whether there was a second operation pending reaction from the first was, in a sense, inconsequential. There was room for believing that the crime was committed on the night that Mr. Richardson heard Beatrice crying, and that on the later night the girl was groaning in labor; "Oh mamma, it pains!" In the interval of three or four days blood poisoning and its dread concomitant, peritoneal inflamation, had opportunity for development to deadly degree.

The girl's statement of the use of a syringe may be reconciled easily. Unexpected and unappreciated inactivity attending the mother's effort to abort, the girl believed, albeit erroneously, that what the mother did would not accomplish the desired result, and that what she herself had done, in the desperateness of her condition, had provoked her suffering.

There was other evidence; evidence of conflicting statements by the respondent concerning the first time that she acquired a certainty of her daughter's pregnancy; evidence of a household remedy or decoction of pennyroyal and tansy tea brewing upon the stove, by suggestion as an abortifacient; and still other evidence both for and against the State's contention. But that which has been set out at more or less length in this opinion comprised the essential substance of the testimony at the trial. The jury accepted the facts as demonstrating the inconsistency of any reasonable hypothesis of the respondent's innocence, and as proving her guilt to a moral certainty, consistently. The circumstances led where truth was hid.

Appeal dismissed.
Judgment for the State.

JOSEPH J. SMITH *vs.* ELIZABETH ELLIOTT.

BERTHA L. DUGAN *vs.* ELIZABETH ELLIOTT.

Cumberland. Opinion December 25, 1922.

The negligence of the owner of the automobile, one of the plaintiffs, precluded him from having the verdict for defendant set aside. The plaintiff in the other case, an invited passenger, to whom negligence of the owner and driver of the automobile cannot be imputed, nevertheless cannot have the verdict for defendant disturbed in absence of proof of negligence of defendant.

In the instant case, all other considerations aside, the negligence of the owner of the injured car, continuing to the very moment of the accident, barred a right on his part to maintain the action he brought. True, his negligence was not imputable to the other plaintiff. But, even if she herself were sufficiently attentive to consequences, there remains the controlling fact that negligence on the part of the defendant was not shown.

On motions for new trial by plaintiffs. These are actions on the case for alleged negligence in operating an automobile at the junction of Ocean Street and Broadway Extension, so called, which is an extension of Summer Street on the easterly side of Ocean Street in South Portland. It is alleged that on August 28, 1921, this negligence resulted in a collision between the automobile of the plaintiff, Joseph J. Smith, and that being driven by the defendant. The action brought by Joseph J. Smith was to recover damages for injury to his automobile; and in the other action the plaintiff, Bertha L. Dugan, daughter of the plaintiff in the first action, who was riding in the automobile with her father, sought to recover for personal injuries. The cases were tried together and a verdict for defendant rendered in each. Plaintiffs filed general motions for a new trial. Motions overruled.

The case is fully stated in the opinion.

Frank H. Haskell, for plaintiffs.

Verrill, Hale, Booth & Ives, for defendant.

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

DUNN, J. Only by a fiction of speech could it be said that the verdicts for the defendant, in these actions which were tried together, were clearly and unmistakably wrong.

Ocean Street, a main way in South Portland, and a side street called Summer, were intersecting; the latter, having reference to its recorded location, coming in from the westward at practically a right angle, and thence crossing to a so-called extension along a trolley line projection a few feet southerly of the travelled part of its opposite side. Although this extension was lacking a formal establishment, and though its nature was generally broken and irregular like that of an ungraded fill, nevertheless it was used, rather infrequently, as a street, by travelers in vehicles, in going to and coming from places in the field or pasture through which it ran.

Both streets were of concrete surfacing, sixteen and fifteen feet, respectively, in width. The surfacing on Summer united with that of Ocean on a northerly curve, toward the city of Portland. This curving was so distinctive as to justify the belief that travel over it went almost entirely to that city and back. On a traveller's right, going in the direction of Portland on Ocean Street, trolley tracks were nearly parallel to the cement, a three-foot strip of dirt intervening. Summer too had a trolley line, on the south side. The tracks of this line had been extended across Ocean Street, in a world's war time convenience, to shipyards located beyond. These tracks were still in position. Also, the tracks of this line crossed from Summer to Ocean, in corresponding angle with the adjacent concrete,—a narrow strip of soil between the two,—to a connection with the tracks to Portland.

On a clear day in August of 1921, the defendant was operating an automobile on Ocean Street, Portland bound. Her car was well over to the right of the travelled road. The speed at which she drove, estimated by herself, in testimony replete with unreservedness, at a maximum of twenty miles the hour, was said by others to have seemed excessive of the statute's negligence presuming definition of faster than twenty-five miles. Laws of 1921, Chap. 211, Sec. 62. Whichever may be the more accurate estimate, it should be remembered that no car was immediately following or coming after the defend-

ant's, and that, on her side of the road, there was neither public street nor well-defined private one, cutting in. *Bragdon* v. *Kellogg*, 118 Maine, 42. Besides, it was not for the plaintiffs to rely, with implicit impunity, upon her driving at a lawful rate. *Bragdon* v. *Kellogg*, supra.

Back, an approximate distance of one hundred and forty feet, from the intersection of the streets, the defendant had had a plain view across lots of Summer Street, its stretch to Ocean being a little shorter, so she said, than that which she herself had to go to be where the streets were meeting. On Summer, moving to Ocean, was an automobile in which these plaintiffs were; the man was driving. With him, riding by invitation without pay, was the other plaintiff, his daughter. When the defendant saw their car, both plaintiffs saw that in which the defendant was, on their right. They said that they then were nearer the intersection than she was. But the precise fact about this is of small consequence for it is clear that each driver drove on until, in the wonderfully short time in which the automobiles annihilated distances, their cars were not far apart at the junction of the streets.

When plaintiffs and defendant saw each other, for the first time, their cars kept on. The defendant testified, in substance, she had supposed that the other car would turn, on arriving at Ocean Street, and go ahead of her in the direction of Portland, or, perhaps, that it would come the other way. Her apprehension was, as they neared, not four, but three, corners, that the car approaching on Summer Street would be steered so as to pass to the left of the intersecting center lines of the travelled parts of the roads, or that it would be kept to the right of those lines in a course either to or from the city. Laws of 1921, Chap. 211, Sec. 7; *Bragdon* v. *Kellogg*, supra. But no; the car in which the plaintiffs were was the first to come to where the cements joined. Up to its arrival there, the driver's purpose of crossing Ocean Street had not been developed to the defendant. In less than a single second from that time, in deduction from his own testimony, the driver pressed forward across Ocean Street, the defendant's car in swift motion, right at hand. When his car was across, the defendant's car, according to the testimony in the plaintiff's case, would traverse the distance between the two before another second had gone. Hope and doubt and fear were contending in uncertain conflict in the excitement of that instant.

Instinctively the defendant swerved to the right, vainly struggling to avert a collision, the trolley locations impeding progress. After colliding with the car that had broken the course of hers, her own car went on, through and over trolley ties and track, and down the adjoining field some eighty feet, before it was brought to a stop. How her car was stopped, the defendant, in the stress of the moment, did not mark in memory. But, let the fact not be unnoticed, once her car was at a standstill, she was quickly out and hurrying to where the plaintiffs were.

The plaintiffs say: (1) Had the defendant, seeing us as we started to go across, but slackened the speed of her car, we would have passed safely in her front; or, (2), had she, in the exigency, by diverging to the left, gone in our rear, there would have been no accident. Relative to these propositions, rates of speed and distances and lengths of cars, as well as other things, were urged argumentatively.

The legal test of adequacy, in weighing human conduct with a view to a judicial determination, is reasonable probability. The ruling principle is, what he of ordinary prudence would or not have done in the circumstances; and not that wisdom which is revealed only after the event, or that fault finding which is so easy that it soon becomes uncritical.

This defendant was well within her right on Ocean Street. Her course was fair and free almost till the crash. She had no reason to anticipate that the car in which the plaintiffs were would dispute the way. *Bragdon* v. *Kellogg*, supra. She was without means of perceiving, until the Summer Street automobile was at the meeting of the roads, that such a situation might loom. That the plaintiff driver had a right to put his car across the street is not to be gainsaid. But his right was to be exercised with due regard to the defendant's right. He had seen her car coming along the street. Afterward he did not look, across the vacant lots that lay between, for its whereabouts. Instead, he kept on to the intersecting way, in unchecked speed and in unchanged direction, forgetful of the defendant's presence, and unmindful of her privilege as a traveler. "At Ocean Street," said the plaintiff, Mr. Smith, in expiatory frankness, "I slowed down a little." Slowing down began too late. The advance of his car ought to have been retarded so as not to oppose the passage of the defendant's car which, in the circumstances, had precedency

on that street. Mr. Smith's own negligence, continuing to the very moment of the accident, necessitated the returning of a verdict against him. *Moran* v. *Smith*, 114 Maine, 55; *Smith* v. *Somerset Traction Co.*, 117 Maine, 407.

Mr Smith's negligence was not imputable to the other plaintiff. *Fernald* v. *French*, 121 Maine, 4. The fatal difficulty with her case, however, even granting that she herself was sufficiently attentive to consequences, was the absence of proof of the defendant's negligence.

In both cases the entry must be,

Motion overruled.

LLOYD V. PRINCE *vs.* MAINE CENTRAL RAILROAD COMPANY.

Cumberland. Opinion December 25, 1922.

Negligence of defendant, and contributory negligence and assumption of risk on the part of plaintiff are questions of fact for the jury, and the verdict though large is not so grossly extravagant for such grievous injuries as to require revision by the court.

In this case the negligence claimed by the plaintiff is the act of Getchell in sending him with the car without giving any warning as to the due time of the approaching train, it being conceded that it was Getchell's duty to know or inform himself as to the running time of the trains and that plaintiff was under his control. It is also conceded that neither the plaintiff nor King had any right to place the motor car upon the rails and operate it without orders from Getchell.

The interpretation of the message left by Getchell with King was for the jury under all the circumstances of the case, and the finding of the jury that Prince was justified in believing himself included with King, and also that both were authorized to use the car, is not manifestly against the evidence.

The plaintiff was not a volunteer acting outside the scope of his employment and duty, and was not guilty of contributory negligence.

On motion by defendant. This is an action of tort brought under the Federal Employers Liability Act to recover damages for personal injuries sustained by colliding with a locomotive of a passenger train of defendant. The plaintiff at the time of the accident was in the employ of defendant as a signal helper and was working with a fellow

servant, another signal helper, under their superior, one Getchell, known as a signal maintainer, in Auburn near Adams Street crossing in bonding a rail, that is, making an electric connection between the rails by means of a wire in the block system. Getchell, the immediate boss of plaintiff, sent plaintiff to one Carson a signal inspector in the employ of defendant on another block signal with a message, and on the return of plaintiff after he and the other helper, one King, had completed that job, was informed by King that Getchell had given to him instructions for them to take the gas motor hand car and go where he had gone on foot westerly to a point of trouble. Accordingly the plaintiff and King started with the hand car and soon saw a passenger train approaching around a curve. Plaintiff and King stopped the hand car and while endeavoring to remove it from the track the locomotive of the passenger train struck them, seriously injuring plaintiff. Defendant under the general issue and brief statement set up contributory negligence, and assumption of risk. At the conclusion of the evidence by plaintiff, defendant introducing no evidence, defendant moved for a nonsuit which was refused, and the jury rendered a verdict of $29,965.18 for plaintiff, and defendant filed a general motion for a new trial. Motion overruled.

The case is fully stated in the opinion.

Hinckley & Hinckley, for plaintiff.

Charles B. Carter of White, Carter & Skelton, for defendant.

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

CORNISH, C. J. This is an action of tort for personal injuries sustained by the plaintiff on May 18, 1921, at Auburn, and is brought under the Federal Employers Liability Act of April 22, 1908, U. S. Comp. Stat. Vol. 8, Secs. 8657-8665. The applicability of that act is admitted. The alleged negligence of the defendant resulted in injuries which necessitated the amputation of the plaintiff's legs, leaving a stump of seven inches on the right and five inches on the left, measuring on the inside. The defendant introduced no testimony so that the evidence offered by the plaintiff stands uncontradicted. The jury having returned a verdict for the plaintiff in the sum of $29,965.18, the case is before the Law Court on defendant's motion for a new trial on the customary grounds.

Under the Federal Employers Liability Act, the defense of negligence of a fellow servant is not open, but plaintiff's assumption of risk, and contributory negligence in reduction of damages are open unless the injury was caused through the violation of some statute enacted to promote the safety of employees. *Foley* v. *Hines*, 119 Maine, 425. No such statutory violation is claimed here.

The outline of the facts may be briefly stated. The plaintiff is twenty-three years of age. He had worked for the defendant for nearly three years, under one Carson, a signal inspector with headquarters at Deering. He had been in Auburn five days working as a signal helper under one Getchell who was termed a signal maintainer and who was at the time his immediate boss. Another helper was David King. About seven o'clock on the morning of May 18, 1921, these three took a gas motor hand car, such as are commonly used on railroads, from the tool house at Lewiston and started for Auburn. Their first stop was at the Adams Street crossing in Auburn where the section men were replacing a broken rail. When the section men had completed their work King proceeded to bond the rail, that is to make the electric connection between the steel rails by means of a bonding wire, in order that the block system might operate. While there the block signal located a considerable distance to the westward of Adams Street toward Danville Junction, was reported to Mr. Getchell as out of order. Getchell thereupon despatched the plaintiff to go to Mr. Carson, the signal inspector in charge of that division and his superior, and who was then working with a helper on another block signal, some little distance toward the east from the Adams Street crossing, and ask him to come down and see what was the matter with this westerly block signal. Prince delivered the message and Carson put his car on the track, and with his helper and the plaintiff started toward the point of trouble. The plaintiff got off the car at Adams Street. Carson and his helper proceeded on their way. Getchell himself in the meantime had started on foot westerly to the same point of trouble, and was around a curve, and not in sight, when Prince returned. After Prince had left on his errand, and before Getchell himself started toward the west, he said to King: "Dave, as soon as you get that bonded, come down." When Prince returned from his errand King was at the Adams Street crossing alone. The bonding was nearly finished. Prince helped King for five minutes to complete the job. He then asked King what

Getchell's orders to him were and what they were to do next. King replied: "Getchell told him to take the car and come down when he finished up that bonding the rail." Thereupon they put the hand car upon the tracks and started for the place where Getchell on foot and Carson in his car had gone before. While on the way they saw a passenger train approaching them around the curve. They immediately stopped their hand car, got off and started to take the hand car off the track, King lifting the rear end and therefore facing the engine, while the plaintiff lifted the front end with his back toward the engine. They had gotten the car almost off the tracks when King tripped over the rail and fell, and the onrushing train, moving at forty to forty-five miles an hour, struck the plaintiff, crushing him between the engine and the car, with the result already described.

1. DEFENDANT'S NEGLIGENCE.

The negligence claimed by the plaintiff is the act of Getchell in sending him with the car to the westward without giving any warning as to the due time of the approaching train. It is conceded that it was Getchell's duty to know or inform himself as to the running time of trains and that the plaintiff as a helper was under his control.

The defendant strenuously resists the claim of negligence and says that Getchell gave no order whatever to Prince, that the only order he gave was to King, and that did not include Prince, nor direct King to take the car; that as Getchell had sole control of the car, neither King nor Prince had a right to place it on the tracks and run it; that in so doing they were both outside the scope of their employment and were mere volunteers, under the doctrine, of *Moran* v. *Street Railway*, 99 Maine, 127.

It is true that Getchell gave no direct orders to Prince, except to deliver the message to Carson and then to return to the Adams Street crossing, which he did. But that is not conclusive. It was competent for Getchell to give such orders or orders couched in such language as under all the circumstances would justify the plaintiff in believing himself included and also as authorizing the use of the car by both King and himself. And that is precisely what Getchell did, as an unprejudiced examination of the situation cannot fail to disclose. Getchell was working with his crew of two men upon the

Adams Street repair. Before that was completed another defect at the westward was reported to him. He sent Prince to the eastward to notify Carson and ask him to come. Carson had as a helper one Applebee. In that instance, as an illustration, the orders were not for Carson and his crew and car, but for Carson. However, that was understood by the parties, because as soon as their job was done, Carson and Applebee took the car and hurried to the scene of the trouble. They brought Prince back to his place at Adams Street, from which he had been gone about twenty minutes. When Getchell left after sending for Carson he gave a similar message to King: "As soon as you get that bonded, come down!" What was the fair interpretation of those words? Not that King should start off afoot and alone down the track, leaving the car with its tools and materials by the side of the road, and leaving Prince to remain there idle. The materials and tools would naturally be needed at the new place, and so would Prince as a workman. The reasonable interpretation of Getchell's words to King was: "I am going ahead. When you get your job done here you follow on with the car and the crew and join me at the next point of trouble." King so understood it, for he told Prince that Getchell had ordered him to take the car and come down. That is the order as he understood it, as both his words and his acts indicate. Both Prince and King were acting in the utmost good faith, obedient, not disobedient servants, and were faithfully and promptly carrying out the wishes of their superior as they understood them, and as they had a right to understand them.

At any rate it was a question of fact for the jury to decide whether under all the circumstances and considerations the plaintiff was a mere volunteer and outside of the scope of his employment, or a faithful servant within his ordered duties. They have sustained the plaintiff's contention and we see no reason for disturbing it. *Moran* v. *Street Railway,* supra, has no application to this state of facts.

2. CONTRIBUTORY NEGLIGENCE.

The only ground for this contention is that during the eight seconds which elapsed between the discovery of the on-coming train and the impact, the plaintiff did not conduct himself as the ordinarily prudent person under the same circumstances would have done, having due regard for the rights of others as well as of himself. In such an

emergency as was there presented it is impossible to act with absolute coolness and repose. The law neither requires nor expects it. Apparently the plaintiff and his companion King, thinking that the hand car with its load of materials and tools weighing several hundred pounds might afford a serious obstruction to the train and endanger the lives on board, used every effort to remove it from the tracks and thereby save others as well as themselves. They had nearly accomplished their purpose when King tripped and fell, and then the collision occurred. Such altruistic conduct on their part hardly deserves reproach, legal or moral, and a railroad company would naturally be expected to commend rather than condemn its employees for such noble action. The jury have evidently found no contributory negligence on the part of the plaintiff and that finding we are far from wishing to disturb.

3. Assumption of Risk.

Evidence on this point is entirely lacking, and in fact this contention is not seriously urged by the defendant.

4. Excessive Damages.

This verdict of $29,965.18 is very large in amount, but the injuries were very grievous both in nature and extent, and required two operations. A trunk of a young man is left to go through life, with all the attendant losses, deprivations, and suffering both physical and mental. It is unnecessary to recite them. The picture paints itself. While the award is huge it is not in our opinion so grossly extravagant as to require revision by this court.

Motion overruled.

MARK MCCOLLOR'S CASE.

Somerset. Opinion December 25, 1922.

Under the Workmen's Compensation Act, though the petitioner does not make claim for compensation within one year from the date of the accident causing the injury, such failure is not available as a defense unless set up in the answer filed by defendants.

When in a compensation case an answer filed by the defendants does not set up failure to make claim for compensation within a year as required by Section 17, such defense is not open.

On appeal. This is an equity proceeding to recover compensation under the Workmen's Compensation Act, for an alleged injury suffered by plaintiff while in the employ of defendant, on March 23, 1920. The petition for compensation was not filed until February 29, 1922, more than one year after the date of the accident which caused the alleged injury. The defendant contended that the year within which a claim for compensation must be made as provided under Section 17 of said Act, begins on the date of the accident from which resulted the alleged injury, while petitioner insisted that such year does not begin to run until the injury results in incapacity. In the answer filed by the defendant no claim is made on the ground of such failure to make claim for compensation within the year from date of accident. From a decree of a single Justice affirming the awarding of compensation by the commission, an appeal was taken. Appeal dismissed. Decree affirmed.

The case is stated in the opinion.

Merrill & Merrill, for claimant.

George E. Thompson, for defendant.

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

DEASY, J. Section 17 of the Workmen's Compensation Act (Laws of 1919, Chapter 238) provides that "no proceedings &c. shall be maintained" unless the claim for compensation with respect

to such injury shall have been made within one year after the occurrence of the same. It is conceded that the petitioner made no claim for compensation for more than a year following the happening of the accident. The defendants contend that the injury occurs and the year during which the claim must be made begins to run at the happening of the accident causing the injury. The petitioner argues on the other hand that the injury occurs when it results in incapacity and so becomes compensable. This defense, if valid, is not available. Section 32 of the Act requires the defendants to "file an answer to said petition . . . . which answer shall state the claims of the opponents with reference to the matter in dispute as disclosed by the petition." The right to compensation is the matter in dispute so far as disclosed by the petition in this case.

The defendants now contend that the right is barred by failure on the part of the petitioner to perform a condition precedent, to wit, to make a claim within one year. But the answer filed by the defendants does not state this claim. The answer denies that the petitioner received a personal injury by accident arising out of and in the course of his employment by the defendant employer, or that the accident happened as stated, or that it resulted in hernia.

It does not inform the petitioner that a breach of condition on his part will be claimed. Under the issues as made by the petition and answer the petitioner was not required to produce any evidence upon this point. The breach of condition (assuming that a breach is shown) does not avail the defendants. *Mitchell's Case*, 121 Maine, 460; see also *Storrs* v. *Ind. Com.*, (Ill.), 121 N. E., 267; *Roach* v. *Kelsey Wheel Co.*, (Mich.), 167 N. W., 35; *Baldwin* v. *McDowell*, (Ind.), 135 N. E., 389; *Lumber Co.* v. *Pillsbury*, (Cal.), 161 Pac., 982; *Ackerson* v. *Zinc Co.*, (Kan.), 153 Pac., 530.

Appeal dismissed.
Decree affirmed.

A. HAARPARINNE

vs.

BUTTER HILL FRUIT GROWERS ASSOCIATION.

Androscoggin. Opinion December 27, 1922.

A corporation, organized for a common purpose to assist the people of a community as a cooperative and mutual agency to market their farm produce, acts in the capacity of agent only, no authority appearing in its charter or articles of association to authorize it to act as purchaser.

The corporation was manifestly an association for the common purpose of enabling the people of the community to form a cooperative and mutual agency for the handling of their apples and other farm products.

The plaintiff became a member of the corporation in accordance with the provisions of Section 3, and thereby subject to all the obligations, and entitled to all the privileges and advantages, of such membership.

There is no provision in the charter or articles of association that warrants or implies the conclusion that the association was acting, or was authorized to act, in the capacity of purchaser from its individual members.

There is no adequate evidence, if authorized, that the corporation in this case assumed to purchase the plaintiff's apples for the association.

On motion for a new trial by defendant. An action of assumpsit to recover for 150 barrels of apples at $5.50 per barrel. Plea, the general issue. The question involved was as to whether the defendant was acting, in the handling and packing of the apples of plaintiff, as agent of plaintiff, or purchaser. The case was tried to a jury and a verdict for $786.50 was rendered for plaintiff, and defendant filed a general motion for a new trial. Motion sustained.

The case is fully stated in the opinion.

Frank A. Morey, for plaintiff.

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

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

SPEAR, J. The action in this case is assumpsit for the price of 150 barrels of apples at $5.50 per barrel, with a money count. The

plea was the general issue. The relation of the plaintiff and defendant does not grow out of an alleged agreement of sale, acceptance and delivery, but arises from the voluntary membership of the plaintiff, as a stockholder, in the defendant corporation, as appears from the following certificate of stock and the certificate of incorporation of the Association:

"This certifies that A. Haarparinne is the owner of one share of the Capital Stock of the Butter Hill Fruit Growers Association."

The certificate of incorporation, so far as pertinent, omitting the names of members, is as follows: "Section 1, Name. This association shall be known as the Butter Hill Fruit Growers Association incorporated under the laws of the State of Maine. Its place of business shall be in Livermore, Maine. Section 2, Objects. The objects of this Association shall be to encourage better and more economical methods of production; to secure better results in grading, packing, marketing and advertising our products, to buy supplies in a co-operative way; to rent, buy, build, own, sell and control such buildings and other real and personal property as may be needed in the business; to cultivate the cooperative spirit in the community, and perform any other work which may tend to the betterment of the members and the uplift of the neighborhood. Section 3. Membership. Any bona fide fruit grower in Livermore, tributary to the shipping point of this Association, who shall sign these rules, may become a member of this Association by contributing his share or shares of capital stock or other regular investment."

It would hardly seem necessary to go further in the discussion of this case than the foregoing recital of its objects. It is so manifestly a corporation for the common purpose of enabling the people of a community to form a cooperative and mutual agency for handling and marketing their apples and other products, that interpretation can add but little to what is so clearly expressed.

We are of the opinion, moreover, that every section and item of the certificate of incorporation is expressed, in substance and form, in phraseology calculated to carry on the entire business of the corporation in harmony with the scheme expressed in the objects and purposes of the organization.

It is obvious that the plaintiff became a member in accordance with the provisions of Section 3 and thereby subject to all the obligations and entitled to all the privileges and advantages of such membership.

Referring to other pertinent sections and paragraphs, we come first to Section 8, which provides for grading and inspecting, and specifies what is required of members to enable the Association to accomplish these purposes. Item 1 reads as follows:

"All goods produced for sale by the members shall be delivered to the Association for grading, packing, and shipment." It will be observed that this item requires delivery to the Association for particular specified purposes in no way suggesting the sale. Section 9 describes the duties and rights of members. Items 1, 2 and 3 read as follows:

Item 1, "A member shall have the right to give away, or retain for his own use such of his fruit as he may wish, but he shall not make sale of any fruit or other products promised to the Association, to any outside parties, except any product not accepted by the Association."

Item 2, "In case any member is offered a price in excess of the price then obtainable by the Association, said member shall turn said bid over to the Association for filling from said member's goods."

Item 3, "All members shall contract their entire crop of fruit to the Board of Directors each year, whenever in the judgment of the Board such contracts would prove of benefit to the Association."

These items, read together, clearly define, and were undoubtedly conceived to establish, a voluntary agreement whereby the members of the Association should individually make delivery of their apples for marketing with a view to the corporate as well as individual benefit.

The plaintiff, however, puts great stress upon the effect of Item 1, inasmuch as, as he contends, he could not sell his fruit to any "Outside parties." But this was an arrangement to which he consented, and was an essential and necessary part of the scheme of accomplishing the chief purpose for the Association. Without that provision, the business of the enterprise would have been as uncertain and vacillating as the moods and whims of its members. A reference will show that Item 2 was intended to supplement Item 1 as to price, by giving every member the advantage of an offer of a larger price than the Association was getting. By Item 2 it will be seen the member simply transfers the "bid over," for filling his order, not for buying his goods. Moreover, the plaintiff treats Item 1 of Section 9 as if it compelled him and of course every other member as a matter of

contract to deliver his apples to the Association, and as a legal restraint upon him from selling them, himself, to "outside parties." But such is not the interpretation. A member under Item 1 is under no legal obligation, not to sell his apples to an "outside party." He is in honor bound, however, not to do it. Yet if he does, no penalty whatever attaches except that of conscious wrong and the loss of his rights as a member of the Association. It is clearly apparent, however, that if the plaintiff could sell to "outside parties" every member could do the same, and that would mean the end of the Association as an effective agency. Hence, the whole scheme of the Corporation depends upon not a legal but an honorable observance of that item. We are unable to discern any interpretation of Section 9, that points to the Association as a purchaser, or a member thereof as a vender thereto.

Section 10 prescribed the duties and powers of the manager, which so far as pertinent to the present discussion, read as follows:

"He shall have charge of the grading, packing and inspection of all the Association products and shall have control of the brands and labels, and their use on the Association packages, in accordance with the rules of the Association. He shall enter into contract for the sale of the Association goods. He shall have entire charge of the marketing of all Association goods, subject only to the action of the Board of Directors, and the rules and regulations of the Association."

Among other things the specification of his duties requires that: "He shall enter into contracts for the sale of the Association goods. He shall have entire charge of the marketing of all of the Association goods." What were the Association goods? Undoubtedly in the present case the apples that each member of the Association should turn over to the Association for grading, inspection and sale, in accordance with the common purpose of the Corporation. Nothing in this section points to a purchase and a sale by a member.

Section 13 relates to packing and emphatically points to individual ownership. It provides: "The cost of packing each individual's fruit shall be deducted from the receipts of the sale of that fruit." This method of doing business is entirely incompatible with the theory of the sale by the member to the Association. Moreover, the manner of transacting the business of the Association in disposing of fruit from the individual to the market, as shown by actual transactions with the plaintiff, were in exact accord with the requirement of

the foregoing provision. A part of the very lot of apples, for which he brings suit, was sold by the manager, all the expenses deducted and the balance turned over to him. No semblance of a sale to the Association appeared in this transaction.

As before said, the plaintiff was a voluntary member of the defendant Association, and as such, at the time of the transaction here involved, was subject to the rules and regulations thereof. We are, accordingly, unable to find any provision in the charter or articles of association that warrants or implies the conclusion that the Association was acting or authorized to act in the capacity of purchaser from its individual members. Every section and item of the Charter is inconsistent with such an interpretation.

Nor is there any adequate evidence that the corporation, if authorized, assumed in this case the purchase of the plaintiff's apples for the Association. The evidence clearly shows that the manager in dealing with the apples of the plaintiff, acted in harmony with his duties as prescribed in the charter. He had supervised the packing of the plaintiff's apples as required. A part was marketed and a part left. Cold weather was coming on. The apples were in the plaintiff's barn. The manager told the plaintiff to cover up the apples with hay; the plaintiff did so and later put them into his cellar. When he took them to Canton for shipment it was discovered that the apples were frozen. Up to this time not a thing had been done or said with reference to the selling or purchase of these apples, different from what was said and done with reference to the other part of the same lot that the manager had already marketed, except the suggestion that he cover them with hay. Later an agent of the Association by direction of the Treasurer, came to the house of the plaintiff, and salvaged some 60 barrels from the frozen lot. But this act on the part of the Association was in perfect accord with the object for which it was formed, namely, mutual benefit and assistance to associate members.

But the act of the treasurer was not the ground at all upon which the plaintiff claims the Association became the purchaser of all his apples. He claims that all the apples he delivered to the Association that were sold and settled for with him, according to the rules and regulations as above stated, as well as those that were left and frozen, were sold to the Association when they were packed, as appears from his own testimony as follows:

"Q. Now do you remember whether they packed 185 barrels? A. Yes, sir. Q. So that there were 185 barrels in your stable when Mr. Boothby and his packers went away? A. I had 195 barrels in there, because I packed 10 barrels of early apples myself. Q. But the Association only packed 185 barrels? A. Yes, sir. Q. Now those 185 barrels were the same barrels of which 145 became froze, were they not? A. Yes, sir. Q. Now when Mr. Boothby and his men left those apples in your stable, they were not sold then, were they? A. Yes, sir; because they were packed. Q. Because they were packed? A. Yes, sir. Q. And is that the only reason why you say that those apples were sold, were because they were packed? A. The way to answer it is that nobody can pack apples for another person unless he buys them. Q. I didn't understand what you said? A. Nobody can pack the apples of another person unless he buys them. Q. So that is the reason why you think that those apples were sold? A. Yes, sir; of course."

The plaintiff, in his brief bases the sale upon precisely the same ground that he does in his testimony. He says: "The title passed to the defendant when it sorted, packed and stamped the apples and told the defendant to leave them in the barn." The plaintiff in his brief further says: "It was through the carelessness of the defendant who owned the apples that they became frozen." Whether it was the defendant's carelessness or not it cannot affect the question of whether there was a sale.

It seems to us that the object of the Association as expressed in the charter; the intention to attain that object as made manifest in all the administrative provisions; and the transaction of its business in accordance with these provisions; all point in the same direction and prove conclusively that every member of the defendant association designed to and did adopt the Association as a selling agent of what farm products it was his duty to contribute under the rules and regulations of the Association, and that there is nothing in the evidence to take the present case from the operation of its charter rights and obligations.

It would seem upon the whole that the conception of the Association was to establish a Corporation, made up of a few directors charged with the duty of selecting a competent manager to do the executive and administrative work of preparing and marketing the apples of each associate, thereby bringing to the discharge of his

office, the time, the attention, the knowledge of the business and the trend of the market, which it would be practically impossible for the individual to do, in view of the many other activities on the farm, and his lack of facilities to know the conditions of business and keep his hand on the pulse of the market. An important result of the Association, whether so contemplated or not, was to actually relieve the farmer of the very things which the manager is selected to do, and at the same time to enable his affairs to receive all the advantages of intelligent personal attention.

As the case comes up on a motion for a new trial by the defendant the entry must be,

Motion sustained.

ABRAHAM J. BERNSTEIN *vs.* JOHN B. KEHOE, Admr.

Cumberland. Opinion December 27, 1922.

The legal construction of Sec. 14, Chap. 92, R. S., relative to filing a claim, supported by affidavit, against an estate, in the Registry of Probate, is that such a claim may be filed at any time after the decease of the intestate and within twelve months after the appointment of the administrator.

The facts show in this case that the plaintiff's claim was filed in writing with affidavit. A notation on the proof of claim reads: "This proof of claim was filed before the administrator was appointed;" such was the proof. The defendant's exception lies wholly to the validity of the filing of the claim on the ground that it could not be filed against an estate before the appointment of the administrator.

The legal issue thus presented by defendant cannot be sustained. The phrase in Section 14, which pertains directly to the issue requires that the claim shall be filed "either before or within twelve months after his qualification as such executor or administrator." The language of that phrase is too elementary to admit of any construction. A claim properly made and filed any time after the decease of the intestate and entered within twelve months after the appointment of his administrator is a valid claim so far as the time of filing is concerned. And as no other objection is made to the legal sufficiency of the claim, the exception is not well founded.

The verdict was for the exact difference between the amount claimed and the amount credited. No other inference could be drawn from the evidence. As the verdict was right, the exceptions to the order for a verdict for the plaintiff and the general motion to set aside the verdict, must be overruled.

On exceptions and motion for a new trial. An action of assumpsit to recover on account annexed for use and occupation of a tenement. The plaintiff filed his proof of claim against the estate of the intestate in the Registry of Probate on December 18, 1919, and the administrator was appointed and qualified June 23, 1920. Defendant contended that the claim must be filed within twelve months after the appointment of the administrator, while the plaintiff insisted that a claim may not only be filed within said twelve months, but may be filed at any time before the appointment of the administrator. At the close of the plaintiff's testimony, no evidence being offered in defense, defendant made a motion for nonsuit, which was denied. He then presented a request that the court instruct the jury, in case it should find for plaintiff, to assess nominal damages only, which was refused. The plaintiff then made a motion to the court to direct a verdict for plaintiff, which was granted. To this order exceptions were taken, and a general motion was also filed for a new trial. Exceptions and motion overruled.

The case is stated in the opinion.

I. Bernstein, for plaintiff.

George Libby, for defendant.

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

SPEAR, J. This is an action of assumpsit against the administrator of an estate to recover $200.50 for rent, a sum alleged to have been due from the decedent, in his lifetime, to the plaintiff. A money count was attached. The verdict was for the full amount. The case comes up on exceptions and motion.

The exceptions involve a single question of law, which requires the interpretation of a phrase in Sec. 14, Chap. 92, of the R. S. Section 14 reads as follows:

"CLAIM TO BE FILED WITHIN TWELVE MONTHS. All claims against estates of deceased persons, except for legacies and distributive shares and for labor and materials for which suit may be commenced

under section thirty-four of chapter ninety-six, shall be presented to the executor or administrator in writing, or filed in the registry of probate, supported by an affidavit of the claimant, or some other person cognizant thereof, either before or within twelve months after his qualification as such executor or administrator; and no action shall be commenced against such executor or administrator on any such claim until thirty days after the presentation or filing of such claim as above provided. Any claim not so presented or filed shall be forever barred against the estate, except as provided in sections seventeen, nineteen and twenty-two of this chapter."

The facts show that the plaintiff's claim was filed in writing with affidavit. A notation on the proof of claim reads: "This proof of claim was filed before the administrator was appointed;" such was the proof. The defendant's exception lies wholly to the validity of the filing of the claim on the ground that it could not be filed against an estate before the appointment of the administrator. In argument he contends as follows:

"No one would contend that notice in writing as provided in the Statute could be given the administrator before he was appointed and the Defendant claims that the same rule should apply to filing of notice in the Probate Court which to be valid should be filed after the appointment of the administrator or within twelve months after his qualification."

Thus the legal issue is presented by the defendant. But it cannot be sustained. The phrase in Section 14, which pertains directly to the issue requires that the claim shall be filed "either before or within twelve months after his qualification as such executor or administrator." The language of that phrase is too elementary to admit of construction. A claim properly made and filed any time after the decease of the intestate and entered within twelve months after the appointment of his administrator is a valid claim so far as the time of filing is concerned. And, as we understand, no other objection is made to the legal sufficiency of the claim. The exception is not well founded.

At the close of the plaintiff's testimony, no evidence being offered in defense, the defendant made a motion for nonsuit, which was denied. He then presented a request that the court instruct the jury "in case the jury shall find for the plaintiff, nominal damages only may be assessed against the defendant," which was refused. The

plaintiff then made a motion to the court to direct a verdict for plaintiff, which was granted. To this order exceptions were taken, and a general motion was also filed for a new trial.

The evidence of the plaintiff proved that he was entitled to recover for rent of certain premises, occupied by the decedent in his lifetime, for 114 months at five dollars per month. It was then incumbent upon the defendant, not the plaintiff, if payments on the account were claimed, to prove them. None were so proved, but the plaintiff gave certain credits upon the account which were admissions against his interest and consequently became evidence of the credits so given. The verdict was for the exact difference between the amount claimed and the amount credited. No other inference could be drawn from the evidence. As the verdict was right, the exceptions to the order for a verdict for the plaintiff, and the general motion to set aside the verdict, must both be overruled.

Exceptions and motion overruled.

CARROLL H. GLEASON *vs.* FRED R. SANBORN.

Cumberland. Opinion December 27, 1922.

Exceptions to the admission of harmless exhibits are unsustainable. An exception to a refusal to direct a verdict can be sustained only on the theory that a verdict for the other party would not stand for want of sufficient evidence.

The first exception, with the explanation given by the court, was entirely harmless.

The exhibits offered were in exact accord with what they all understood was going to be done and was done.

The second exception, under the instruction actually given, involved the admission of evidence substantially as the Brooks Brothers claimed the fact to be.

On exceptions. An action of replevin for the possession of a portable sawmill, involving an issue of title. Homer C. and Fay A. Brooks, as Brooks Brothers were to operate on a timber lot in which one W. E. Crosby had an half interest, and had bargained for a

portable sawmill for that purpose which was shipped to them with sight draft attached to bill of lading, and when the mill arrived they could not pay the draft which was sent to the bank, thereupon the said Crosby, by having the property billed directly to him, furnished the money and paid for the mill. Brooks Brothers alleged that they had an understanding with Crosby that the mill should become their property when they paid him the amount paid by him for the mill. Crosby sold the mill to plaintiff and the defendant acquired what title he had from Brooks Brothers. The jury found for the plaintiff and assessed the damages as one dollar. The defendant excepted to the admission of certain exhibits, and also excepted to the refusal of the court to give requested instructions, and also excepted to the denial of a motion to direct a verdict for defendant. Exceptions overruled.

The case is stated in the opinion.

Ralph M. Ingalls and William Lyons, for plaintiff.

Edgar F. Corliss and Arthur Chapman, for defendant.

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

SPEAR, J. This is an action for replevin for the possession of a sawmill. The direct issue is, in whom was the title when the property was taken?

The case comes up on exceptions; first, to the admission of certain exhibits; second, to the refusal of the court to give a requested instruction; and, third, to the denial of a motion to direct a verdict for the defendant. The last exception raised an issue equivalent to a demurrer to the evidence, and can be sustained only upon the theory that, upon the testimony, a verdict for the plaintiff would not have been permitted to stand for want of sufficient evidence to support it. A careful analysis of the testimony clearly shows that this exception was not well founded. Upon the whole we are inclined to the opinion that the evidence palpably preponderated in favor of the plaintiff. The transaction out of which the case grew was the bargain for a mill by Brooks Brothers, through whom the defendant claims title. They negotiated for the mill in the usual way, had it shipped to themselves with bill of lading, invoices and sight draft attached. The immediate purpose of the bargain for this mill was

to carry on a lumber operation on lands of which W. E. Crosby, from whom the plaintiff claims title, was half owner. The mill came, billed and shipped as directed. But the Brooks Brothers were unable to meet the draft. The mill lay undelivered for some little time when negotiations were begun between W. E. Crosby and Brooks Brothers which culminated in the payment for the mill by Crosby. The mill lay on the siding for about two weeks. Mr. Crosby was then asked by the Brooks to pay for the mill but declined. Crosby then testified as to what he did toward handling the mill, as follows: "What did you do relative to purchasing this mill, Mr. Crosby? A. Why, I took steps to have this bill put into my name, as I told the Brooks boys that I wouldn't pay for it as long as it was billed to them, but, if the mill was billed direct to me, I would pay for it, and that was the understanding between the Brooks boys and I. I took the matter up with the Lane Manufacturing people, which the bank at that time held the bill of with a sight draft. . . . ."

"I informed the Lane people if they would withdraw their sight draft from the Bridgton National Bank and bill the mill direct to me that I would pay for the mill."

"Q. Was that done? A. That was done. The draft was drawn and the mill was billed direct to me, and the bank was ordered to deliver the bill of lading to me, which I received."

After Crosby received the bill of lading he says he "ordered it shipped to Ingalls road to the lot." He thus exercised dominion over the mill. He gave no bill of sale, or writing of any kind, indicating a sale to them. We are of the opinion that upon this evidence the jury was justified in finding that the title of the mill vested in W. E. Crosby. But the defendant claims, although this be so, that the financing of the transaction reveals a sale of the mill to the Brooks Brothers. After receiving title to the mill, as above concluded, Crosby received a promissory note signed by each of the brothers, individually, which he endorsed and deposited at the Bridgton bank. The character of the note is amply shown from the following question and answer on cross-examination: "Q. The agreement was, if I understand correctly, when this note was paid, the mill was to be the Brooks Brothers? A. Yes, sir. Q. Until such time you were to retain title to the mill? A. Yes, sir, that is exactly the understanding."

The note was renewed and paid by Crosby as he states, and it is no where specifically contended, that the Brooks Brothers, or either of them, ever paid a cent either upon the note or in any other way on the cost of the mill.

The jury was not only justified in placing confidence in the testimony of Crosby, which was in perfect harmony with the legitimacy and honesty of the entire transaction, but, on the other hand the inadequacy of consideration paid by the defendant, $1200, the usual manner of the transaction, and the uncertainty of what it was, as a whole, as described by the defendant, might well give rise to suspicion upon the bona fides of the defendant's entire version of his title.

The first exception was to the admission of plaintiff's Exhibits 2, 3 and 4, upon the ground that they were not properly authenticated.

Exhibit 2, so far as essential to illustrate this exception, was as follows:

"Terms: Cash, 30 days; 2% off 10 Days.

LANE
MANUFACTURING COMPANY.
Jul 2 1920

SOLD to

Woodworking Stoneworking
Willie E. Crosby MACHINERY
Bridgton, Me.

Montpelier, Vt.
June 19, 1920.

Shipped by Freight to order to Brooks Brothers, Ingalls Road, Me."

The other two are precisely the same so far as the objection and exception go. The defendant's attorney upon cross-examination of the plaintiff put this question and received this answer: "Q. When you bought the mill do you know whether or not, of your own knowledge, Mr. Crosby ever owned it?" "A. I see the bill of sale or the C. O. D. or the bill of lading which accompanied the mill that Mr. Crosby had. He showed it to me at the time he sold the mill to me. I also looked on the records at the town clerk's office and see there was no transfer made at that time or up to that time I received a bill of sale."

The court then admitted the exhibit with the following explanation of its effect: "The Court: Seems to me it would be incompetent

to use it as evidence of who really did own this mill, as has been said, until it is shown where it came from and whether it is genuine or not, but as evidence to what this man had for information to go and act on, if that is the purpose for which it is being offered, I shall admit it."

With the explanation the admission of the exhibit was entirely harmless. Moreover, the history of the transaction between Crosby and the Brooks Brothers shows that the exhibits were in exact accord with what they all understood was going to be done and was done.

Fay A. Brooks testified that Mr. Crosby paid for the mill. Mr. Crosby also testified on cross-examination: "Q. The agreement was, if I understand correctly, when the note was paid the mill was to be the Brooks Brothers?" "A. Yes sir."

In view of the theory upon which the case was tried, the admission that Crosby paid for the mill and the claim that the Brooks Brothers bought it of him, the exhibits are not only harmless but entirely immaterial.

The requested instruction related to a paragraph in the bill of sale of the mill from Crosby to the plaintiff, namely: "I hereby sell said sawmill and Edger subject to a first option to buy and have the same, given by me to Brooks Brothers, at the fixed and agreed price of nineteen hundred seventy-six and 73/100 dollars ($1976.73)." The bill of sale was admitted without objection. After the charge to the jury the defendant requested the following instruction in explanation of the effect of that clause, namely: "The statement in the bill of sale from Crosby to Gleason that the mill was subject to an option to Brooks brothers is not to be considered by you in determining the nature of the transaction between Brooks brothers and Crosby."

The court instructed the jury as follows: "That clause taken by itself, Gentlemen, should not be accepted as a conclusive evidence of what a former trade had been. It simply goes before you, and you have it to consider, with all the testimony and with all the circumstances, giving it such weight as you think it is entitled to in assisting you to the ultimate conclusion as to what the original trade was. That does not bind anyone."

We think the instruction sufficiently covered the request. However that may be, the paragraph expressed substantially what the Brooks Brothers claimed. They say when the note was paid the mill was to be theirs;—and Crosby's reservation in the mortgage

showed an honest purpose to preserve all the rights of the Brooks Brothers, and that is all the paragraph meant, although the word "option" was used.

Exceptions overruled.

STATE *vs.* AUTOMOBILE AND ALBERT L. TAYLOR, Claimant.

Sagadahoc. Opinion December 27, 1922.

A claimant to get possession of an automobile seized while engaged in the illegal transportation of intoxicating liquors, in violation of the laws of the State, must prove title, as the issue is one of fact involving proof.

Whether the seizure is legal or not, a claimant alleging ownership must prove his title to enable him to gain possession of a car libeled.

The issue which becomes decisive of the right of the claimant to possession of the libeled car is one of fact involving proof of title.

The case also shows by positive evidence the falsity of the claimant's testimony as to his ownership of the car.

On report. On January 10, 1922, the sheriff of Sagadahoc County and a Federal enforcement officer seized the automobile involved in this case while engaged in the illegal transportation of liquors together with the liquors found in the car, without a warrant, and the next morning obtained a warrant and libeled both the liquors and the car. On January 19, 1922, Albert L. Taylor became a party to the proceedings as claimant of the automobile. Claim denied.

The case is fully stated in the opinion.

Edward P. Murray, for claimant.

Arthur J. Dunton, for the State.

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

SPEAR, J. This case involved the disposal of an automobile admitted to have been engaged in the illegal transportation of intoxi-

cating liquors, in violation of the laws of the State, at the time of its seizure. A warrant was issued for the seizure of the liquors the morning following their seizure and the sheriff filed a libel for the forfeiture of the liquors, and also one for the forfeiture of the car, on the eleventh day of January, 1922, upon which notice was duly ordered. On the nineteenth day of January, 1922, Albert L. Taylor became a party to the proceedings as claimant of the automobile.

The claimant contended at the hearing upon the libel that the State must show: First—A legal seizure; Second—That the claimant had knowledge of and consented to the illegal transportation of the liquors. The State, on the other hand, contends that the claimant had no standing in court unless he proved that he was owner of the car, if he alleged ownership in his claim; and the claim sworn to and filed in court did so allege, as follows: "And now comes Albert L. Taylor, of Brewer, in the County of Penobscot, whose business is that of . . . , and specifically claims the right, title and possession in the items of property hereinafter named, as having a right of possession thereof at the time when the same were seized."

We think the position of the State is well taken; whether the seizure was legal or not, the claimant alleging ownership must prove his title to enable him to gain possession of a car libeled. The State's contention would seem to be axiomatic, inasmuch as there is no legal or equitable ground, or reason, upon which a car belonging to one person, whoever he may be, should be turned over to another who has failed to prove ownership. And this would seem emphatically true when the name of the rightful owner, other than the claimant, was proved by the very testimony upon which the claimant seeks to gain possession.

The issue, therefore, which becomes decisive of the right of the claimant to possession of the libeled car is one of fact involving proof of title.

It is not our purpose to enter into a lengthy analysis of the claimant's testimony. It is so palpably unreasonable, inconsistent and unreliable, that a detailed analysis would tend to cast a reflection upon the capacity of the court to detect from the inherent falsity of testimony a manifest fraud. A few references, however, may profitably be made. The claimant claims to have purchased the car of Mr Striar, the man who was driving it when it was seized, for $2250. This was August 15th. A receipt for $500 was given August 15th.

A receipt for the balance, $1750, was given October 28th, two months and thirteen days later than the alleged date of the purchase of the car. He was earning $2.69 a day on the railroad winters and $45.00 a week summers, he says. He paid $1750, in currency, which he asserts he had previously earned, had let out, and collected in within three days of October 28th. He testified upon this point as follows: "Now, how much of it had you received from people you had let it out to?" "A. About eight hundred dollars." "Q. About eight hundred?" "A. Yes, sir." "Q. Who did you receive that from?" "A. Different parties." "Q. Well, name some of them?" "A. Mr. Dalton." "Q. Can you name someone else that you received money from at that time?" "A. I can, but they asked me not to bring them into it."

What is the significance of the last question and answer? It would be difficult to conceive of a more flimsy reason for declining to name those who were owing him money. Assuming his statement to be true we are at a loss, even, to fancy any other normal person composed of such delicate fibre, that he would not have coveted the opportunity to reveal the name of his debtors, proof of whose existence would have been to him such a legitimate source of advantage.

He then further testified as follows: "Q. But you said this money that was paid you was for borrowed money that was repaid you?" "A. Well, I wouldn't say exactly borrowed money . . . Money that they owned me." "Q. Was this all paid to you about the 28th day of October?" "A. Within three days of that." "Q. Then all of the other money you must have acquired since the purchase of the auto?" "A. Yes, sir."

The claimant was unprepared for the questionnaire propounded to him by the County Attorney as to the source of the lump sum of $2250.00 and on redirect by his own attorney, he had a new, but equally ridiculous version.

"The County Attorney has asked you about where you got this money. Tell where you got most of it, this $1750, as a part of it?" "A. Got it in a stud game, twelve hundred dollars." "Q. Stud, what?" "A. Poker."

The case also shows by positive evidence the falsity of the claimant's testimony as to his ownership of the car. On October 26th, two days before the claimant pretends to have paid to Striar $1750 to complete the payment on this car, Striar executed and delivered,

in consideration of $624.00, to the Knowles & Dow Company, of Bangor, a chattel mortgage of the identical car which the plaintiff claims to have fully paid for two days later. The mortgage was not discharged until January 26th, 1922.

In connection with the mortgage is another incident which dovetails directly into it in contradiction of the good faith of the alleged sale of Striar to the plaintiff. On August 15th, the claimant gave to Striar what is called a Holmes Note, describing the car and the terms of payment, but it is significant that that instrument was not recorded and afforded no security to Striar against the sale to an innocent purchaser. Moreover, the inherently false testimony of the claimant, considered in connection with these instruments, and the possession and use of the car by Striar, when it was seized, conclusively proves that the pretended sale was without foundation, planned and executed for the sole purpose of inventing and furnishing evidence upon which the pretended owner might come into court and make an effort to salvage the car from the forfeiture of the law.

We have not overlooked the fact that the claimant was corroborated in his testimony as to the payment of $1750, in bills, to Striar, but the corroboration of his story, so inherently improbable that it cannot be believed, subtracts nothing from the improbability.

Claim denied.

JULIA E. SMITH *vs.* JOSIAH W. LIBBY.

Somerset. Opinion December 27, 1922.

A claim of prescriptive title not sustained, to an one third interest in common and undivided in the real estate of libellee, under the plea of nul disseizin by libellant, who acquired such interest in the real estate of libellee by virtue of a decree of divorce for fault of libellee made more than twenty years prior to the bringing of the writ of entry by libellant, there having been no decree in the divorce proceedings as to property rights.

In this case plaintiff, under the plea of nul disseizin, made out a prima facie case when she rested.

The evidence failed to show a settlement of property rights pending the divorce proceedings.

The defendant did not gain a prescriptive title to the plaintiff's common and undivided third interest in his real estate.

On report. A writ of entry to recover a common and undivided third interest in a certain lot of land and buildings thereon situate in the village of Pittsfield, and for mesne profits. Plea, the general issue, with a brief statement setting up title under a lost deed, and also title by adverse possession. On December 22, 1900 the plaintiff was decreed a divorce from defendant for fault of husband, who owned at that time the real estate in question, there being no decree in the divorce proceedings as to property rights. The writ was dated May 25, 1921. At the conclusion of testimony the case was reported to the Law Court, with an agreed statement that in the event plaintiff prevails, she should recover as mesne profits $211.48. Judgment for the plaintiff for possession of an undivided one third part in common of the premises described in her writ, and for $211.48 and interest from the date of the writ.

The case is fully stated in the opinion.

Harry R. Coolidge, for plaintiff.

J. W. Manson, for defendant.

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

SPEAR, J. This is a writ of entry. The plaintiff read into the record the following admissions:

"MR. COOLIDGE: In this case, it is admitted that the whole of the lot of land with the buildings described in the writ was conveyed to the defendant, Josiah W. Libby by warranty deed; and that by decree dated December 22, 1900 of the Supreme Judicial Court of Somerset County a divorce was granted to the plaintiff from the defendant for the cause of adultery; that the fair rental value of the whole of said lot of land with the buildings thereon described in the writ, for the two years previous to the beginning of this action has been $180 per year, and for the four years previous to that date $120 per year, or a total for the six years of $840; and that the defendant has been during said six years to no expense for repairs or for the collection of rent and profits, and has during said six years been in the possession of the whole of said premises; and that the taxes assessed for the last six years on the whole and paid by the defendant amount to the total sum of $205.56."

It further appeared that "there was no decree in the divorce proceeding as to property rights." The decree of divorce was then read into the record, which need not be inserted here, and the plaintiff rested her case.

The defendant moved a nonsuit upon the ground that the plaintiff had not shown that she had been seized within twenty years. The motion was overruled, to which exceptions were taken, and the case proceeded to completion, and comes up on report, thereby investing the Law Court with the powers of a jury. The plea was the general issue with brief statements.

The divorce decree was granted to the plaintiff on the 22d day of December, 1900. At that time the defendant was the owner of a house and lot in the village of Pittsfield. Accordingly, by virtue of Sec. 9, Chap. 65, R. S., which was the same then as now, upon the granting of her decree she became "entitled to one third, in common and undivided of all his real estate, except wild lands, which shall descend to her as if he were dead."

Under the plea of nul disseizin, the plaintiff had made out a prima facie case when she rested, although it was not made to appear that

she had been in possession within twenty years prior to the date of the writ. *May* v. *Labbe*, 112 Maine, 209. *Daly* v. *Children's Home*, 113 Maine, 526. *Rand* v. *Skillin*, 63 Maine, 103. If the case stopped here the plaintiff would be entitled to judgment.

But at this juncture the defendant interposes two defenses under his brief statement.

First, that if the plaintiff ever had any title, she conveyed it to the defendant by a deed which has been lost. Second, that the defendant, for more than twenty years has had open, notorious exclusive and adverse possession and occupation of said premises as owner thereof under a claim of right to the whole fee therein.

The careful reading and fair interpretation of the evidence fails to support the first defense of a lost deed, or other instrument of conveyance from the plaintiff to the defendant of her interest in his estate, which accrued to her by virtue of the decree of divorce. His own testimony fails to prove, prima facie, such lost instrument. His strongest claim is that whatever it was, if it existed at all, was a document signed by Abel F. Davis. If this were so, there is no evidence whatever to show what the deed covered or conveyed, nor that Davis had any authority to sign a deed of her particular right in the property involved.

Before proceeding to the last and vital defense, it may here be noted that an equitable defense was set up in the evidence by way of an alleged settlement of the property rights between the plaintiff and defendant at about the time the divorce was decreed. But were such a defense admissible under the pleadings, we are compelled to say that it was not established by a preponderance of the evidence. The whole transaction involving a payment of $200 by the defendant to the plaintiff took place two years before the divorce decree, when the plaintiff left the defendant. The note of the defendant which constituted the major part of the transaction was dated December 20th, 1900. With respect to the alleged settlement the defendant testified:

"MR. MANSON: Q. While the divorce was pending did you make settlement, as to Mrs. Smith, of your property affairs with Mr. Davis?

"A. Well, there is so much of it I can't hardly remember. I am telling all I can about it truthfully, because I meant to settle with her all right. It seems as though we had a conversation about it,

but I am not sure about that. I ain't going to make no statement I ain't sure of. I don't like that way of doing business."

The plaintiff emphatically denied any settlement of property rights pending the divorce proceedings.

We now come to the crux of the case. Did the defendant gain a prescriptive title to the plaintiff's common and undivided third interest in his real estate? We think the evidence fairly construed fails to prove it. *Mansfield* v. *McGinniss*, 86 Maine, 118, seems to be conclusive upon this issue in the present case. This was a case in which a verdict was rendered for the defendant under claim of prescriptive title, which the court set aside in the following pertinent and significant language:

"The defendant claims to have disseized the plaintiff and thus to have acquired a title to the whole tract by an adverse possession for more than twenty years.

"There is a manifest difference in character between the possession of a stranger and that of a co-tenant. A stranger has no right of possession. His occupation, therefore, would be in itself some evidence of an adverse claim, at least in the absence of any evidence of license. A land owner seeing indications of occupation by a stranger, would be on his guard against the nature of the stranger's claim. A co-tenant on the other hand, has full right of possession of the whole undivided land. His occupation therefore would not be the slightest evidence of any adverse claim. It would be presumed to be in accordance with his right as part owner. A tenant in common seeing indications of occupation by a co-tenant, would have no reason to apprehend a denial of his own equal right.

"As between co-tenants evidence of long continued, visible, uninterrupted and even exclusive occupation by one co-tenant, is not enough to bar the rights of the other co-tenants. There must be evidence from which an ouster, a putting out and a keeping out, of the other co-tenants, can be inferred."

The above quotation is fully supported by authority. *Thornton* v. *York Bank*, 45 Maine, 158 is a case in which the defendants went into possession under a deed purporting to convey the entire estate, but the court says Page 161 "the possession or entry of one tenant in common, or joint tenant is always presumed to be in maintenance of the right of all; and he shall not be presumed to intend a wrong to his companion, if his acts will admit of any other construction."

On Page 162 it is further said "if a tenant in common enters on the common property, and takes the whole rents and profits, without paying over any share thereof to his co-tenants, his possession is not to be considered adverse to them but in support of the common title."

In *Colburn* v. *Mason*, 25 Maine, 434, it is said "one tenant in common occupying the estate does not oust or disseize another tenant in common, or one who claims to be such, without some unequivocal act manifesting an intention to do so. Such tenants are individually seized per mie et per tout. The entry of one is the entry of both. Either has a right to actual possession; and his entry will be presumed to be in accordance with his title; and this presumption will hold until some notorious and unequivocal act of exclusion shall have occurred . . . . But if upon demand of the co-tenant of his moiety, the other denies to pay and denies his title, saying he claims the whole, and will not pay, and continues in possession, such possession is adverse and ouster enough."

To the same effect is *Hudson* v. *Coe*, 79 Maine, Page 94, quoting the above citation from 25th Maine.

Doherty v. *Russell*, 116 Maine, Page 273 and 274 is cited by the defendant in support of his contention, but the reasoning of the opinion seems to be the other way. The court, as defendant states says that "after divorce former spouses may hold adversely to each other," but the whole paragraph reads as follows:

"Was there adverse possession? After divorce the former spouses may ordinarily hold adversely to each other. 1 R. C. L., 756 and cases cited. Mr. Simmons, the husband occupied the property just the same after the separation as before. He occupied the whole property in defendant's absence as he had a right to do. Having the right to occupy the whole, what was there left to hold adversely, what part did he select and determine to hold in hostility to the defendant's rights? What could he add to his prior holding and right of occupancy?" The court also cites from *Mansfield* v. *McGinniss*, 86 Maine, 118 the paragraph already quoted in the present opinion. We are unable to find any case where passive occupancy by one tenant in common for a period of twenty years with the bare acquiesence of the co-tenant has been held to constitute such ouster or disseizin as to enable such occupancy to ripen into a prescriptive title against the co-tenant.

The defendant, however, claims that certain acts, such as conveying the property and leasing it, from time to time, are evidence of ouster. Granting that these acts constitute prima facie evidence of ouster, when did the first act occur? We presume it will be conceded that ouster must precede or at least be coincident with adverse possession. Adverse possession must run twenty years to effect prescriptive title. We are unable to find any evidence of such acts within the required time. The defendant says: "Q. At the time of the divorce, and the divorce was December 22d, 1900, who was living in the house? A. I can't tell who was living there then; yes I was living in it. Q. You were in the house? A. Yes: I have always lived there until the last two years I have lived in Massachusetts." The conveyance took place long after December 1900. By all the authorities a tenant in possession to gain prescriptive title against the co-tenant must prove ouster or disseizin with all the other elements of prescription for a period of twenty years. If the payment of taxes could be regarded as evidence of ouster then the evidence fails in the present case. The mere assessment of taxes is immaterial. *Smith* v. *Booth Bros.*, 112 Maine, 308. *Holden* v. *Page*, 118 Maine, 242. There is no evidence that the tax assessed upon the property was paid twenty years before the date of the writ. Furthermore as between co-tenants exclusive occupation and payment of taxes are not evidence of disseizin. *Mansfield* v. *McGinniss*, 86 Maine, 118.

The plaintiff's writ was dated May 25th, 1921. The plaintiff's decree of divorce was dated December 22d, 1900. From December 22d, 1900 to May 25th, 1921 is twenty years, five months and three days. It, therefore, follows that it was incumbent upon the defendant, to make out a prescriptive title, to prove ouster or disseizin, within five months and three days after December 22d, 1920. We are unable to find any adequate evidence of such ouster or disseizin.

This brings us to the question of damages. According to the agreed statement the plaintiff was entitled to recover $211.48 and interest thereon from the date of the writ. The entry therefore will be

Judgment for the plaintiff for possession of an one undivided third part in common of the premises described in her writ and for $211.48 and interest from the date of the writ.

STATE OF MAINE *vs.* FRED B. LITTLEFIELD.

York. Opinion December 27, 1922.

An indictment for liquor nuisance, without alleging cider was kept or sold for tippling purposes or as a beverage, held sufficient.

This court is of the opinion that the time has come when mere refinement of pleading should not be invoked as a subterfuge for the escape of manifest violators of the criminal law. When an indictment employs the use of language which makes clear and unambiguous the offense with which the respondent is charged and enables him to fully comprehend the charges and make full defense to every allegation in the indictment, we are of the opinion that such indictment is sufficient and should not be quashed because it does not happen to be couched in that technical language and form required by the courts in pleadings, when the law required the infliction of the death penalty for stealing a sheep or imprisonment for life for committing what now may be called a misdemeanor.

On exceptions and motion for a new trial by respondent. The respondent was indicted for a liquor nuisance. The intoxicating liquors as set forth in the indictment, as a matter of fact, consisted of cider, and it was not alleged in the indictment specifically that cider was kept or sold for tippling purposes or as a beverage, and for that reason, counsel for respondent contended that the indictment did not include cider, and excepted to the introduction of evidence bearing on the question of cider as constituting intoxicating liquor. The respondent was found guilty and his counsel filed a general motion for a new trial which was not considered in this case as it was not properly before the Law Court. Exceptions overruled.

The case is stated in the opinion.

Edward S. Titcomb, County Attorney, for the State.

Willard and Ford, for respondent.

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

SPEAR, J. It is admitted that the issue of law in the present case is the same as that upon which *State* v. *Douglass* was decided in

121 Maine, 137. It was there said: "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 sellng 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."

This court is of the opinion that the time has come when mere refinement of pleading should not be invoked as a subterfuge for the escape of manifest violators of the criminal law. When an indictment employs the use of language which makes clear and unambiguous the offense with which the respondent is charged, and enables him to fully comprehend the charges and make full defense to every allegation in the indictment, we are of the opinion that such indictment is sufficient and should not be quashed, because it does not happen to be couched in that technical language and form, required by the courts in pleadings, when the law required the infliction of the death penalty for stealing a sheep or imprisonment for life for committing what now may be called a misdemeanor. We, accordingly, see no reason for overruling *State* v. *Douglass* in 121st Maine.

The motion is not considered in this case as it is not properly before the Law Court.

Exceptions overruled.

EVERETT F. CLEMENTS, Appellant from

Decree of Judge of Probate.

Waldo. Opinion December 27, 1922.

The language "I give, bequeath and devise to . . . . all my estate, real, personal and mixed" devises an unqualified fee to devisee, notwithstanding such language may be followed by language clearly showing an intent that a remainder, if any, is to go to another person.

The language of the testatrix in the first part of her will devises an unqualified fee to her husband.

Granting that it was her actual intent that whatever remained of her estate at the decease of her husband should go to her nephew, the language she employed in giving expression to her judicial intent in that regard was clearly in violation of the "firmly fixed canons of interpretation."

On appeal on an agreed statement of facts. The question involved is the interpretation of the only paragraph in the will of Phebe A. Fraser, which reads as follows, to wit: "I give, bequeath and devise to my beloved husband, John D. Fraser of Belfast, all my estate real, personal and mixed, wherever found and however situated, and should any property remain at the death of my said husband, it is my will that the rest, residue and remainder go to my nephew Everett F. Clements of Waldo, Maine, and I do here appoint Marcellus R. Knowlton of Belfast, sole executor of this my last will and testament without bond." On a hearing in the Probate Court the judge decreed that the husband, John D. Fraser, took an estate in fee simple, and an appeal was taken. Appeal denied. Decree in accordance with this opinion.

The case is stated in the opinion.

Arthur Richie, for appellant.

Buzzell & Thornton, for appellee.

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

SPEAR, J. This case was appealed from the Probate Court to the Supreme Court and comes from that court to the Law Court,

upon an agreed statement of facts, reported by the Supreme Court of Probate. This was a proper procedure. *Stilphen's Appeal,* 100 Maine, 146. The agreed statement presents for construction one, and the only, paragraph of a will of the following tenor to wit: "I give, bequeath and devise to my beloved husband John D. Fraser of Belfast, all my estate real, personal and mixed, wherever found and however situated, and should any property remain at the death of my said husband, it is my will that the rest, residue and remainder go to my nephew Everett F. Clements of Waldo, Maine, and I do here appoint Marcellus R. Knowlton of Belfast, sole executor of this my last will and testament without bond."

The rules of interpretation, applicable to the language employed by the testator to give expression to his intention in the above quoted paragraph have been so often and so recently promulgated by our court, that an opinion in this case would necessarily be but a repetition of what has been so many times declared. The language of the testator in the first part of her will devises an unqualified fee to her husband. She then expresses a wish by the use of the words "and it is my will," that if anything should remain at his death, it should go to her nephew. Granting that it was her actual intent that whatever remained of her estate at the decease of her husband should go to her nephew, the language she employed in giving expression to her judicial intent was clearly in violation of the "firmly fixed canons of interpretation." *Taylor* v. *Brown,* 88 Maine, 56; *Bradbury* v. *Warren,* 104 Maine, 423 and cases cited. *Barry* v. *Austin,* 118 Maine, 51 and cases cited. *Gregg* v. *Bailey,* 120 Maine, 263, is not in conflict with the foregoing authorities or the present opinion as it was held in the former case that the disposing clause, made without the lifting of the pen and read as a whole, created a life estate.

Appeal denied.
Decree in accordance with this opinion.

GEORGE R. KETCHUM *vs.* LINNIE C. MOORES.

Aroostook. Opinion December 27, 1922.

The plaintiff prevails in a writ of entry in maintaining title to all the land he claimed, and likewise the defendant prevails in maintaining title to all the land he claimed not included in his disclaimer.

The defendant had title to all he claimed.
The plaintiff claimed only the part disclaimed which he already had.

On report. This is a writ of entry in which the plaintiff demands a certain described lot of land. The defendant filed a disclaimer of all except a certain described part. The defendant's disclaimer was based upon a grant by the plaintiff to the defendant. The deed of grant reveals the fact that the plaintiff conveyed to the defendant the identical part of the locus which the defendant claims. The plaintiff did not claim the part excepted in the disclaimer. Judgment for defendant.

The case is stated in the opinion.

William L. Waldron and Archibalds, for plaintiff.

Doherty & Tompkins and Charles P. Barnes, for defendant.

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

SPEAR, J. This is a writ of entry in which the declaration is as follows:

"In a plea of land; wherein said Plaintiff demands against said Defendant the following real estate, with its appurtenances in Garfield Plantation or Township 11, Range 6, in said County of Aroostook to wit: all that part of Lot numbered Thirty-six (36) in said Garfield which lies south of Machias Stream flowing through said lot, whereof the Plaintiff was seized in fee simple within twenty years last past, but the Defendant since unjustly disseized him thereof, and with-

holds the same. To the damage of the Plaintiff (as he says) of Ten Hundred Dollars, which shall then and there appear, with other due damages."

At the return term the defendant filed a disclaimer of a certain part of the premises described and demanded in the plaintiff's writ, to wit:

"And now, at the return term of the above entitled writ, comes the defendant, and disclaims all title and interest in the premises in said writ demanded, except any of that part of lot number thirty-six (36) in said Garfield that is necessary to use in maintaining a dam nine (9) feet high at any point between the road and the place where the dam now is located on the westerly shore, together with a strip of land one (1) rod wide, measuring from the high water mark caused by a dam nine (9) feet high, at the old dam site on each side of the Big Machias Stream, and extending up said Stream so far as owned by said George R. Ketchum July 12, 1909."

The defendant's disclaimer is based upon a grant by the plaintiff to the defendant. An examination of the deed of that grant, dated and recorded the second day of April, 1917, reveals the fact that the plaintiff on that date conveyed to the defendant the identical part of the locus which the defendant claims; and his exception in the disclaimer is in the exact language of that grant. The plaintiff does not claim the part excepted. He, therefore, already has all he asks in his writ under his deed. He can have judgment for no more: He can claim only the part of the premises disclaimed. *Russell* v. *Brown*, 56 Maine, 94, in which it is said: "In the trial upon a writ of entry, under our statute, on the general issue, the rendition of a general verdict in favor of the demandant entitles him (where no cause is found to disturb the verdict) to judgment for the demanded premises, as described in his writ when no part has been disclaimed; where some portion has been disclaimed, to judgment for the remainder."

This action was undoubtedly brought for the purpose of obtaining an interpretation of the respective rights of the parties with reference to a paragraph in the deed which reads as follows:

"Fourth. All that part of lot numbered thirty-six (36) in said Garfield that is necessary to use in maintaining a dam nine (9) feet high at any point between the road and the place where the dam now is located on the westerly shore.

"Together with a strip of land one rod wide (measuring from the high water mark caused by a dam nine (9) feet high at the old dam site) on each side of the Big Machias Stream, and extending up the said stream as far as was owned by the said George R. Ketchum, July 12, 1909."

But the fact is that that paragraph is excepted in the disclaimer precisely as it is stated in the deed, and, therefore, the defendant claims no more than his deed gives him. In other words, the plaintiff retains in the premises described in his writ everything that he demands except what he has deeded away. And, under the pleadings, he can recover only upon the title he has proved. *Brown* v. *Webber*, 103 Maine, 60.

The parties, however, in their briefs urge the court to enter the domain of construing the meaning of the disclaimer. But such suggestion presents only a moot question.

Judgment for defendant.

ADOLPHUS ORINO *vs.* ALBERT BELIVEAU.

Oxford. Opinion December 27, 1922.

Res adjudicata.

It is not necessary to pass upon the legal effect of the retention by the plaintiff of the check sent to him by the defendant, as the whole matter was res adjudicata except as to the $300 and res adjudicata as to that so far as the amount was concerned. There was no error in the action of the clerk, nor was the plaintiff aggrieved, as he received the full amount legally due him.

On exceptions. This case was taken to the Law Court on exceptions by the plaintiff to a ruling denying his motion to change a docket entry made in the case. Exceptions overruled.

The case is fully stated in the opinion.

Joseph E. F. Connolly and Clinton C. Palmer, for plaintiff.

Albert Beliveau, pro se, for defendant.

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

DUNN, J. did not participate.

SPEAR, J. In 1917, the plaintiff, in the present case, brought an action as assignee of Oscar U. Sullivan, against the defendant for money had and received, for the sum of $625.00. This was an equitable action and entitled the plaintiff to recover whatever was legally or equitably due him. In the present case he also brings an action for money had and received for the same $625.00, alleging that no part of said money has been paid either to the plaintiff or Sullivan.

The former case, found in the *Memorandum Decisions*, 120 Maine, 550, was heard by the presiding Justice with the right of exceptions as to matters of law, who found the following facts, as stated in the exceptions:

"after hearing the evidence submitted by the parties and the admissions made by them the Court found and decided and gave judgment in favor of the defendant and against the plaintiff and in and by said findings, decision and judgment ruled that defendant was entitled to credit for and on account of said sum of $625.00 for the following amounts, to wit, for the sum of $25.00 applied by defendant as due him for the costs of said action of *Sullivan* v. *McCafferty* and for the sum of $300.00 applied by defendant as compensation due him for his services as attorney for said Sullivan in said action under agreement made by and between said Sullivan and defendant, and for $280.97 paid Rumford Trust Co. and for $25.00 paid said Sullivan and to said rulings, findings, decision and judgment in so far as thereby defendant was found entitled to credit for said sum of $25.00 costs and for said sum of $300.00 as agreed compensation and to each of said rulings, decisions and findings plaintiff excepts and prays that his exceptions may be allowed."

The finding as to the amount due the plaintiff and what amount was paid to him involved pure questions of fact. No question of law was involved, consequently the finding upon the facts constituted a judgment of the court.

The Law Court in passing upon the questions of fact found as follows: "Upon the facts, the Justice ordered judgment for the defendant. From that finding, it appears that the defendant had

collected $625.00 on the judgment in favor of Sullivan and had paid out over $300.00 of it, on Sullivan's account and retained $300.00 for his services, under a contract which Sullivan claims to be champertous. The plaintiff, Sullivan's assignee, accordingly brought an action for money had and received for the recovery from the defendant of the $300.00. No question is raised as to the money paid out on Sullivan's account."

These findings of fact were in no way disturbed by the court in passing upon the exception.

In accounting for the $625.00 which the defendant had in his hands, he claimed, and was allowed by the sitting Justice, the sum of $300.00 as reasonable fee for his services. But the plaintiff, whose assignor was equally culpable with the defendant morally, in making a champertous contract to deprive the defendant of what would otherwise have been justly and equitably due him, raised the question of champerty, which did and could affect only the fee which the defendant retained and claimed. And the court so found, as follows: "The defendant claims that, even though the agreement was champertous, he is entitled to receive the value of his services upon a quantum meruit. It is the opinion of the court, however, that he cannot so recover, and that, consequently, the three hundred dollars which he held in his hands should not have been allowed against the plaintiff's claim."

Thus it clearly appears that the finding of the court in the first case was res adjudicata in the second case, except as to the sum of $300.00, which the court disallowed on account of the champertous contract by virtue of which it was claimed. The case was properly certified to the trial court, where, at the October term, 1921, said case was duly called for trial and was defaulted by agremeent of defendant . . . . and damages assessed at $300.00. This entry was in accordance with finding and mandate of the court in the former case. The clerk found the full amount due the plaintiff to be the sum of $369.43, which amount the defendant sent the plaintiff, who retained the same with the reply that he had applied it to the account of $625.00 as claimed in his writ, not one cent of which was due in equity, law, or decency, above the $300.00 and costs which he retained.

It is not necessary to pass upon the legal effect of retaining the check, as the whole matter was res adjudicata except as to the $300.00

and res adjudicata as to that so far as the amount was concerned. There was no error in the action of the clerk, nor was the plaintiff aggrieved, as he received the full amount legally due him.

Exceptions overruled.

INHABITANTS OF LIMINGTON *vs.* INHABITANTS OF ALFRED.

York. Opinion December 27, 1922.

On the issue involved the evidence was sufficient to warrant a verdict for the plaintiff if the jury had so found. Exception to a nonsuit sustained.

The nonsuit must have been granted upon the ground that Mrs. Knight did not have a pauper settlement in the defendant town, when she fell into distress, as the amount charged for the assistance rendered to her is not in controversy.

On exception by plaintiff. An action of assumpsit to recover for pauper supplies. The defendant pleaded the general issue with a brief statement setting up insufficiency of the pauper notice. At the close of the evidence by the plaintiff on motion by counsel for defendant the presiding Justice ordered a nonsuit and plaintiff excepted. Exception sustained.

The case is sufficiently stated in the opinion.

Elias Smith, for plaintiff.

Edward S. Titcomb, for defendant.

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

SPEAR, J. This case comes up on the following bill of exceptions, namely:

"This was an action of assumpsit, brought by the plaintiff under the provisions of Chapters 29 and 64 of the Revised Statutes for the

recovery of the expense of relieving and necessary support of destitute persons found in the plaintiff town and having no settlement therein, and having a pauper settlement in the defendant town.

"At the trial before a jury, at the conclusion of the plaintiff's testimony and on motion of the defendant, the court ordered a nonsuit.

"The writ, and declaration, and amendment thereto, and defendant's pleadings, together with the evidence introduced by the plaintiff are to be made a part of this bill of exceptions.

"To all which rulings, and instructions, and refusals to instruct the said Plaintiff excepts and prays that his exceptions may be allowed."

The original declaration was a count under the forms of R. S., Chap. 29, for the recovery of pauper supplies furnished by the plaintiff town, to relieve the distress of one Mrs. C. K. wife of C. J. K. and his sons D. K. and G. K. alleged at the time to have had their legal pauper settlement in the defendant town.

Before proceeding to trial the plaintiff was permitted to amend his declaration by inserting a count under the provisions of R. S., Chap. 64, Sec. 55, which relates to the protection of neglected children, and imposes liability on the town in which they have a legal settlement for the expenses of their support, until they are placed in a permanent home.

The second count may be easily disposed of upon the grounds that the evidence fails to show a legal commitment of the children to the institution to which it was alleged they were committed.

The notice disposes of any liability upon the defendant town for the support of the children under the first count, under the provisions of Chapter 29. The notice reads as follows:

"To the Overseers of the Poor of the Town of Alfred, in the County of York, in the State of Maine:

Gentlemen:—You are hereby notified that Charles Knight wife, inhabitant of your town, having fallen into distress, and in need of immediate relief in the town of Limington, the same has been furnished by said town on the account and at the proper charge of the town of Alfred, where said Charles Knight has legal settlement; you are requested to remove said Charles Knight wife or otherwise

provide for her, without delay, and to defray the expense of support in said town of Limington. The sums expended for support up to this date are

Dated at Limington, this 1 day of Jan., A. D., 1917.

Yours respectfully,

C. N. CHASE.
GEO. M. BRACKETT,
Overseers of the Poor of Limington."

The reply reads as follows:

"To the Overseers of the Poor in the Town of Limington, in the County of York, in the State of Maine:

Gentlemen:—Your notice of the 6th of Jan. instant, stating that Mrs. Chas. Knight has fallen into distress and been furnished relief by your town at the charge of the town of Alfred was duly received.

Upon inquiry, we are satisfied that this town is not the place of the lawful settlement of the said Mrs. Chas. Knight.

We therefore decline to remove her or to contribute towards her support.

Dated at Alfred, this 16 day of Jan. A. D., 1917.

Yours respectfully,

J. W. PLUMMER,
J. O. NUTTER,
Overseers of the Poor of Alfred."

It is now well settled that, in order to hold a town liable for the support of its pauper children, the number of the children at least for whom compensation for support is claimed, must be stated. A review of the cases giving an interpretation of notices, in this regard, will be found in *Thomaston* v. *Greenbush*, 98 Maine, 141, in which the pith of the opinion is, that a notice, otherwise complete, but stating only that a mother or a father, by name, has fallen into distress, is not sufficient to include his or her minor children. The decisions go much further. In *Wellington* v. *Corinna*, 104 Maine, 257, speaking of a notice, in the following language; "'Frank N.

Moody and wife and children have fallen into distress,' etc., it is said: It fails to give either the name or number of the children, and in that respect it is obviously an insufficient compliance with the statute as interpreted by the Court."

The notice in the present case, therefore, is not sufficient to include the children.

It is shown, however, by the reply of the overseers of the defendant town and conceded in their brief, that the notice was sufficient to charge it with liability for Mrs. Charles Knight, alone, if she had a pauper settlement therein.

At the close of the plaintiff's case a motion for nonsuit was granted. It must have been upon the ground that Mrs. Knight did not have a pauper settlement in the defendant town, when she fell into distress, as the amount charged for the assistance rendered to her is not in controversy. This brings us to the question whether the evidence in the case was sufficient to have sustained a verdict if one had been rendered in favor of the plaintiff. Without going into an analysis of the testimony, we are of the opinion that there was sufficient evidence to warrant a verdict for the plaintiff if the jury had so found, and that the evidence should have been submitted to their judgment

Exception sustained.

EDGAR M. BRIGGS, In Equity *vs.* ALFRED L. CHILDS et als.

Androscoggin. Opinion January 8, 1923.

The delivery of notes by a person in expectation of death to another person, with instructions, in the event of death, that such notes are to be cancelled, absolutely surrendering all title and control over such notes, subject only to revocation in the event donor should recover, constitutes a valid gift causa mortis to such person in trust for the makers of the notes. No party is entitled to a jury trial as a matter of right in an equitable proceeding to enforce a trust.

A short time before her decease Flora M. Frost of Litchfield intrusted certain promissory notes to Edgar M. Briggs who was named executor of her will which had been previously executed. A single Justice hearing the case has found that the transaction was intended to be, and that it took effect as a gift causa mortis to the makers of the notes and directed that the notes be cancelled and surrendered to such makers.

Held:

That the finding is conclusive and the ruling right.

In a cause in equity to enforce a trust no party can claim a jury trial as a right.

If upon the theory of the party entitled to prevail, there is no full, adequate and complete remedy at law, equity has jurisdiction.

The suit was properly brought by the plaintiff individually. The notes are not held by him as executor. The plaintiff is a trustee within the purview of the law and holds the notes in that capacity.

On appeal. An equitable proceeding to determine the disposition of certain promissory notes delivered to complainant by Flora M. Frost, on entering a hospital on September 8, 1920, for a serious operation, with instructions that in the event of her death, the notes were to be cancelled by complainant. Of the three defendants, A. L. Childs was interested as an indorser on some of the notes, and also as a stockholder in a corporation which was the maker of several of the notes, the other two defendants were interested as residuary legatees in the will of the said Flora M. Frost, who died testate November 23, 1920, at the hospital.

One of the defendants, A. L. Childs, contended that the transaction constituted a gift causa mortis, the other two defendants, although one was the maker of two of the notes, claimed that the notes were a part of the assets of the estate. Upon a hearing on bill, answers, replications and proof, after a motion that the defendants be ordered to interplead was overruled, the sitting Justice found that there was a gift causa mortis of the notes in controversy and ordered them cancelled by complainant and delivered to their respective makers, from which finding an appeal was taken by the two defendants who were the residuary legatees in the will. Appeal dismissed. Decree affirmed.

The case is stated in the opinion.

Edgar M. Briggs, pro se, for plaintiff.

George C. Wing and George C. Wing, Jr., for Alfred L. Childs.

Frank A. Morey, for Henry E. Frost and Florence A. Frost.

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

DEASY, J. Bill by trustee for instructions. In September 1920, Flora M. Frost of Litchfield, being very ill, entered the Central Maine General Hospital at Lewiston for a surgical operation. She at that time caused certain promissory notes owned by her to be delivered to the plaintiff who had previously drafted her will and was named therein as executor. Miss Frost remained in the hospital until her death which occurred in November. The principal issue of fact is as to whether any and what instructions were given by her to the plaintiff respecting the disposal of the notes. The Justice hearing the cause found in substance that Miss Frost gave the plaintiff express instructions to cancel the notes "if I do not come back." The Justice further found "that the deceased intended to and did absolutely surrender all title and control over the notes delivered to Mr. Briggs subject only to revocation if she returned alive from the hospital, and that she acted in expectation of death." Thereupon the Justice ruled "that the transaction constituted a valid gift causa mortis to the plaintiff in trust for"—the makers of the notes. The decree directs that the notes be cancelled and delivered to the makers.

The findings of fact are in this case conclusive and the legal ruling clearly right.

It is contended however, that the appeal should be sustained for the following reasons:

(1) That the issues of fact should have been submitted to a jury, such submission having been prayed for in the bill. But in a cause in equity to enforce a trust "a subject within the jurisdiction of courts of full equity jurisdiction long before the adoption of our constitution," while the Justice hearing the cause may in his discretion ask the advice of a jury, no party can claim a jury trial as a right. *Farnsworth* v. *Whiting*, 106 Maine, 435.

(2) That there was a full, adequate and complete remedy at law. True if the defendant's contention as to the facts be adopted. But the Justice hearing the cause found the plaintiff's theory to be true, to wit:—that he received the notes with instructions to cancel them "if I do not come back," an obvious euphemism meaning if I shall die at the hospital. She died at the hospital. The plaintiff's duty was to cancel the notes, a duty which equity alone can establish and enforce.

(3) That the suit should have been brought by the plaintiff not individually but as executor of the will of Flora M. Frost. Not so. The facts as found by the Justice are that the plaintiff after the death of Flora M. Frost held the notes not as her executor, not as part of her estate but as trustee to cancel them, and thus give effect to her intent to make a gift causa mortis to the makers of the notes.

(4) Not disputing that this court having jurisdiction over trusts and full equity jurisdiction may entertain bills by trustees for instructions, the defendant contends that the plaintiff is not a trustee within the purview of the law. The defendant presents no theory as to the capacity in which the plaintiff holds the notes. Whatever may have been the relation of the parties prior to the death of Miss Frost, the plaintiff since her death has not held the notes as agent, attorney or bailee. We think that he may fairly be treated as a trustee entitled to maintain this bill for instructions.

Appeal dismissed.
Decree affirmed.

EDWARD T. DALTON *vs.* MICHAEL J. CALLAHAN.

Cumberland. Opinion January 9, 1923.

Under a contract for the conveyance of real estate stipulating that vendor is to give a good and perfect title, vendee, as a general rule, may refuse to accept a deed of a third party, being entitled to a deed containing the personal covenants of his vendor. Strict performance may be waived by word or act and estoppel may preclude that as a defense. An action of debt a proper form of action to recover damages for breach of a sealed contract to buy land, if amount is a definite sum, or can be definitely ascertained from fixed data by computation. Plaintiff not required to elect which of several counts alleging different causes of action on which he will proceed if causes are not improperly blended.

Where nothing to the contrary appears from the contract the good title to which the purchaser is entitled must generally be made out by the vendor himself or by his legal representatives. As a rule the purchaser is not bound to accept a good title from a third person.

When the purchaser contracts for a conveyance from the vendor he is entitled to insist upon a perfect title of record in the vendor at the time of the delivery of the deed to him.

Under the contract the purchaser is entitled to a deed containing the personal covenants of his vendor, and with a perfect title of record in him at the time of delivery. He can refuse to accept the warranty of a third party, for the value of the covenants may depend upon the responsibility of the covenantor.

One to whom a person has agreed to convey land is entitled to a deed from such person, and need not accept a deed from a stranger to the contract.

A party has a right to select and determine with whom he will contract, and cannot have another person thrust upon him without his consent. It may be of importance to him who performs the contract. He may contract with whom he pleases and the sufficiency of his reasons for so doing cannot be inquired into. And were such reasons open to inquiry it is easy to see that one might be willing to take the warranties of one person in a deed when he would not take those of another. At any rate he is only obliged to take the deed which he contracted to take.

The action of debt will lie for the recovery of a fixed or definite sum of money, or for a sum of money which can be ascertained from fixed data by computation, or is capable of being readily reduced to certainty.

Where a declaration contains two or more counts, and each sets forth a separate and distinct cause of action, the plaintiff will not be required to elect on which count he will proceed, neither will election be enforced where, otherwise, the causes are not improperly blended.

A trial court is not required to give instructions, though proper and such as the party is entitled to, in the very terms asked for.

In the absence of anything in the agreement to that effect there is no law which required that a vendor should have a good title, free from encumbrances, at the time when the agreement is entered into, and during the time between that and the arrival of the time when the agreement is to be performed.

On exceptions and motion for a new trial by defendant. An action of debt to recover nine hundred dollars claimed by plaintiff as due him from defendant by reason of breach of a written contract relative to the sale of real estate. Under the conditions of the written contract under seal plaintiff was to deliver to defendant his warrantee deed of certain real estate situate in Portland within thirty days from December 29, 1920, the date of the contract, and defendant was to pay plaintiff therefor in addition to one hundred dollars paid down the sum of ten thousand nine hundred dollars, that is the contract price being eleven thousand dollars. Plaintiff did not own the real estate in question but had an option on it from its owner, Mrs. Lunt. On January 29, 1921 plaintiff obtained from Mrs. Lunt a warrantee deed of the premises running from her to defendant and tendered it to defendant demanding acceptance and payment of the balance of the purchase price, both of which defendant refused. On February 4, 1921, defendant purchased the property directly from Mrs. Lunt, receiving from her the same deed tendered to him by plaintiff, and paying her therefor the sum of ten thousand dollars. Plea, the general issue. A verdict for nine hundred sixty-two and 55-100 dollars was rendered for plaintiff. Defendant excepted to a refusal to order a nonsuit, and also excepted to a denial to direct a verdict for defendant, and also excepted to rulings on requests for instructions and filed a motion for a new trial. Motion and exceptions overruled.

The case is fully stated in the opinion.

Frederic J. Laughlin, for plaintiff.

M. E. Rosen, for defendant.

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

DEASY, J., concurs in result.

PHILBROOK, J. On the twenty-ninth day of December, A. D. 1920, the parties to this action entered into an agreement which was evidenced by a written instrument, under seal, of the following tenor, to wit:

"This memorandum of agreement, made and entered into by and between Edward T. Dalton, Agt., of Portland, Maine, hereinafter called the party of the first part, and Michael J. Callahan also of Portland, Maine, hereinafter called the party of the second part, witnesseth as follows: that the party of the first part agrees to sell and convey unto the party of the second part, with a clear and perfect title thereto, by a good and sufficient deed of warranty with usual covenants therein and title by descent properly released, the real estate situated at 322 Spring Street, known as the Lunt house, consisting of a half brick house, for the sum of eleven thousand ($11,000.00) dollars, to be paid as follows, cash on delivery of deed, subject to the following provisions; and the party of the second part hereby agrees to purchase of the party of the first part the said real estate, on the terms and conditions mentioned above, within 30 days from this date, and in consideration thereof the party of the second part has paid unto the party of the first part the sum of one hundred ($100) dollars on account of the purchase price, the receipt of which is hereby acknowledged." The defendant signed the instrument by his appropriate name, but the plaintiff signed "Edward T. Dalton, Agt."

On the twenty-ninth day of January, 1921, the plaintiff tendered to the defendant a deed of the property, executed by Alice Storer Lunt, running to the defendant, and "demanded that he accept it and make payment," as the record discloses. The defendant did not accept the deed and said "that he wouldn't have anything to do about it, he wouldn't pay for it. I could demand and that is all the good it would do, or words to that effect."

The defendant, at the time of the tender, made no objection to the form of the deed and gave no reason for not accepting it. The deed

was then returned by Dalton to Mr. Sanderson, who drew the instrument for Mrs. Lunt. It is not claimed that Dalton ever tendered his own deed to Callahan.

A very few days later the defendant purchased the property directly from Mrs. Lunt, taking from her the same deed which Dalton tendered, paying her as purchase price the sum of ten thousand dollars, and also giving her a guaranty against any claims which Mr. Dalton might make against her. Mr. Sanderson, attorney for Mrs. Lunt, a witness called by the defendant, on cross-examination testified:

"Q. Isn't it a fact that when Mr. Callahan and myself (meaning Mr. Rosen, attorney for Mr. Callahan) came to your office, you were offered ten thousand dollars and guarantee against any claims of Mr. Dalton? A. Yes.

"Q. And you received that? A. Yes.

* * * * * *

"Q. All you were interested in was to get the ten thousand dollars and protect your client against any claims of Dalton's for brokerage?

"A. I supposed that was what we were all interested in.

"Q. And you got that? A. Yes."

Dalton held an option to purchase the property from Mrs. Lunt for the sum of ten thousand five hundred dollars, which option was later modified so that he could purchase it for ten thousand dollars. Whether Mrs. Lunt was to be protected from brokerage claims or from option claims is not clear, as the guaranty does not appear in the record. The exact terms of that guaranty might throw some light upon the knowledge and understanding by all parties in interest as to certain aspects of the case.

At all events the difference between the option price of ten thousand dollars and the selling price to Callahan of eleven thousand, less one hundred dollars already paid, or nine hundred dollars, is what the plaintiff sues for in this action. The defendant offered no testimony but, at the close of the plaintiff's testimony, moved for a directed verdict in his favor. The jury found for the plaintiff and assessed damages in the sum of nine hundred sixty-two dollars and fifty-five cents.

The case is brought to us upon defendant's exceptions and motion for new trial. Before discussing either it is proper to say that the testimony of the plaintiff, emphatic and uncontradicted, is to the effect that he was not acting as agent for anybody, but was acting for himself when he signed the agreement with the defendant. We must therefore regard the term "Agt." which followed Dalton's signature to the agreement as mere surplusage.

The law must be considered as fairly well settled that where nothing to the contrary appears from the contract, the good title to which the purchaser is entitled must generally be made out by the vendor himself or by his legal representatives. As a rule the purchaser is not bound to accept a good title from a third person. *Hussey* v. *Roquemore*, 27 Ala., 281. When the purchaser contracts for a conveyance from the vendor he is entitled to insist upon a perfect title or record in the vendor at the time of the delivery of the deed to him. *George* v. *Conhaim*, 38 Minn., 338; 37 N. W., 791. Under the contract the purchaser is entitled to a deed containing the personal covenants of his vendor, and with a perfect title of record in him at the time of delivery. He can refuse to accept the warranty of a third party, for the value of the covenants may depend upon the responsibility of the covenantor. *Steiner* v. *Zwickey*, 41 Minn., 448; 43 N. W., 376. *Buswell* v. *O. W. Kerr Co.*, 112 Minn., 388; 128 N. W., 459. One to whom a person has agreed to convey land is entitled to a deed from such person, and need not accept a deed from a stranger to the contract. *Royal* v. *Dennison*, (Cal.), 38 Pac., 39. See also, *Gaar* v. *Lockridge*, 9 Ind., 92; *Smith* v. *Addleman*, 7 Blackford, (Indiana), 119; In re *Bryant*, 44 Ch. D., 218. "A party has a right to select and determine with whom he will contract, and cannot have another person thrust upon him without his consent. It may be of importance to him who performs the contract. He may contract with whom he pleases and the sufficiency of his reasons for so doing cannot be inquired into. And were such reasons open to inquiry it is easy to see that one might be willing to take the warranties of one person in a deed when he would not take those of another. At any rate he is only obliged to take the deed which he contracted to take." *Pancoast* v. *Dinsmore*, 105 Maine, 471.

We have not overlooked *Kimball* v. *Goodburn*, 32 Mich., 10, where it was held that the tender of a title which satisfied the requirements of the contract in other respects would not be objectionable because

it comes not directly from the party to the contract but from a third person. That ruling is supported neither by logic nor citation of decided cases and is, we think, clearly overborne by the great weight of authority. Nor have we overlooked *Greffet* v. *Williams*, 114 Mo., 106; 21 S. W., 459; a bill to enforce specific performance of a contract, and to compel the vendee to accept a deed of the premises, wherein the court said, "If the defendant receives a good title to the land, it can make no difference to him whether the grantor in the deed which invests him with such title is the plaintiff or his wife." Here again the court gave no reasoning in support of its rule, nor citation in support thereof from any other jurisdiction. Toward that decision also we entertain the same view that we do in *Kimball* v. *Goodburn*, supra. In *Bigler* v. *Morgan*, 77 N. Y., 312, it was held that "the deed of a third party conveying the title would be a substantial performance of the covenant to convey; but the covenants, whose value depended upon the responsibility of the covenantor, the defendant was entitled to require from his vendor." To our minds this statement is not in conflict with the principle above stated, viz. that the good title to which the purchaser is entitled must generally be made out by the vendor himself or by his legal representatives, but on the other hand is entirely in harmony with it.

We must hold that the tender of the Lunt deed by Dalton was not a fulfillment of his contract with Callahan.

But the plaintiff strongly urges that by word and act the defendant waived the strict performance which required a tender of plaintiff's personal deed and is now estopped from setting up that defense. We think there is much merit in this claim. The delay of the defendant to tender his money and demand a deed, the nature of the excuses offered for that delay, and other significant indicia, quite clearly show that he would welcome release from his bargain. This was consummated by his flat refusal, when the Lunt deed was tendered, to "have anything to do about it" . . . . that he "wouldn't pay for it." The absence of any objection to the form of the deed, no reason given for not accepting it, his speedy acceptance of the same deed when it could be obtained for one thousand dollars less than the amount which he was to pay Dalton, all indicate a purpose, more or less thinly veiled, to avail himself of any method, however unpraiseworthy, to avoid the contract. So far did he carry this purpose into effect that he overstepped his own interests, and by so

doing committed such a breach of the contract as to release Dalton from its binding demand of a literal compliance and authorized the institution of this suit. The verdict, upon issues of fact, is right and the motion for a new trial upon such issues must be overruled.

Consideration of the exceptions alone remain. These we will consider in the order in which they appear in the bill of exceptions.

EXCEPTION 1.

Refusal to direct a verdict in favor of the defendant. We have already discussed this motion so far as the issues of fact are concerned, but the defendant claims that his motion should have been granted upon legal grounds because the plaintiff's declaration, consisting of five counts, begins with a count of plea in debt, "according to the account annexed," which account reads thus: "1920, Feby. 4. To balance due on purchase price of real estate situated at No. 322 Spring Street, in said Portland according to contract, sealed with the seal of Michael J. Callahan, $900.00." This count concludes that the defendant "in consideration thereof then and there promised the plaintiff to pay him said sum on demand." The defendant relies upon *Mitchell* v. *McNabb*, 58 Maine, 506. But that case is by no means decisive of the case at bar. In that case there was a sealed instrument whereby the defendant, who had sold a boot and shoe business in Portland to the plaintiff, agreed that he would not engage in the same business in Portland for a period of one year. The plaintiff alleged that the defendant committed a breach of the agreement by engaging in said business in Portland within one year and brought an action of debt, alleging, "that the said defendant, by not keeping his said agreement, has damaged him in his business the sum of two hundred dollars." To this declaration the defendant filed a general demurrer, which the plaintiff joined. The presiding Justice sustained the demurrer and adjudged the declaration bad. Plaintiff's exceptions to this ruling were overruled. In overruling the exceptions the court, among other things, said: "The declaration sets forth no promise to pay any money under any terms or conditions, but simply an agreement to abstain from selling boots and shoes at a particular place and for a stipulated time, and a violation of such agreement. The damages in such case must obviously be uncertain and unliquidated. Debt lies when one is entitled to

receive a certain and liquidated sum of money, or in case of a bond for the payment of money, or the performance of some act under a penalty, or for goods sold and delivered." Further continuing, by citation of *Lowell* v. *Bellows*, 7 N. H., 391, the court said: "Debt is the proper action, whenever the demand is for a sum certain, or is capable of being readily reduced to a certainty; but it is not the proper remedy when the demand is rather for unliquidated damages than for money, unless the performance of the contract is secured by a penalty." Upon the authority of Storey J. in *Bullard* v. *Bell*, 1 Mason, 543 (U. S. C. C. Rep.), our court further said: "The true test is, therefore, whether the sum to be recovered has, upon the contract itself, a legal certainty." Continuing authorities upon this point it may be observed; the action of debt will lie for the recovery of a fixed or definite sum of money, or for a sum of money which can be ascertained from fixed data by computation, or is capable of being readily reduced to certainty; *Mills* v. *Scott*, 99 U. S., 29, *Norris* v. *School Dist. No. 1*, 12 Maine, 293; *McVicker* v. *Beedy*, 31 Maine, 314; *Carroll* v. *Green*, 92 U. S., 513. It has even been held that it is not necessary that a price should be agreed upon for an article sold and delivered before debt could be maintained, provided, from the nature of the contract, the vendor was to be compensated in money. *Jenkins* v. *Richardson*, 6 Marsh, J. J., (Ky.), 441; 22 Am. Dec. 82. Debt has been held to lie on a quantum meruit or quantum valebant. *Van Deusen* v. *Blum*, 18 Pick., 229. Debt will lie on a specialty, or on a simple contract express or implied, although after indebitatus assumpsit came into use it was rarely resorted to in cases on simple contracts; whenever indebitatus assumpsit is maintainable debt will also lie; *Norris* v. *School District*, supra. "The general rule is that debt lies whenever indebitatus assumpsit will lie." *Seretto* v. *Railway*, 101 Maine, 140, and numerous authorities there cited. From an examination of the agreement between the parties, in the light of the decided cases to which we have referred, we are of opinion that the defendant takes nothing by his first exception."

EXCEPTION 2.

Plaintiff's declaration contained five counts and before argument to the jury the defendant moved that the plaintiff be ordered to select upon which count he wished to go to the jury, which motion

was denied and to this denial an exception was allowed. The defendant does not dwell upon this exception in his argument but it is proper to observe that where a declaration contains two or more counts, and each sets forth a separate and distinct cause of action, the plaintiff will not be required to elect on which count he will proceed, neither will election be enforced where, otherwise, the causes are not improperly blended. 21 R. C. L., 599 and cases there cited.

EXCEPTION 3.

During the cross-examination of the plaintiff the following question was asked, and excluded: "Isn't it a fact that Mrs. Lunt had first told you that she would sell the property for $10,500 net to you?" This exception also is not argued by defendant in his brief and seems to lack merit because nothing appears in the record which makes the question pertinent or relative to the issues involved in the case.

EXCEPTION 4.

The following instruction to the jury was requested and the request denied; "The burden is on the plaintiff to prove that on or before Jan. 29th, 1921, the plaintiff tendered the performance by delivery or offer of delivery of a warranty deed of the plaintiff to the defendant." The charge of the presiding Justice is made part of the bill of exceptions. Therein the rules governing the burden of proof were fully and clearly given, and the overwhelming weight of authority sustains the proposition that a trial court is not required to give instructions, though proper and such as the party is entitled to, in the very terms asked for. 14 R. C. L., 804, and cases there cited.

EXCEPTIONS 5 and 6.

These exceptions relate to instructions requested and refused; (a) "The burden is on the plaintiff to show that if there was a waiver of strict performance, it was prior to Jan. 29, 1921." (b) "The plaintiff must show that he was able to deliver his warranty deed on or before January 29, 1921."

Exception 5 is not sustainable because the waiver would be equally effective if made on the 29th of January as it would if made prior to that date. Exception 6 is not sustainable because it is not in harmony with the law. In equity time is not regarded as of the essence of a contract like the one here involved unless expressly so declared or involved in the nature of it. *Hull* v. *Noble*, 40 Maine, 459; *Jones* v. *Robbins*, 29 Maine, 351; *Snowman* v. *Harford*, 55 Maine, 197. And while, at law, time is of the essence of such contracts, *Columbia Bank* v. *Hagner*, 1 Pet., 455, *Friess* v. *Rider*, 24 N. Y., 367, yet the requested instruction omits the qualification that the plaintiff was not required to be able to deliver his warranty deed at all if the defendant had signified that he would not accept it under any circumstances. Moreover, in the absence of anything in the agreement to that effect there is no law which requires that a vendor should have a good title, free from encumbrances, at the time when the agreement is entered into, and during the time between that and the arrival of the time when the agreement is to be performed. *Smith* v. *Greene*, 197 Mass., 16.

The defendant takes nothing by any of his exceptions and the mandate must be

Motion and exceptions overruled.

L. J. UPTON & COMPANY, Inc. *vs.* GEORGE M. COLBATH et al.

Aroostook. Opinion January 22, 1923.

It is reversible error to order a nonsuit where the question involved is as to whether there was a completed oral contract, being a question of fact for the jury, and where there is sufficient evidence supporting such contract to sustain a verdict for plaintiff, should one be so rendered by a jury, and also if there was a sufficient memorandum of such contract signed by the party to be charged to remove it from the statute of frauds.

In the instant case the question whether there was a completed oral contract between the parties rather than merely a preliminary negotiation looking forward and leading up to a written contract to be made and executed later, was one of fact for the jury.

There was sufficient evidence supporting the existence of such an oral contract to sustain a verdict for the plaintiff in case the jury so found.

If the jury found the existence of such an oral contract there was a sufficient memorandum of it signed by the party to be charged to take the contract out of the statute of frauds.

On exceptions by plaintiff. An action on the case to recover damages for breach of contract to deliver at Norfolk, Virginia, 5,000 barrels of potatoes at $6.75 per barrel. The plaintiff, a corporation, doing business at Norfolk, Virginia, on March 1, 1920, wired F. W. Higgins & Company of Boston, Mass., a potato brokerage firm, requesting a quotation on 10,000 barrels of potatoes, said brokerage firm having also an office at Fort Fairfield in Aroostook County, where at this time, F. W. Higgins a member of firm was, Edward P. Higgins another member of the firm being at the Boston office, and F. W. Higgins having been informed of the requested quotation of plaintiff, called by telephone, George M. Colbath, one of the defendants, and a member of the partnership doing business at Presque Isle, and had a conversation with him relative to the order from plaintiff, and plaintiff claims that by that conversation an agreement was made for the sale by defendants to plaintiff of 5,000 barrels of potatoes at $6.75 per barrel delivered at Norfolk, Virginia, between March 15 and April 15, and a deposit of $1.00 a barrel to be made by plaintiff on signing of the contract.

On the same day the broker drafted in duplicate a contract embracing the conditions and terms of the alleged telephone agreement and mailed it to defendants, and also wrote to plaintiff informing it of the alleged telephone agreement. Defendants returned the written contract to the broker without execution objecting to the description therein of the potatoes to be shipped, and the broker made a change covering the objection made by defendants, and drew a new contract in duplicate embracing the change made, and mailed it to defendants. Mr. Colbath before executing the new contract for the defendants interlined with a pen a clause covering inability to procure cars, and then mailed to plaintiff the typewritten contract signed by defendants, who on its receipt drew a pen through the interlineation made by defendants, and interlined with a pen a clause materially different, and then signed it, it being March 22, and sent the contract and a check for $5,000 to the broker at Boston to be given to defendants. On March 31 defendants wired plaintiff cancelling the contract and two days later returned the check. The defendants pleaded the general issue and under a brief statement set up the statute of frauds. At the close of the testimony by the plaintiff, counsel for the defendants moved for a nonsuit which was granted, and plaintiff excepted. Exceptions sustained.

The case is fully stated in the opinion.

Charles P. Barnes, for plaintiff.

Cook, Hutchinson & Pierce and Carl A. Weick, for defendants.

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

MORRILL, J., did not concur.

CORNISH, C. J. Action on the case to recover damages for breach of contract to deliver 5,000 barrels of potatoes at Norfolk, Virginia, at $6.75 per barrel. The case is before the Law Court on plaintiff's exceptions to the order of a nonsuit.

The sequence of events is as follows: Plaintiff corporation is engaged in the fruit and produce business at Norfolk, Virginia. Defendants are potato dealers in Aroostook County, Maine. Frederick W. Higgins is a member of the potato brokerage firm of F. W. Higgins & Company, located in Boston, Mass.

On March 1, 1920, Mr. Upton wired Higgins & Company for a quotation on 10,000 barrels of Aroostook potatoes. Mr. Edward Higgins, one of the firm, quoted a price on 5,000 barrels on that day, and Mr. Upton accepted it. Mr. F. W. Higgins was then in Fort Fairfield, Maine, and having been informed of the Upton order he had a telephone conversation with Mr. Colbath on the same day. This conversation as narrated by Mr. Higgins was as follows:

"I told Mr. Colbath that I had an order for several thousand barrels of potatoes for L. J. Upton & Company, and I asked him if he wanted to sell them 5,000 barrels for shipment to commence March 15 and end April 15, price to be $6.75 a barrel delivered at Norfolk, Virginia, and a deposit of one dollar a barrel at the signing of the contract and he said he would."

Thereupon Mr. Higgins sent the following letter to Upton & Company:

"Fort Fairfield, Me., March 1, 1920.

L. J. Upton & Co.,

Norfolk, Va.

Gentlemen:

Regarding the 5,000 barrels of white stock sold to you through our Boston office today, to be shipped by G. M. Colbath of Presque Isle, will say that we confirm same to you.

Mr. Colbath will be away until the last of this week and we are mailing contract to his office at Presque Isle to be signed by him and will be forwarded to you not later than next Monday. Mr. Colbath's partner is also away and there is a possibility of his returning by the middle of the week; if so he will sign contract and forward it at that time.

Very truly yours,

F. W. Higgins & Co."

On the same day and "immediately after the sale" Mr. Higgins drafted a memorandum of agreement in duplicate and mailed both copies that evening to Mr. Colbath. Mr. Colbath returned the

drafts as he objected to the designation of the potatoes as "U. S. Grade No. 1," and wished the word "merchantable" substituted therefor. Mr. Higgins then rewrote the document in duplicate, making the substitution requested, but changing no other terms, and sent them back to Mr. Colbath a few days later. This memorandum was in these terms as it left Mr. Higgins:

"Memorandum of Agreement made and entered into this first day of March, 1920, Colbath and Watson of Presque Isle, in the State of Maine, party of the first part, and L. J. Upton & Co. of Norfolk in the State of Virginia, party of the second part.

"Party of the first part does hereby sell and agree to deliver to party of the second part, five thousand (5,000) barrels of merchantable white potatoes for table stock, free from frost and disease, at the sum of six dollars and seventy-five cents ($6.75) per barrel delivered Norfolk, Virginia. If said Upton wants potatoes in sacks a charge of thirty (30) cents extra is to be paid for each sack.

"Party of the second part buys and agrees to accept said potatoes at the above stated price, same to be paid for in the manner following: One dollar ($1.00) per barrel as a deposit upon the signing of this contract, balance upon receipt of draft attached to bill of lading.

"It is further agreed that the deposit of $1.00 per barrel shall be equally applied against the number of barrels loaded in each car.

"Party of the first part is to ship said potatoes as follows: Shipment from March 15, 1920, to April 15, 1920, shippers option.

"Obligation of party of 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."

Mr. Colbath on receiving this new draft interlined with a pen after the word "embargoes" in the last paragraph, the words "inability to get cars to ship in during the life of this contract." He then signed one of the documents "Colbath and Watson, by G. M. Colbath," and mailed it to Upton and Company at Norfolk. On receiving it, Upton & Company ran a pen through the interlineation made by Mr. Colbath, and inserted another after the word "control" in the same paragraph, viz.: "or inability to get cars to ship in during the life of this contract in which event shipments are to be made as fast as possible thereafter as cars can be secured." Then

Upton & Company signed it and on the same day it was signed, March 22, they sent the memorandum with the check for $5,000 to Mr. Higgins in Boston to be given to Mr. Colbath. Mr. Higgins however returned it to Upton & Company and they then sent the memorandum and check on March 26, to Mr. Colbath. On March 31, Colbath from Boston wired plaintiff cancelling the contract, and on April 1, sent this letter of confirmation:

"DEAR SIRS:

Inclosed find your check returned. Wired you from Boston last night cancelling contract. Can't accept for reasons of changes you made and delay in receiving check.

Yours truly,

G. M. COLBATH."

By inadvertence the check was not enclosed but was sent on the following day, April second. This ended the transaction. No potatoes were shipped and this action was the result.

Two main questions are involved.

First, was a complete oral contract made between the parties on March 1, or was that merely a preliminary negotiation looking forward and leading up to a written contract to be made and executed later?

Second: If the oral contract was complete on March 1, is there a sufficient memorandum of it signed by the party to be charged to take it out of the Statute of Frauds?

I. The first question is one of fact, largely one of intention, to be determined under all the evidence and circumstances in the case. *Wharton* v. *Stoutenburg*, 35 N. J. Eq., 266; *Berman* v. *Rosenburg*, 115 Maine, 19. The second is one of law for the court. The question of fact was taken from the jury by the order of nonsuit. Was this ruling correct?

This court, in the leading case of *Mississippi and Dominion Steamship Co.* v. *Swift*, 86 Maine, 248, after a very extensive and analytical review of English and American authorities bearing on the subject

of the completeness or incompleteness of an oral contract in view of its subsequent reduction to writing, drew from them these governing principles:

"From all these expressions of Courts and jurists it is quite clear that, after all, the question is mainly one of intention. If the party sought to be charged intended to close a contract prior to the formal signing of a written draft, or if he signified such an intention to the other party, he will be bound by the contract actually made, though the signing of the written draft be omitted. If, on the other hand, such party neither had nor signified such an intention to close the contract until it was fully expressed in a written instrument and attested by signatures, then he will not be bound till the signatures are affixed. The expression of the idea may be attempted in other words: if the written draft is viewed by the parties merely as a convenient memorial or record of their previous contract, its absence does not affect the binding force of the contract; if, however, it is viewed as the consummation of the negotiation, there is no contract until the written draft is finally signed."

The opinion then goes on and suggests various circumstances and considerations as helpful in reaching a conclusion on the disputed point, viz.:

"In determining which view is entertained in any particular case, several circumstances may be helpful as: whether the contract is of that class which are usually found to be in writing; whether it is of such a nature as to need a formal writing for its full expression; whether it has few or many details; whether the amount involved is large or small; whether it is a common or unusual contract; whether the negotiations themselves indicate that a written draft is contemplated as the final conclusion of the negotiations. If a written draft is proposed, suggested or referred to during the negotiations, it is some evidence that the parties intended it to be the final closing of the contract."

The plaintiff contends that utilizing these suggested tests and considering the facts and circumstances in the case at bar, the contract between the parties was intended to be and was concluded when the conversation, already quoted, took place between Mr. Higgins and Mr. Colbath on March 1st; that their minds met then and there on all the essential elements of the trade, and that the subsequent written memorandum was looked upon by the parties

merely as "a convenient memorial or record of their previous contract." There are strong arguments in favor of this contention.

The oral contract did contain all the essential elements,—the names of the contracting parties, vendors and vendee; the goods to be sold, potatoes; the quantity, 5,000 barrels; the price, $6.75 per barrel; the place of delivery, Norfolk, Virginia; the time of delivery, from March 15 to April 15; the initial payment, one dollar per barrel; the time of making that initial payment, at the signing of the contract. What more was needed to constitute a full and complete agreement? Some minor details might be thought of later and inserted in a memorandum, but their omission or insertion could not affect the integrity of the contract already entered into. The law fixes no legal standard as to the minuteness of details required in a valid contract. The essentials must be agreed upon, and the plaintiffs claim that they were in this case. In answer to the question whether Mr. Colbath recited any conditions other than those mentioned Mr. Higgins replied that he did not. The conversation therefore as quoted constitutes the entire oral contract and it was sufficient at common law.

Now, applying seriatim the tests suggested in the Steamship Company case, the plaintiff insists that they should be resolved in its favor. It says that,

First, the contract is not of that class usually found to be in writing, but, as Mr. Upton testified, without contradiction, that it is the custom in Aroostook County to sell potatoes by telegraph or telephone, afterwards confirming the sale in writing.

Second, that the contract was not of such a nature as to require a formal writing for its expression, like that in the Steamship Company case which involved a voluminous correspondence continuing from November, 1889, to October, 1891, a period of nearly two years, and where the negotiations concerned the use of space on ocean steamers, of which the shippers were to have partial control, and in which they were to set up their own appliances and load and care for their own merchandise, and which contemplated not merely one area of space on a single steamer for a single voyage, but was to be for a year, and for different areas of space on three different steamers. Such complicated negotiations would naturally necessitate a long and carefully drafted written contract to protect the varied interests of the parties, as the court there held. Here the contract was an uncomplicated

trade for the sale and delivery of a certain quantity of a single kind of merchandise at a given price and at a stated time and place.

Third, that it comprised few details.

Fourth, that it is not an unusual contract but an ordinary and common one, such as is made very frequently in Aroostook County during the potato season.

Fifth, on the proposition whether the negotiations themselves indicate that a written draft was contemplated as the consummation of the contract, the plaintiff argues that nothing whatever was said in the course of the negotiations about a written document except in connection with the time of making the initial payment, and that while that mention constituted some evidence to the contrary, as the Steamship Company case holds, yet its weight under all the other circumstances was for the jury, and that the jury would have the right to find that the contract alluded to, that is, the written instrument to be signed, was to be merely the memorial of a previously concluded agreement. In support of that claim is the fact that the memorandum of agreement itself bears the very date, March 1st, when the conversation took place, and not the date many days after when it was actually signed. In the Steamship Company case the draft was prepared midway of the negotiations, bore date simply "Montreal 1890," and was never signed.

There is force in the contention that in this respect this case falls in line with those like *Bournewell* v. *Jenkins*, 8 Ch. Div., 70, cited in the Steamship Company case, where the defendants' agents offered certain premises for sale and the plaintiff wrote the agents making an offer of eight hundred pounds for the estate. The agents replied: "We are instructed to accept your offer of eight hundred pounds for these premises and have asked Mr. Jenkins' solicitor to prepare contract." The court held that the contract was concluded by the correspondence, and Thesiger, L. J., said: "The mere reference to a preparation of an agreement, by which the terms agreed upon would be put into a more formal shape, does not prevent the existence of a binding contract."

So much for the contentions of the plaintiff.

The defendants on the other hand strenuously urge that neither party had or manifested an intention to close the contract until it was fully expressed in a written instrument duly executed, and as the written instrument in this case is obviously invalid as a contract,

because the defendants executed it after making an interlineation to which the plaintiff would not agree, and the plaintiff signed it after striking out the defendants' interlineation, and inserting another to which the defendants would not agree, there is no subsisting contract either oral or written binding upon the parties.

In support of their claims as to intention, the defendants rely upon,

First, one of the suggested tests, the large amount involved, $33,750.

Second, upon another as to the necessity of further details not mentioned in the original conversation but incorporated in the written instrument, such as the kind and quality of potatoes, the provisions as to sacking, the time of paying the balance of the purchase price, as to unavoidable accidents, weather conditions, car shortage, and necessary extension of time of delivery caused thereby.

Third, upon the fact that the conversation bound only the defendants to sell, while the written agreement bound also the plaintiff to buy.

Such in brief are the contentions of the defendants on this preliminary question of whether the parties intended the trade between Higgins and Colbath to constitute the completed contract. These contentions are in sharp conflict and the issue was one of fact. As this court said in a recent case, "It is settled that the fact that parties negotiating a contract contemplate that a formal agreement shall be made and signed is some evidence that they do not intend to bind themselves until the agreement is reduced to writing and signed. But, nevertheless, it is always a question of fact, depending upon the circumstances of the particular case, whether the parties had not completed their negotiations and concluded a contract definitely complete in all its terms which they intended should be binding upon them and which for greater certainty or to answer some requirement of law they designed to have expressed in a formal written agreement." *Berman* v. *Rosenburg*, 115 Maine, 19, 25.

Unless, therefore, a verdict for the plaintiff could not stand the case should have been submitted to the jury to determine this controverted question of fact, unless further, even conceding the existence of a concluded oral contract there was no sufficient memorandum of it signed by the party to be charged, the defendants, to remove it from the ban of the Statute of Frauds.

II. This brings us to the second main issue, which is one of law. Granting that the jury find there was a concluded oral contract, was there a sufficient memorandum to satisfy the statute?

1. Obviously the letter of March 1 from Higgins to the plaintiff is entirely inadequate. It contains none of the essential elements of the contract except the quantity. The price, time of delivery and terms of payment are lacking. It does not profess to be more than a confirmation of the execution of the order given by the plaintiff to Higgins & Company by telephone. It cannot do duty as a sufficient memorandum. It is too meagre. *Thurlow* v. *Perry*, 107 Maine, 127.

2. But in our opinion the full memorandum drawn by Mr. Higgins on March 1 does meet the requirements and contains all the terms of the oral trade. True it covers them in amplified and formal language, but that is no objection. The fact that it also contains details not embraced in the contract itself does not destroy its force as a memorandum whether those additional provisions are agreed to or not. It may contain more than the original terms, provided the parties agree to them, but it cannot contain less. Oftentimes the memorandum in writing is gathered from correspondence between the parties, and the fact that the letters contain matters other than the terms of the oral agreement is immaterial. Its purpose is to express the terms of the original trade and is evidence by which that trade can be proved. *Bird* v. *Munroe*, 66 Maine, 337. The rights of the parties must be ascertained from the memorandum without resort to parol testimony. *Williams* v. *Robinson*, 73 Maine, 186. With all these requirements this memorandum complies. The vital inquiry is whether there exists a memorandum signed by the party to be charged containing the essential terms of the oral contract. This memorandum contains not only the essential terms but all the terms of the trade as orally agreed upon and is signed by the party to be charged, the defendants.

It must be borne in mind that we are not discussing the validity of the document as a written contract. It is admittedly invalid in that capacity. Nor are we here considering its evidentiary weight as showing that the parties contemplated a written contract to be made. That is a question for the jury under the first branch of this opinion which we have already discussed. We are examining it to ascertain whether it can serve as a sufficient memorandum assuming a contract has already been made, and in this capacity we think it is adequate.

The situation then is this. The order of nonsuit took from the jury a vital question of fact, on which there was a serious conflict of

evidence. Were the jury to decide that point in favor of the defendants then the legal question of the adequacy of the memorandum would not arise, and the defendants would be entitled to judgment. If the jury should decide the question of fact in favor of the plaintiff, then, as the memorandum is adequate, the plaintiff would be entitled to judgment so far as this point is concerned. Under these circumstances to withdraw the case from the jury on the question of fact was reversible error. The legal rights of the parties require the entry to be

Exceptions sustained.

NOTE. MORRILL, J. I am unable to concur in the opinion by the Chief Justice.

I agree that ordinarily the question whether in a given case there has been a completed oral contract between the parties, is for the determination of the jury. But in the present case a verdict for the plaintiff upon that issue could not, in my opinion, have been sustained.

The testimony of Mr. Higgins, relating his conversation with Mr. Colbath on March 1, clearly shows that it was the understanding of both that the agreement was not binding until reduced to writing, signed and the deposit of one dollar a barrel paid. I cannot see how any other construction of their words can be sustained; and the subsequent acts of Mr. Higgins, and the attempts of the parties to reach a satisfactory contract are consistent with such construction, and none other.

The cases cited by Judge Emery in *Steamship Company* v. *Swift*, 86 Maine, 248, illustrate the different phases of the general question, and several of them are directly in point here.

The burden of proof to show a completed oral contract is upon the plaintiff, and his case fails there, upon the testimony of Mr. Higgins and Mr. Upton. Neither undertakes to say that it was the intention that the telephone conversation between Mr. Higgins and Mr. Colbath should constitute a completed contract; it would have been competent for Mr. Higgins to so testify, if such were the fact. *Edwards* v. *Currier*, 43 Maine, 474. *Faxon* v. *Jones*, 176 Mass., 206, 209. *Rand et al.* v. *Michaud*, 122 Maine, 65. All outward manifestations of intention negative the contention that the telephone conversation was intended as a completed oral contract.

I think that the nonsuit was rightly ordered.

CARROLL PERKINS *vs.* ARCHIE ROWE AND LOGS.

Androscoggin. Opinion January 27, 1923.

A lien for labor on logs provided by R. S., Chap. 96, Sec. 47, is not destroyed by either selling or sawing the logs within sixty days, provided the identity of the lumber is traceable.

Manufacturing logs into lumber, the identity being traceable, does not defeat the laborer's lien provided by R. S., Chap. 96, Sec. 47.

Nothing in the statute either in its original or present form suggests a legislative intent to authorize the log owner to defeat the statutory lien either by selling or sawing the logs.

An action to enforce a lien for hauling logs under Chap. 96, Sec. 47 of the R. S., before the court upon an agreed statement of facts. The defendant, owner of a portable saw mill engaged in cutting and sawing lumber for Lucius M. Perkins and John Stevens in the town of Minot, engaged the plaintiff to haul with his team certain of the logs from where they were cut to the mill. Two other persons were hauling logs at the same time and the logs thus hauled by all of the parties were piled together in the mill yard and commingled and were manufactured into lumber.

The action was brought and attachment made after the logs were manufactured into lumber, but within sixty days after the last of those hauled by plaintiff arrived at the mill. The question involved was as to whether the manufacturing of the logs into lumber within sixty days after the last of those hauled by plaintiff were delivered at the mill, destroyed the statutory lien. The defendant consented to a default. Personal judgment against defendant Rowe and in rem judgment against the attached logs for seven hundred two dollars and seventy-five cents and interest from the date of the writ.

The case is stated in the opinion.

George C. Webber, for plaintiff.

Frank A. Morey, for Archie Rowe, principal defendant.

Harry A. Manser and Neal A. Donahue, for owners of the logs.

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

DEASY, J. The plaintiff was employed by the defendant Rowe to haul from woods to mill certain logs owned by the defendants, Perkins and Stevens. The logs hauled by the plaintiff were without his agency commingled at the mill with those hauled by other teams and, thus promiscuously mingled, were manufactured into lumber.

It is not disputed that the present action, a lien suit under R. S., Chap. 96, Sec. 47, was begun by attachment after the logs were manufactured, but within sixty days after the last of those hauled by the plaintiff arrived at the mill.

The statute omitting parts not here directly material is: "Whoever labors at . . . hauling . . . logs . . . has a lien on the logs; such liens continue for sixty days after the logs . . . arrive at the place of destination for sale or manufacture."

The commingling of the logs with those hauled from the same cutting by others did not defeat the lien. *Ouelette* v. *Pluff*, 93 Maine, 177. *Spofford* v. *True*, 33 Maine, 283. Indeed counsel for the defense do not by their brief so contend. The owners claim that the manufacture of the logs into boards or other lumber, though within sixty days destroyed the statutory lien. This position is not sound.

There is no reason why mere change of form, identity being readily traceable, should defeat the lien. It is not conceivable that the legislature after holding out to the laborer a promise of a sixty day lien on logs meant to permit the owner at his option to reduce the time limit to a few days or even hours.

But the intent of the Legislature is conclusively shown by the bracketing together of the words "manufacture" and "sale." If manufacturing the logs within sixty days will defeat the lien then a sale within that time will also destroy the lien. But this result would be clearly at variance with the purpose of the law.

The learned counsel for the owners invoke the original (1848) form of the lien law wherein the words "previous to being rafted" appear before the words "for sale or manufacture." It is said that the act in its original form expresses the legislative intent which was not modified when for brevity and simplicity the words "previous to being rafted" were omitted in the revision of the statutes. *Mitchell* v. *Page*, 107 Maine, 388.

Even so the omitted words served simply to identify the "place of destination" in case of river-driven logs (*Sheridan* v. *Ireland,* 66 Maine, 68) and to make it more apparent that no lien for labor upon manufactured lumber was intended to be created. *Mitchell* v. *Page,* supra.

Nothing in the act either in its original or present form suggests a legislative intent to authorize the log owner to defeat the statutory lien either by selling or sawing the logs.

Personal judgment against the defendant Rowe and in rem judgment against the attached logs for seven hundred two dollars and seventy-five cents and interest from the date of the writ.

OXFORD PAPER COMPANY, Petitioner for Mandamus

vs.

ARTHUR L. THAYER et als.

Cumberland. Opinion January 27, 1923.

Under the Workmen's Compensation Act, generally speaking, an employer, if he accepts as to any must accept as to all his employees in a given business, but by Sec. 4, Chap. 238, Public Laws, 1919, it is optional with an employer of loggers and drivers whether he is carrying on that business alone or in connection with his general business, to avail himself of the Act or not as he sees fit.

By Sec. 4, Chap. 238, Public Laws, 1919, "Cutting, hauling, rafting and driving of logs" are excluded from the provisions of Section 2 of the Act, and whether an employer carries on a logging or driving operation as his sole business or as a part of his general business, the provisions of Section 2 do not apply to that particular kind of work.

The language of Section 4 goes no further than to exclude loggers and drivers from the effect of Section 2, and does not exclude laborers in that business from

the benefit of the Act if their employers see fit to include them. It is optional with employers of loggers and drivers to avail themselves of the Act or not as they see fit.

The petitioner's written assent in this case included pulp and paper manufacturing and excluded cutting, hauling, rafting and driving logs. The assent and policy being in proper form it was the duty of the Industrial Accident Commission to issue the required certificate.

On report. A petition for mandamus by the Oxford Paper Company to compel the Industrial Accident Commission to issue to it a certificate as an assenting employer. In its application and policy filed by petitioner with the Commission the kind of business was described as "Pulp and Paper Manufacturing excluding cutting, hauling, rafting and driving logs." The Commission refused to issue a certificate to the Oxford Paper Company as an assenting employer contending that it had no right to exclude cutting, hauling, rafting and driving logs in its assent and insurance policy. By agreement of the parties the cause was reported to the Law Court. Petition granted. Peremptory writ of mandamus to issue as prayed for.

The case is fully stated in the opinion.

Leon V. Walker, for petitioner.

Arthur L. Thayer, for Industrial Accident Commission.

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

CORNISH, C. J. The Oxford Paper Company for the purpose of becoming an assenting employer under the Workmen's Compensation Act, filed with the Industrial Accident Commission a written assent and a copy of an Industrial Accident Policy as required by the Act. The written assent specified the location of the business to be "Rumford, Oxford County, Maine," and the kind of business included in the assent to be "Pulp and paper manufacturing, excluding cutting, hauling, rafting and driving logs." The insurance policy contains a similar provision: "This employer is conducting no other business operations at this or any other location not herein disclosed . . . . excepting cutting, hauling, rafting and driving of logs which are excluded from the operation of this policy."

The Commission refused to issue a certificate to the petitioner as an assenting employer on the ground that the company had no right

to exclude cutting, hauling, rafting and driving logs in its assent and policy. The Paper Company therefore brought this petition for a writ of mandamus against the Commission and the cause is before this court on report. The single question is whether under the provisions of the Workmen's Compensation Act the petitioner is entitled to its certificate as an assenting employer with the exceptions contained in the application and policy.

The grounds upon which the Commission refuse to issue the certificate are: First, that an employer carrying on a given business must accept the provisions of the Workmen's Compensation Act as to his entire business if he would accept them at all, that he cannot accept as to a part of his employees and decline as to the others. Second, that so far as this petitioner is concerned, the cutting, hauling, rafting and driving logs is a part of its business as a manufacturer of pulp and paper, and therefore it follows, Third, that this branch cannot be excepted from its assent and certificate.

The petitioner while conceding as a general rule the soundness of the major premise that an employer, generally speaking, if he accepts as to any must accept as to all his employees in a given business, and cannot be allowed to accept as to a part only, yet it strenuously contends that even conceding that as a matter of business management and of bookkeeping, its woods department is carried on as a branch of its general manufacturing, yet that branch is excluded by Section 4 from the provisions of Section 2 of the Act, and that whether an employer carries on a logging or driving operation as his sole business or as a part of his general business, still the provisions of Section 2 do not apply to that particular kind of work. This fairly states the contentions between the parties, and we are of opinion that the construction placed upon the statute by the petitioner is the reasonable and proper one. Public Laws, 1919, Chap. 238, Sec. 2, provides in substance that in an action of tort to recover damages for personal injuries or for death resulting from personal injuries sustained by an employee in the course of his employment, the three common law defenses of contributory negligence, negligence of a fellow servant and assumption of risk cannot be set up. Section 3 provides that Section 2 shall not apply to employers of five or less workmen employed regularly in the same business. The practical effect of these two provisions therefore is that employers of more than five are generally led to accept the terms of the Act from a sense of

self protection. They cannot afford to run the risk of actions for injuries or death, when they are deprived of the three usual defenses.

Section 3 contains this further provision: "At the time of electing to become subject to the provisions of this Act, if engaged in more than one kind of business, he shall specify the business or businesses in which he is engaged and concerning which he desires to come under the provisions hereof."

This paragraph admittedly gives an employer who is carrying on two or more distinct kinds of business the right to choose in which he will come under the Workmen's Compensation Act and in which he will not. If for instance an employer is engaged in the manufacture of boots and shoes and also is carrying on the manufacture of cotton goods, two clearly distinct kinds of business, he can elect which business he desires to place under the Act in case he does not desire both. Then follows Section 4, which reads: "The provisions of section two shall not apply to actions to recover damages for personal injuries or for death resulting from personal injuries sustained by employees engaged in domestic service or agriculture or in the work of cutting, hauling, rafting or driving logs."

It would seem from a study of the Act that this provision as to logging and driving must have been adopted by way of amendment after the preparation of the general bill and without a clear comprehension of the underlying principles and purposes of the act as an entirety. As originally enacted (R. S., Chap. 50, Sec. 4) it read: "The provisions of this act shall not apply to actions to recover damages for personal injuries . . . . sustained by employees engaged in domestic service or agriculture, or in the work of cutting, hauling, rafting or driving logs." In that form it was an apparent effort to take employees in logging and driving operations entirely out of the statute, the same as domestic servants, farm hands, casual and municipal employees were excepted by Subsection II of Section 1.

However, in the revision and reenactment of 1919, Chap. 238, Sec. 4 was changed so as to read, the "provisions of section 2" instead of the provisions of the entire Act as in the original statute, shall not apply to domestic servants, farm laborers, loggers and drivers, &c. This language goes no further than the exclusion of loggers and drivers from the effect of Section 2. It does not exclude those laborers from the benefit of the Act if their employers see fit to include them. In other words, the scope of the entire Act, whose purpose is the

benefit of employees, is restricted by Subsection II of Section 1, defining the term "employee" and creating certain exceptions. Loggers and drivers are not among the exceptions, therefore so far as that subsection is concerned they are left within the act. But Section 4 says that the provisions of Section 2, which takes away the three usual defenses, shall not apply to loggers and drivers, any more than it does to domestic servants and farm hands. The result is, although reached in a very cumbersome and awkward manner, that it is optional with employers of loggers and drivers to avail themselves of the Act or not as they see fit. If they do avail themselves of it, then their employees enjoy its benefits. If they do not avail themselves of it and suit is brought against them for personal injuries, the ordinary defenses of contributory negligence, negligence of a fellow servant, and assumption of risk are still open to the employer. The employer of loggers and drivers therefore is not forced into accepting the Act, and for this reason he may except this class if he desires to do so when he accepts the Act as to his general manufacturing business. It can make no difference whether the employer of loggers and drivers is carrying on that business alone or in connection with a general lumber or pulp and paper manufacturing business; he is not compelled to accept the Act as to the logging and driving.

Coming then to the concrete case before us, it was in conformity with both the letter and the spirit of the Workmen's Compensation Act under Public Laws, 1919, Chapter 238, that the petitioner's written assent in this case included "pulp and paper manufacturing" and excluded "cutting, hauling, rafting and driving logs." *Fournier's Case*, 120 Maine, 191; *Berry* v. *Donovan*, 120 Maine at 459; *Michaud's Case*, 121 Maine, 537. The assent and policy being in proper form it was the duty of the Commission to issue the required certificate, Public Laws, 1919, Chap. 238, Sec. 6, Par. III. Mandamus may compel the performance of this duty. *Furbush* v. *County Commissioners*, 93 Maine, 117.

The mandate is,

Petition granted.
Peremptory writ of Mandamus
to issue as prayed for.

JOSEPH HUARD et als. *vs.* STEPHEN J. HEGARTY et als.

Kennebec. Opinion February 8, 1923.

A, a partner with B, devised and bequeathed to B all his interest in the partnership property, provided B should pay to the wife of A seven thousand dollars. The wife of A died before the testator, neither leaving descendants. Such circumstances created neither a condition precedent, nor subsequent, nor a charge upon the devise, but did create a devise with a payment of said sum as an exception therefrom.

Under the circumstances presented by this case the clause of the will in question did not create either a condition precedent or subsequent, or a charge upon the devise, but a devise with the payment to the wife as an exception therefrom.

The lapsing of the legacy by the death of the wife does not enure to the benefit of the devisee for the reason that he never had the complete gift of the whole estate.

The devisee must pay the stipulated sum to the party or parties entitled to receive it, which in this case are the heirs of the testator.

The land on which the stable mentioned in the devise to Pomerleau stands, passes with the devise, it being apparent that the testator intended to give to his partner all his interest in the partnership property; and as the will speaks from the death of the testator, any increased value in the partnership property, whether by the addition of buildings or ordinary appreciation, must be also held to pass to the devisee named.

On report. A bill in equity seeking the construction and interpretation of the will of Richard Huard, executed August 24, 1910, under the "First" clause of which he bequeathed and devised to Joseph Pomerleau, his partner in a grocery business, all of his interest in the partnership business, provided he paid to his wife seven thousand dollars, one thousand dollars at his decease, and one thousand dollars annually thereafter for six years. The wife of the testator died before he did.

The question at issue was as to whether under the circumstances of the situation there was created a condition precedent, or subsequent, or a charge upon the property devised and bequeathed to Pomerleau, as to the payment of the seven thousand dollars to the

wife of the testator, or whether the payment of the sum to the wife was in effect intended as an exception from the devise; and as to whether such legacy having lapsed by the death of the wife of testator before his death descends to the heirs of testator. The cause was heard upon the bill, answer, replication, and proof, and reported to the Law Court for final judgment based upon the rights of the parties in law and fact. Decree in accordance with opinion. Reasonable counsel fees to be fixed by the court below may be allowed out of the estate.

The case is fully stated in the opinion.

Benedict F. Maher, for plaintiffs.

Beane & Beane, for Joseph Pomerleau and Stephen J. Hegarty.

H. E. Holmes, for Patrick F. Tremblay.

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

WILSON, J. Upon a report, a construction of the last will and testament of one Richard Huard is sought, which, after providing for the payment of his debts and funeral charges and expenses of administration, disposed of his estate as follows:

"First, I give, bequeath and devise to Joseph Pomerleau, his heirs and assigns, my undivided half interest in the stock of goods in stores Nos. 35 Water Street and 11 Franklin Street in said Augusta, my undivided half interest in all book accounts in stores, and my interest in cash in the bank in the firm's name, notes and all bills receivable, also teams, horses and outfit, utensils and fixtures now owned by Pomerleau & Huard." Then followed a description of certain parcels of real estate owned in common by the testator and his partner, the said Pomerleau, one item of which, a stable, was erroneously, and inadvertently no doubt, described as located on land belonging to the testator, when as a matter of fact the land on which it stood was partnership property and owned in common. Following the description of the property so bequeathed and devised and as a part of the same paragraph it is further provided: "Said property to go to said Joseph Pomerleau upon his paying the sum of seven thousand (7000) dollars to my beloved wife, Mithaidi Huard; said payments to be made by the said Pomerleau $1000.00 at my decease; and $1000.00 each year without interest and not otherwise."

"Second, I give, bequeath and devise to my beloved wife Mithaidi Huard all the remainder of my property, real, personal and mixed wherever found or however situated to her, her heirs and assigns forever."

The will was executed in 1910. The active business partnership between said Pomerleau and the testator was dissolved in 1918. Mithaidi Huard, the wife, predeceased the testator in 1920, and the testator died in 1921, the result of an accident.

Conditions since the drafting of the will have materially changed. A building has been erected out of partnership funds on one lot of land, greatly adding to its value. The stock, fixtures and teams formerly used in conducting the partnership business have been sold and the proceeds divided between the partners; and the various parcels of real estate belonging to the partnership have appreciated in value so that the testator's share of the real estate with the added improvements is now appraised at approximately thirteen thousand dollars, and constitutes nearly one half of the testator's estate.

Under any construction the court adopts it might be urged that some injustice will result, but the court cannot draft wills anew to fit changed conditions. That can only be done by the testator.

The provision of the will which this court is asked to construe provides that the testator's undivided one half part of all the partnership property shall go to his former copartner, Joseph Pomerleau, "upon his paying the sum of seven thousand dollars to my beloved wife, Mithaidi Huard," etc.

The main question submitted to the court is, whether this clause creates a condition precedent, or a condition subsequent; a devise of the property in question charged with a legacy to the wife, or whether the payment of the sum to the wife was in effect intended as an exception from the devise.

With nothing in the case to indicate any other than confidential business relations between him and his copartner, the testator gives to his partner, Pomerleau, his entire one half interest in the partnership assets upon condition that Pomerleau pay the sum of seven thousand dollars to the testator's wife, to whom the testator also gives all the residue of his estate with no provisions over in case she did not survive him, there being no children.

The inference is strong, we think, from the facts shown in the case that this provision as to the disposition of the partnership property was the result of a prearrangement between the partners for the

settlement of the partnership affairs in case of death, and that seven thousand dollars was the value placed upon the testator's share in the partnership assets at that time.

The facts in the light of the surrounding circumstances do not, we think, warrant the conclusion that it was the intent of the testator that the estate devised to the copartner should not vest until and unless the condition of the payment of the sum stipulated was fully complied with. On the contrary it seems clear that it was intended that he should take and enjoy the property pending the payments to the wife which were to extend over a period of years. Such a provision, if creating a condition, is generally held to be indicative of a condition subsequent. *Leighton* v. *Leighton*, 58 Maine, 63, 69; *Stark* v. *Smiley*, 25 Maine, 201; *Morse* v. *Hayden*, 82 Maine, 227.

But we do not think it should be construed as a devise upon a condition, either precedent or subsequent, or as a devise charged with a legacy to the wife; but rather as a devise with the payment to the wife as an exception therefrom.

As between a condition subsequent and a charge upon the devise to Pomerleau, the payments to the wife should undoubtedly be construed as a charge upon the devise. *Whitehouse* v. *Cargill*, 86 Maine, 60; *Merrill* v. *Bickford*, 65 Maine, 118; but as between a charge upon the land and an exception from the devise to Pomerleau the latter is far more consonant with what the circumstances and relations of the parties and the other provisions of the will indicate must have been the intent of the testator, which is always the guiding star in the construction of wills.

That there is a distinction recognized by the authorities between legacies which are a charge upon a devise and legacies which are exceptions from the devise does not admit of question. Jarman on Wills, *347; 40 Cyc., 1956; 18 Am. & Eng. Enc. of Law, 2d Ed., 766, 767; *Hillis* v. *Hillis*, 16 Hun., 76; Re Smith's Est., 11 N. Y., Suppl., 783; *Ward* v. *Stannard*, 81 N. Y. Suppl., 906; *Macknet's Exrs.* v. *Macknet*, 24 N. J. Eq., 277; 291; Re Cooper Trusts, 4 Deg. M. & G. Rep., 756, 766; *Cook* v. *The Stationer's Co.*, 3 Myl. & K., 262.

The distinction, however, is not always easy to draw, and the authorities give but little aid in this respect. Nor are the cases numerous or recent where the question has been raised and considered. There is no special form or language by which an exception is created as distinugished from a charge. It is wholly a question of intent.

In one case the court gave as the true test: "Did the testator mean to give that property minus the thing in question, or is it a charge upon the devised property?"

In another: "It was not his plan to except out a certain part of the value from the devise to the residuary legatee. That is, the intention of the testator was not directed to the diminution of the residuum by taking a certain value from it, but it was directed to the making of the legacy secure for the wife." In which case it was held to constitute a charge upon the residuum instead of an exception from it.

All of which, however, furnishes little light except to emphasize the point that it is entirely a question of intent to be drawn from the circumstances and the relations of the parties and the four corners of the will itself.

The case at bar does not present a situation where there are no other funds out of which provision can be made for the legatee, and it is made a charge upon a devise to ensure its payment; or where the devisee is one whose relation to the testator is such as to furnish grounds for a presumption that if the legacy lapsed it must have been the intent of the testator that the devisee was to take the devise free of the charge. On the other hand it seems clear that the sum fixed to be paid was in the nature of a consideration for the devise, which sum the testator directed should be paid to his wife who, of his family, was the sole beneficiary under the will.

Were not this sum directed to be paid in instalments over a period of years we think it might well be construed under the circumstances presented by this case as a condition precedent. *Acherly* v. *Vernon*, Willes Rep., 153, 157-158; but inasmuch as the testator by providing for the payment of the stipulated sum over a period of years apparently intended the property to immediately pass to the devisee, since he made no other provision pending the payments, the only way, in which what we conceive to have been the intent of the testator can be carried out, is to treat the payment to the wife in effect as an exception from the devise to his partner.

If it were construed as a charge upon the devise, upon the legacy lapsing by the death of the wife before the testator, the charge would unquestionably sink into the devise and the devisee take it free of the charge. But, construed as an exception, the lapsing of the legacy

will not inure to the benefit of the devisee for the reason that he never had the complete gift of the whole estate. *Ward* v. *Stannard*, 81 N. Y., Supp., 906, 909.

There are not sufficient grounds in the case at bar to warrant the inference that the testator intended an absolute gift of all his partnership assets to his business partner in case his wife did not survive him. On the contrary we think it reasonably certain that he must have intended that out of the devise and in consideration thereof there should be paid to the beneficiary named, or in the event she did not survive him, to his heirs, the sum of seven thousand dollars.

The devisee must, therefore, pay the stipulated sum to party or parties entitled to receive it. If it passes by will, to the executors or administrators c. t. a., otherwise to the heirs as intestate property. In re *Smith Est.*, 11 N. Y., Suppl., 783, 784.

Inasmuch as in the case at bar the heirs are numerous and all the residue of the estate must also be distributed as intestate property, owing to the death of the residuary legatee before vesting, the sum named to be paid may for convenience be paid to the administrators c. t. a. to be distributed with the residue of the estate among the heirs.

With reference to the stable and the land upon which it stands, it appearing that it was the intent of the testator to give to his copartner his entire share of the partnership assets upon the conditions set forth above and that the land on which the stable stood was in fact a part of the partnership property and held by them in common, we think his interest in both the building and land passed to the devisee.

As to any increase in the value of the real estate either by improvements or appreciation it must be held to pass under the devise. *Hoitt* v. *Hoitt*, 63 N. H., 475; *Warner* v. *Beach*, 4 Gray, 162; *Havens* v. *Havens*, 1 Sand. ch. (N. Y.), 324. A will always speaks from the death of the testator. *Union, etc., Co.* v. *Dudley*, 104 Maine, 297.

Decree in accordance with the opinion. Reasonable counsel fees, to be fixed by the court below, may be allowed out of the estate.

FRANK A. MOREY, EXR., In Equity *vs.* MARY P. HAGGERTY et als.

Androscoggin. Opinion February 9, 1923.

Title to personal property may be acquired by long continued possession of such a character as to bar remedies for recovery, provided such possession is not permissive.

Possession of personal property so long continued and of such quality and character as to bar remedies for recovery, in effect gives title.

It must appear however, to have this effect that the possession was other than permissive. Merely permissive possession, however long continued will not give title nor bar remedies.

On appeal. A bill in equity brought by plaintiff as the executor of the will of Mary E. Callaghan, late of Lewiston, deceased, to determine the title to six bonds of the city of Lewiston. On January 14, 1911, testatrix gave and delivered to her niece, then Pearl McPhilemy, but afterwards, Mary P. Haggerty, one of the defendants, the bonds in question, and signed a written statement to that effect, and at the same time made her will, in which she named the other defendants as residuary legatees. For two years Mary P. Haggerty retained possession of the bonds and kept them in a safe deposit box rented by her. In about two years testatrix recovered from her illness and the bonds were transferred from the box rented by Mary P. Haggerty to a box rented by testatrix who retained the possession of the bonds, clipping the coupons therefrom, for about nine years until her death. The questions involved were as to whether there was a gift "inter vivos" or "causa mortis," and if a gift inter vivos, as to whether testatrix had regained title by possession. Upon a hearing the sitting Justice found that there was an absolute gift of the bonds inter vivos to Mary P. Haggerty, and the residuary legatees appealed. Appeal dismissed. Decree affirmed.

The case is stated in the opinion.

Frank A. Morey, for plaintiff.

Clifford & Clifford, for Mary P. Haggerty.

Frank T. Powers and Michael J. Jordan, for the residuary legatees.

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

DEASY, J. In 1911 the testatrix Mary E. Callaghan gave certain bonds to her niece Pearl McPhilemy, now Mary P. Haggerty. Before the Justice hearing the case it was strenuously urged that this was a gift causa mortis, therefore revocable, and later revoked. The Justice found that "Mrs. Callaghan made an absolute gift of the bonds inter vivos to Miss McPhilemy on Jan. 14, 1911." This finding is presumably right and is supported by the testimony.

The only other question is as to whether Mrs. Callaghan, having given the bonds away irrevocably, ever regained title to them.

It is contended that Mrs. Callaghan had possession of the bonds at the time of her decease and had kept exclusive possession of them for so long a time and under such circumstances as to bar any legal action to recover from her either the bonds or their value. Such bar it is said in effect gives title recognized and protected both in law and equity.

The principle thus contended for is well grounded in reason and authority. Possession of personal property so long continued and of such quality and character as to bar remedies for recovery, in effect gives title.

"The weight of authority is in favor of the proposition that, where one has had the peaceable, undisturbed, open possession of real or personal property, with an assertion of his ownership, for the period which, under the law, would bar an action for its recovery by the real owner, the former has acquired a good title." *Campbell* v. *Holt*, 115 U. S., 620, 29 L. Ed., 483.

"Where the statute would be a bar to a direct proceeding by the original owner, it cannot be defeated by indirection within the jurisdiction where it is law. If he cannot replevy, he cannot take with his own hand. A title which will not sustain a declaration will not sustain a plea." *Chapin* v. *Freeland*, 142 Mass., 383.

"It is well settled that the title to personal property may be lost or gained by six years adverse possession." *Merrill* v. *Bullard*, (Vt.), 8 Atl., 157. R. S., Chap. 86, Sec. 85.

But to have this effect it must affirmatively appear that the possession was other than permissive. Merely permissive possession however long continued will not give title nor bar remedies. In this essential particular the evidence fails to sustain the contention.

It indeed appears that Mrs. Callaghan had possession of the bonds for several years immediately preceding her death. They were kept in her own safety deposit box. She alone went to the box. She cut the coupons or had them cut. But all this may have been by Mrs. Haggerty's consent. The coupons may have been collected for her benefit. The burden was upon the parties representing the estate of Mrs. Callaghan to prove not merely long continued possession, but such possession as bars remedies and gives title. To determine otherwise would be to hold that any agent who for more than six years has possession of his principal's bonds, cutting and collecting the coupons, may by showing such facts, make out prima facie title as against his principal.

Appeal dismissed.
Decree affirmed.

AUSTIN W. JONES COMPANY *vs.* THE STATE OF MAINE.

Penobscot. Opinion February 9, 1923.

While a State is not responsible for the malfeasance, or wrongs, or negligence, or omissions of duty of its subordinate officers or agents employed in the public service, it may by legislative enactment, remove such immunity, by laying aside the protection furnished by the common law, and become subject to the same liabilities as though it were an individual.

In the instant case the negligence of the superintendent of the hospital, the lack of negligence on the part of the plaintiff and the causal relation between the negligence of the superintendent and the damages sustained by the plaintiff, were all questions of fact which were determined by the jury, after a full, fair and impartial trial, and the findings of the jury are not so manifestly wrong or the result of bias or prejudice as to warrant the interference of the court by granting a new trial.

It appears from examination of the testimony that the verdict included damages for loss of prospective value of the young stock by reason of the destruction of the older members of the herd, which if allowed to live would by dairy record or record of progeniture enhance the value of the younger stock, which damages are speculative in their nature and not recoverable.

On exceptions and motion for a new trial. An action brought by plaintiff corporation against the State of Maine under the authority of a Special Resolve passed by the Legislature of this State in which the plaintiff was authorized to bring suit. The State maintains at Bangor, a hospital for the insane. On April 25, 1920, one George Stanchfield, an inmate, having been duly committed on February 15, 1920, was temporarily allowed his liberty by authority of the superintendent of the institution, and given into the charge of his mother with whom he remained until May 9, 1920, when it was alleged he set fire to the buildings of the plaintiff corporation resulting in great damage.

The case was tried to a jury and a verdict of $23,650.00 for plaintiff was rendered. The defendant filed a general motion for a new trial, and also took exceptions concerning the introduction and exclusion of certain testimony, and also excepted to the refusal of the presiding Justice to give requested instructions. Exceptions overruled. If plaintiff, within thirty days after receipt of rescript, remits $5000 from the verdict, then motion overruled, otherwise, motion sustained and new trial granted.

The case is fully stated in the opinion.

William R. Pattangall and Benjamin W. Blanchard, for plaintiff.

Ransford W. Shaw, Attorney General and William H. Fisher, Deputy Attorney General, for defendant.

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

PHILBROOK, J. On the ninth day of May, A. D., 1920, certain buildings and personal property owned by the plaintiff corporation were destroyed by fire. It claimed that the fire was kindled by one George Stanchfield, who was formerly a patient at the Bangor State Hospital, an institution operated, maintained and supported as an asylum for the care, custody and treatment of insane persons. According to the record it is admitted that the defendant owns and operates the hospital; that it is an institution for the care of the insane; that Dr. Carl J. Hedin is superintendent of the hospital; that he is employed by the State; and that he has general supervision of the inmates therein. Plaintiff further claimed that on the fifteenth day of February, A. D., 1920, Stanchfield was duly committed to said

hospital and accepted into the custody thereof; that at the time of commitment he was suffering from a mental disease known as dementia praecox, paranoid type; that on April 25th, A. D., 1920, he was temporarily allowed his liberty by Dr. Hedin; that at the time when he was allowed his liberty he was still insane, a fact well known by Dr. Hedin, and was a dangerous man, not safe to be at large or to be allowed temporary liberty; that when allowed liberty he was given into the care and custody of one Bessie M. Stanchfield who was not a suitable and proper person to have the care and custody of said George Stanchfield, a fact which Dr. Hedin knew or by the exercise of ordinary prudence should have known.

The plaintiff alleges, as we have said, that the fire which destroyed its property was kindled by Stanchfield and charges "that said defendant was, on the twenty-fifth day of April, A. D., 1920, grossly careless and negligent in permitting said George Stanchfield to be temporarily at large," and further avers "that by, through and because of the gross carelessness and negligence of the defendant, as aforesaid," it suffered the loss sustained by the destructive fire.

The plaintiff further avers that this action is brought against the defendant in accordance with a legislative resolve authorizing the same.

Trial by jury in the Superior Court of Penobscot County resulted in a verdict for the plaintiff in the sum of twenty-three thousand, six hundred fifty dollars. The case is before us upon exceptions and upon a general motion for a new trial based upon the customary grounds.

It is not necessary to rehearse in full the resolve authorizing this suit. The important provision therein contained, so far as the main contention in the bill of exceptions is concerned, is thus expressed: "The liabilities of the parties shall be the same as the liabilities between individuals."

THE EXCEPTIONS.

The exceptions contained in the bill are six in number, but in argument the State's counsel frankly says that the exception relied upon is to the refusal of the court to give the following instruction: "The Court is requested to instruct the jury that notwithstanding the language of the resolve by authority of which this suit is brought, the State, as a matter of law, is not liable for the negligence or want

of care of its officials or employees." The other five exceptions are not referred to in the brief for the State and we shall consider them as abandoned.

In support of its exception the State cites several cases. The first is *Ray County* v. *Bentley et al.*, 49 Missouri, 236. In that case a County Court, charged with the duties of administering certain school funds, made an erroneous order growing out of the sale of property which had been mortgaged to the county to secure a loan of a portion of the fund. The court pointed out that the school lands were vested in the State in trust for the benefit of the inhabitants of the townships in which they were respectively situated; that the State vested the management of this trust in the County Courts; that those courts were the agents of the State for that purpose; that the State was not affected by the laches of her agents; that, as in the case of a corporation, where the acts or omissions from which injury results, are done or omitted in the exercise of a corporate franchise conferred upon the corporation for the public good, and not for private corporate aid, the corporation is not liable for the consequences of such acts or omissions on the part of its officers and servants; that the County Courts were intrusted with the management and care of the school fund for public good, and not for any private gain that would accrue either to them or to the counties. And the court closed its opinion with the following words, which are quoted in the brief for the defendant and relied upon by it: "The State can only act through her officers, and great losses would result if it should be maintained that she was liable for the negligence or omissions of those to whom she is compelled to confide the management of her pecuniary concerns." The quotation just made approaches dictum, as to that case, for the essential question which there required determination was whether that County Court possessed the power, at public sale, to buy in the land in the name of, and for the use of, a county. The opinion holds that the County Court had no power to purchase the land, or hold the same, unless that power was given it by statute, which power did not exist, and hence where the sale complained of was for an insufficient sum the county had the right to maintain an action to recover the balance due on the mortgage. The liability of the State to a private individual, on either contract or tort, as in the case at bar, did not form an element of that case and we cannot consider it applicable to the present contention.

Chapman v. *State*, 104 Cal., 690, reported in 43 Am. St. Rep., 158, is a case where the State of California, owning certain public wharves in the city of San Francisco, in consideration of wharfage and dockage charges, paid to the State Board of Harbor Commissioners, received upon one of its public wharves a certain quantity of coal. A portion of the wharf broke and gave way whereby the coal was sunk and became a total loss. In that State a general statute obtains, the first section of which provides; "All persons who have, or shall hereafter have, claims on contract or for negligence against the State, not allowed by the State board of examiners, are hereby authorized, on the terms and conditions herein contained, to bring suit thereon against the State in any of the courts of this State of competent jurisdiction and prosecute the same to final judgment." The court there declared the law to be well settled that, in the absence of a statute voluntarily assuming such liability, the State is not liable in damages for the negligent acts of its officers while engaged in discharging ordinary official duties pertaining to the administration of the government, but pointed out the fact that the State had entered into the business of a wharfinger, a business apart from its ordinary official duties pertaining to the administration of government, and that therefore the State was bound by its contract as a wharfinger to the same extent as a private person engaged in a like business would be. Under that situation, and by virtue of the statute just quoted, the demurrer to the declaration was overruled and the case stood for trial. The court was there called upon to determine whether the State was liable for the negligence of its servants engaged in a business other than that of discharging ordinary, official duties pertaining to the administration of government, and while doing so held fast to the doctrine of non-liability of the State for the negligent acts of its officers while they were engaged in discharging ordinary, official duties; but even then pointed out that under an enabling statute the State might be so liable. Here again it should be observed, not only that the broad terms of the enabling act, in the case at bar, distinguishes it from the California case, as to principles of liability, but also agrees with the latter when an enabling act presents a different condition.

Wilson v. *Simmons*, 89 Maine, 242, is a case where a street commissioner was sued in trespass for removing certain trees, digging up the soil, and other trespasses in front of the plaintiff's house. The

court there discussed a large number of legal questions involved in that case, but the learned counsel in his argument has failed to indicate to us any question there discussed which is applicable to the case at bar and we are unable to discover any.

Clark v. *The State et al.*, 7 Coldwell (Tenn.), 306, decided in 1869, is a case arising under a statute authorizing the organization of banks under what was known as The Free Banking Law. The bank so organized was required to deposit a certain amount of bonds with the State Comptroller, and thereupon the bank received from the Comptroller an equal amount of circulating notes, the bonds being held for the payment of the notes. At no time were the circulating notes to exceed the value of the bonds. "The business of the Comptroller's office was, for a long time, conducted with utter blundering incompetency and carelessness," said the court, and finally, by disappearance of some of the bonds and an increase of issue of circulating notes, the latter far exceeded the amount of the bonds. Suit was brought against the State charging it with responsibility for the default of the Comptroller, and demanding that it should redeem the circulating notes. The constitution of that State provides that writs may be brought against the State in such manner and in such courts as the Legislature may direct, and the Code provides that "actions may be instituted against the State under the same rules and regulations that govern actions between private persons." Concerning the law governing the case the court said: "The constitutional and statutory provisions provide a remedy for any existing cause of action, but do not change the relation between the State and the citizen so as to create any liability or responsibility on the part of the State. The relation of the State to the citizen is not one of contract, which implies an undertaking, upon good consideration, on the part of the State, that all the functions of government shall be duly performed, or that it will employ none but capable and faithful servants. If an officer or agent of the State, in violation of law, commits an act to the injury of the citizen, it is an act beyond the scope of his agency, unauthorized by his principal, and the State is not liable therefor to the party injured." The court then proceeds to point out that the law in that case provides for the creation of the trust fund and directs the mode of its administration, but declares that this does not constitute the State itself as the trustee, and subject itself to all the liabilities and responsibilities attaching to that

character. Further quoting, "The State has provided by law that certain tribunals or officers shall be the custodians of the funds in question, but this does not render the State liable as trustee, bailee, or agent. Hence, it follows that, though where the statute gives the remedy, the State may be sued upon its contracts with its citizens, such a statute merely gives a remedy, but does not create any new liability, and does not, without more, render the State liable to an action for the negligence or the torts of its officers and agents. The State is therefore not liable to the complainants for the loss of the securities deposited in this case, or for the wrongful over-issue by the officers of the State of circulating notes, if such over-issue occurred, unless it had made an undertaking to that effect." The liability of the State upon contract or tort is thus clearly set forth, and the liability is plainly declared when the State enters or does not enter into an undertaking which would create such liability upon contract or tort.

Clodfelter v. *State of North Carolina,* 86 N. C., 51; 41 Am. Rep. 440. The plaintiff in this case was a person sentenced to hard labor in State Prison for a series of years, and while serving sentence was assigned to work in the construction of a railway. While thus employed he sustained an injury owing to the premature explosion of a rock-blasting operation. Plaintiff claimed negligence on the part of the overseer under whom he was working and brought suit against the State to recover damages. In that State, at the time when this case was reported, there was a constitutional provision conferring jurisdiction upon the Supreme Court "to hear claims against the State," but the court declared that this provision was confined to such claims as are legal and could be enforced if the State, like one of its citizens, was amenable to process, and even then the decision when made was merely recommendatory. It was held that the only question presented was whether the State in administering the functions of government through its appointed agents and officers was legally liable to a claim in compensatory damages for an injury resulting from misconduct or negligence of the servants of the State. "That the doctrine of respondeat superior, applicable to the relations of principal and agent created between other persons, does not prevail against the sovereign in the necessary employment of public agents, is too well settled upon authority and practise to admit of controversy," said the court and the plaintiff's right of action and claim against the State were denied.

Gibbons v. *The United States*, 8 Wall., 269. This was an action brought to recover various sums alleged to be due the plaintiff for damages arising out of transactions connected with breach of contract for furnishing oats to the United States. The case was originally presented before the court of claims, which denied liability. The language of the statute which conferred jurisdiction upon the court of claims excluded by the strongest implication any demand against the government which was founded on a tort. The court declared that the case was presented as an attempt under the assumption of an implied contract to make the government responsible for tortious acts of an officer of the government, and held that the general principle, which is applicable to all governments, forbids that they should hold themselves liable for unauthorized wrongs inflicted by their officers on citizens, while engaged in the discharge of official duties. The enabling power as given to the court of claims, while presenting a novel feature in jurisprudence, confined the power of the act to suits founded on contracts, express or implied, with certain unimportant exceptions. The claim of the plaintiff was dismissed.

Rose v. *The Governor of Texas*, 24 Texas, 496. Two questions were presented in the case, one of which was the construction of an act in regard to the establishment of a general land office and the other was whether, under a given statute, the plaintiffs were qualified to maintain suit against the State, they being aliens. Both claims were decided adversely to the plaintiff, and in closing, the court used this language: "The right to sue the governor of the State, is a matter of favor conferred by the State, in deregation of that immunity, which every sovereignty enjoys; and we think that statutes conferring such privileges should be construed with strictness so as to extend the right only to those by whom it was clearly intended that it should be enjoyed."

The State v. *Hill, Appellee*, 54 Ala., 67. Judgment had been rendered in this cause against the State in a suit brought by the appellee to recover damages for animals alleged to have been killed by the wrongful act of the agents of the State when operating a certain railroad company. At the time of the decision, under the revised code then in operation, the court held that the section authorizing suit against the State was intended only to afford to persons who had claims against the State a mode of ascertaining whether or not they were well founded, and if they were, what sum of money or

other thing was due them, but it was not the purpose or effect of the statute to create liability on the part of the State to its citizens or to subject it to a liability which did not exist or could not arise under laws then existing. The court sustained the appeal of the State and set aside the judgment, quoting the familiar language of Story on Agency, Section 319; "It is plain that the government itself is not responsible for the malfeasances, or wrongs, or negligences, or omissions of duty of the subordinate officers or agents employed in the public service; for it does not undertake to guaranty to any persons the fidelity of any of the officers or agents whom it employs; since that would involve it, in all its operations, in endless embarassments and difficulties and losses which would be subversive of the public interests."

We have thus briefly referred to every case cited by the learned Attorney General in his brief for the State, but no opinion therein given, when carefully examined, goes further than to reiterate the well established principles that, in the absence of express legislation conferring a right or remedy, suit cannot be maintained against a sovereign state to recover damages for the malfeasance, misfeasance, laches or unauthorized exercise of power by its officers and agents; that in the absence of such legislation the doctrine of respondeat superior, applicable to the relations of principal and agent created between other persons does not prevail against the State in the necessary employment of public agents; that by a great majority of recent cases it has been decided that in the absence of such legislation even a private charitable institution which has exercised due care in the selection of its employees cannot be held liable for injuries resulting from their negligence; and in the absence of such legislation, that a purely eleemosynary institution created by the State and maintained at its expense cannot be held responsible for a tort committed by a lunatic of whom it has custody. As to the latter it has been repeatedly held, upon highest authority, that the reason is two-fold, (1) That the rule of respondeat superior does not apply, (2) That funds of such a beneficial institution should not be diverted from their original charitable purposes by judgments for the negligent or tortious acts of its servants or inmates.

But after careful consideration of the wording of the express legislation in the instant case we are of opinion that the State laid aside the protecting shield furnished by the common law and entered

this contest upon the same terms of respondeat superior as would govern if the State were a private individual. Such being our opinion the exception relied upon by the State must be overruled.

THE MOTION.

Bearing in mind that admittedly Dr. Hedin was the superintendent of the Bangor State Hospital, was employed by the State, had general supervision of the inmates therein, and that the principle of respondeat superior is to obtain, we approach the consideration of the motion in the same way that we would approach it if the parties were private individuals.

The action charges negligence, but as a preliminary proposition the burden of proof was upon the plaintiff to satisfy the jury, by a fair preponderance of evidence, that the fire was set by Stanchfield. The jury found affirmatively upon this proposition and their finding is not seriously contested at this time. It was also encumbent upon plaintiff to satisfy the jury by a fair preponderance of the evidence, (1) that the conduct of Dr. Hedin with reference to the enlargement of Stanchfield was negligent, (2) that no negligence on the part of the plaintiff contributed to the resulting injuries, (3) the casual relation between the negligence of Dr. Hedin and the damages sustained by the plaintiff, (4) the amount of the damages.

Contributory negligence on the part of the plaintiff is not claimed and the causal relation between the enlargement of Stanchfield and the setting of the fire hardly admits of argument, for if Stanchfield had not been enlarged he would not have had the opportunity to set the fire. If the fire had not been set the damages would not have occurred. The real contest, as to the facts involved, centers around the question of Dr. Hedin's negligence and the amount of the damages.

NEGLIGENCE.

As defined by one of the ablest elementary law writers of modern times, and approved by the Supreme Court of Michigan, in *Kendrick* v. *Towle*, 60 Mich., 363, 1 Am. St. Rep., 526, "Negligence consists in the failure to observe that degree of care which the law requires for the protection of the interests likely to be injuriously affected by the want of it." Our own court has thus defined the word in *Davis* v.

Winslow, 51 Maine, 264; "Negligence consists in the omitting to do something that a reasonable man would do, or in doing something that a reasonable man would not do, causing, unintentionally, mischief to another."

The statistical data relative to the admission of Stanchfield to the hospital shows that this formality occurred on February 15, 1920, and that the psychosis, as shown by the record, was dementia praecox, paranoid type (manic depressive, manic type). At the staff meeting held February 27, 1920, Dr. Hammond diagnosed the case as one of dementia praecox, paranoid type. Dr. Goodrich said, "If there is any such thing as paranoia, or if we are to make anything of this classification, I think he ought to be put in this group." Dr. Janjigian said that the patient presented more characteristic symptoms of dementia praecox, of paranoid type, but was not fully satisfied that the patient really belonged to that group. Dr. Norris said, "In this case I agree that he is paranoid dementia praecox; quite a typical case." Dr. Hedin was uncertain whether the mental ailment was dementia praecox, paranoid type, or manic depressive insanity, but thought the symptoms were more in favor of dementia praecox. That he was insane seems to be beyond question. It also seems to be well established that the patient's condition was accompanied by delusions of persecution. Under a long line of decisions supported by well-recognized authorities, in a note found in connection with *Westerland* v. *First National Bank*, 38 N. D., 24; 164 N. W. 323; 7 A. L. R., 588, a person adjudged to be insane is presumed to continue as such until it is shown that sanity has returned.

The report of the patient's condition, signed by Dr. Hedin, dated April 2, 1920, shows "There has been no change in this patient's condition since the date of presentation. . . . . Physically he is in excellent condition. Mentally there has been no change. He still clings to the delusions which he expressed at the time of coming here and it is impossible to convince him that they are not true." On April 24, 1920, the patient escaped from the congregate dining-room between six and seven o'clock in the morning. Attendants were sent to search for him but were unable to find him. On April 26, 1920, the patient's mother visited the hospital and gave information as to his wanderings and his arrival at her home on the preceding evening. Under date of April 26, Dr. Hedin's record shows "She returned the patient to the hospital last evening, and upon being

returned from escape, and upon the patient's mother's application he was paroled into her custody, condition improved." The acceptance of the patient on parole, by his mother, is dated April 25, 1920. Six months later, October 25, 1920, we find this record made by Dr. Hedin: "This patient having been committed to the criminal department of the Augusta State Hospital, and his parol from this institution having expired, he is today discharged from this hospital's record, condition unimproved." Stanchfield was committed to the Augusta Hospital for observation as to his sanity on July 19, 1920, by order of the Justice of the Superior Court, pending an accusation charging him with arson. He was returned to the custody of the officers in Penobscot County on October 15, 1920, the medical staff of the Augusta Hospital agreeing that the diagnosis of the patient's trouble was dementia praecox, paranoid type. We regard the fact as sufficiently established that from February 15, 1920, to October 15, a period of six months, which included the date of Stanchfield's enlargement on parol, he was continuously suffering from dementia praecox, paranoid type, accompanied with delusions of persecution. Was Dr. Hedin negligent in granting parole under these conditions? In other words did he fail "to observe that degree of care which the law requires for the protection of the interests likely to be injuriously affected by the want of it?" It should not require argument or citation of legal authorities to prove the necessity and propriety of the various methods provided by law to protect both the afflicted person and the community at large from the ill effects of insanity. Among those methods is that of restraint by lawful commitment to a hospital provided for the custody and treatment of the insane. While the statute law provides that the superintendent of an insane hospital may permit any inmate thereof to leave such institution temporarily in charge of his guardian, relative, or friend, or even by himself, for a period not exceeding six months, yet reason and good sense demand that such permission should not be given if the safety and welfare of the patient, or the community at large, are to be jeopardized by such permission. And it equally follows that the degree of care to be exercised in giving such permission should be commensurate with the particular nature of the patient's mental affliction and the possible or proportionate risk consequent upon his enlargement. It would be unprofitable, and perhaps invidious, to discuss the professional opinions of the distinguished medical men who testified at the trial.

From their testimony, and from all the testimony in the case, the jury passed upon the issue of negligence. There was evidence, if credible to the minds of the panel, to sustain the view that Stanchfield was a dangerous man to be at large; that a reasonably prudent man, possessing the learning, and having had the experience, which were possessed and had by Dr. Hedin, would not have paroled Stanchfield after so short a term of confinement, when he was suffering from a mental ailment which made him a dangerous man to be at large, and without more critical and careful examination of the patient's condition at the very time when parole was granted. Parole under these circumstances, must be regarded as an abuse of discretion. To be sure it was the verdict of laymen upon a question largely affected by professional learning, but it was a question of fact to be determined by a jury, under our judicial procedure, and we are not convinced that their finding should be disturbed by this court.

DAMAGES.

The verdict is large but the loss is great. The elements of damage included destruction of buildings, of cattle, and of other personal property. Damages were also claimed for loss of profits in connection with an established milk route. All these are elements of actual damages and we are not disposed to disturb the sound judgment of practical men, sitting in the jury box, upon these elements of damage But apparently the verdict included damages claimed for loss of prospective value of the young stock by reason of the destruction of the older members of the herd which, if allowed to live, would by dairy record, or record of progeniture, enhance the value of the younger stock. This we regard as coming within the rule of speculative damages and as such are not recoverable. The sum thus included appears to be about five thousand dollars. The mandate will be,

Exceptions overruled.
If plaintiff, within thirty days after receipt of rescript, remits $5000 from the verdict, then motion overruled, otherwise, motion sustained and new trial granted.

SPRINGVALE NATIONAL BANK In Equity *vs.* NELLIE L. WARD et als.

York. Opinion February 9, 1923.

The deposit of money in a bank by A in his own name with the addition of "Trustee for B" raises the presumption that an irrevocable trust was intended, and when not controlled by evidence showing a contrary intent, is sufficient to establish such a trust, unless the power of revocation is reserved, but the entry on the deposit book is not conclusive evidence of an absolute gift of an equitable interest. Evidence is admissible to show the intention of the donor and to control the effect of the entry.

In the instant case if it was the donor's intention, accompanying the declaration, to part absolutely with the equitable title, retaining only the legal title, his intention may be carried into effect; but if he intended to retain both legal and equitable title as long as he lived, to dispose of the fund in his lifetime as he pleased, and that only what was left on the account at his death should then go to the person named as beneficiary, such intention cannot be carried into effect, because it is testamentary in character, and in contravention of the statute of wills.

A careful consideration of the evidence discloses that the first change by Mr. Lerned in the designation of the depositor cannot be given effect as a declaration of an irrevocable trust, conferring the equitable title absolutely on Nellie L. Ward; the evidence of an irrevocable trust is neither explicit nor convincing.

The claim of Myrtie E. Stiles must fail for the same reason. The entire arrangement was testamentary in character and, not being in accordance with the statute of wills, cannot be given effect. The administrator of the estate of Asa J. Lerned is entitled to the deposit and all accumulations.

On report. A bill of interpleader to determine the rights of defendants as claimants in and to a deposit in plaintiff bank by one Asa J. Lerned which had previously to May 4, 1917, stood in his own name.

On that date the said Asa J. Lerned directed the bank to change the entry on the deposit book and also upon the records of the bank so it would read as follows, "Asa J. Lerned, Trustee, payable in case of death to Nellie L. Ward." On March 22, 1918, he directed the bank to make another change in the entries in the deposit book and in the records of the bank, substituting for "Nellie L. Ward" the name "Myrtie E. Stiles."

On June 2, 1918, Mr. Lerned died intestate on which day the account amounted to $5,460.00. A hearing was had upon the bill,

answers, replications and proof, and at the conclusion of the evidence, by agreement of the parties, the cause was reported to the Law Court for the determination of the rights of the parties, with certain stipulations as to plaintiff's costs in any event, and as to the payment of the expenses of intestate's last sickness and burial. Bill sustained. Decree in accordance with the opinion, and the stipulations of the report. The administrator to charge his taxable costs, expenses, and reasonable allowance for services in his account, to be allowed by the Judge of Probate.

The case is fully stated in the opinion.

George A. Goodwin, for plaintiff.

Mathews & Stevens, Sidney Perley, Harry C. Chubb, Willard & Ford, Lucius B. Sweet and F. R. & M. Chesley, for defendants.

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

MORRILL, J. On May 4, 1917, one Asa J. Lerned, a depositor in the Savings Department of the Springvale National Bank, presented his deposit book, which had previously stood in his own name, at the bank and directed that the designation of the depositor be changed so as to read, "Asa J. Lerned, Trustee, payable in case of death to Nellie L. Ward." This change was made upon the deposit book and upon the records of the bank.

On March 22, 1918, he again presented the deposit book at the bank, and said in substance to the assistant cashier, "I wish you would remove the name of Nellie L. Ward from that account and place the name of Myrtie E. Stiles there, and make the account payable to Myrtie E. Stiles in case anything happens to me." The assistant cashier changed the designation of the depositor, upon the deposit book, so that it read, "Asa J. Lerned, Trustee, payable in case of death to Myrtie E. Stiles, March 22, 1918," and upon the records of the bank, so that it read, "Asa J. Lerned, Trustee in the trust for Myrtie E. Stiles, March 22, 1918." The bank officer states that he followed Mr. Lerned's directions as he understood them, and did not distinguish between what he wrote on the deposit book and on the records of the bank.

Between May 4, 1917, and the date of his death Mr. Lerned retained possession of the deposit book and made sundry deposits on and withdrawals from the account; on two occasions he deposited as high as

$2000 each, and on two other occasions as high as $1000 each; three withdrawals were as high as $1500, $1350 and $1700 each.

Mr. Lerned died intestate June 2, 1918, on which day the account amounted to $5460.00. This bill of interpleader is brought to determine the rights of the claimants, Nellie L. Ward, Myrtie E. Stiles, and the Administrator of Mr. Lerned's estate, to this fund and its accumulations.

Claim of Nellie L. Ward. Counsel for Mrs. Ward contend that the deceased created an irrevocable trust in her favor by the designation made on the deposit book on May 4, 1917 when considered in connection with his letter to her of that date hereafter referred to, and that the equitable title to the deposit passed as effectually as in a case of a gift inter vivos. They rely upon *Cazallis* v. *Ingraham*, 119 Maine, 241. In that case we held that the deposit of money in a bank by A in his own name with the addition of, "Trustee for B" raises the presumption that an irrevocable trust was intended, and when not controlled by evidence showing a contrary intent is sufficient to establish such a trust, unless the power of revocation is reserved. In the instant case, however, the entry was not the clear declaration, "Asa J. Lerned, Trustee for Nellie L. Ward," but "Asa J. Lerned, Trustee, payable in case of death to Nellie L. Ward." The difference is significant.

The entry on the deposit book, however, is not conclusive evidence of an absolute gift of an equitable interest. Evidence is admissible to show the intention of the donor and to control the effect of the entry. *Bath Sav. Inst.* v. *Hathorn*, 88 Maine, 122, 126, 128. The material inquiry is as to the donor's intention. *Cazallis* v. *Ingraham*, supra. If it was Asa J. Lerned's intention, accompanying the declaration, to part absolutely with the equitable title, retaining only the legal title, his intention may be carried into effect; but if he intended to retain both legal and equitable title as long as he lived, to dispose of the fund in his lifetime as he pleased, and that only what was left on the account at his death should then go to Mrs. Ward, such intention cannot be carried into effect, because it is testamentary in character, and in contravention of the statute of wills; the case will then fall within that class of cases, of which *Howard, Admr.* v. *Dingley et als.*, 122 Maine, 5, is a recent example.

A careful consideration of the evidence convinces us that Mr. Lerned's action on May 4, 1917, cannot and should not be given effect

as an irrevocable trust, conferring the equitable title absolutely on Mrs. Ward.

In the first place, the language used on the deposit book is very significant; it looks toward the future, and is contingent . . ."in case of death to Nellie L. Ward;" that is, she surviving him.

The case affords, however, ample evidence of what was in Mr. Lerned's mind. The plan adopted originated after consultation with an attorney in Massachusetts about making a will, to whom he stated "that he had some money in the bank and *wanted it left to Nellie.*" The attorney drafted a letter, addressed to Mrs. Ward, which Mr. Lerned signed, and dated it the same day, May 4, 1917, on which he presented his book at the bank. The letter follows:

"Shapleigh, Maine, May 4, 1917.

Nellie (Lerned) Ward,
No. 70 Federal Street
Salem, Mass.

Dear Nellie:—

You are hereby notified that I have deposited in the Springvale National Bank (Savings department) of Springvale, Maine, in the name of 'Asa J. Lerned in trust for Nellie Ward' a certain sum of money.

This money is to be yours when I die, and you are hereby notified that the sum of money left at my death in the Savings department of the said bank in the and under the title of 'Asa J. Lerned in trust for Nellie Ward' is put in in that way so that you may and shall have it at my death.

Keep this notice.

from your father,

ASA J. LERNED."

This letter affords plenary proof of the writer's intention; the deposit was not to be the property of Mrs. Ward until his death; words could not make his thoughts clearer. This letter was shown to the cashier, when he was requested to make the change on the books, and clearly interprets the language there used.

The intention of Mr. Lerned is also disclosed by the way in which he treated the bank account. While the retention of the book, the withdrawal of interest and the making of additional deposits do not necessarily controvert the theory of an irrevocable trust (*Cazallis* v. *Ingraham*, supra), the use of the account as here shown is clearly inconsistent with the position that Mr. Lerned had absolutely parted with the equitable title to the fund. As we have seen the deposits and withdrawals were often in substantial amounts. Between May 4, 1917 and his death, June 2, 1918, the deposits were twelve in number, aggregating $7747, and the withdrawals were thirty-seven in number, aggregating $6779.88, not including September 1917 and March 1918 dividends amounting to $174.76. In other words, this man, retired from business, having use for only very limited banking facilities, treated this account precisely as a business man would treat an active bank account. This is entirely inconsistent with the idea that he had parted with all beneficial interest therein. On the other hand, it is consistent with the theory that he thought and intended that his arrangement at the bank would take the place of a will.

The claim of Nellie L. Ward cannot be sustained. The evidence of an irrevocable trust is neither explicit nor convincing; it falls below the standard recognized in *Cazallis* v. *Ingraham*, supra, page 244.

The claim of Myrtie E. Stiles must fail for the same reason. We do not attach any importance to the difference in the entries made March 22, 1918 upon the deposit book and upon the bank records. The testimony of the assistant cashier clearly shows that deceased only wished to substitute the name of Myrtie E. Stiles for Nellie L. Ward; in all other respects the intention, and arrangement for carrying it into effect, was the same as before.

The entire arrangement was testamentary in character and, not being in accordance with the statute of wills, cannot be given effect. The administrator of the estate of Asa J. Lerned is entitled to the deposit and all accumulations.

Bill sustained. Decree in accordance with this opinion, and the stipulations of the report. The administrator may charge his taxable costs, expenses, and a reasonable allowance for services in his account, to be allowed by the Judge of Probate.

MARJORIE SHAW *vs.* CHARLES CLIFFORD BOLTON.

Cumberland. Opinion February 9, 1923.

The "look and listen" rule of law is well established and reasonable, as relates to steam railroad crossings, but is not applicable to either street railway crossings, or ordinary street crossings.

Public convenience imperatively demands that steam railroad trains be heavy and swift. Such trains cannot ordinarily be kept under control so as to be stopped at street crossings. But there can be no hard and fast rule that a foot passenger about to cross a street must as a legal duty look and listen.

The only legal rule that can be laid down is that when entering upon crossings, and at all times while traversing them, foot passengers shall exercise due care, to wit, such care as an ordinarily prudent and careful person exercises under like circumstances.

A foot passenger is not legally obliged to look and listen upon reaching a silent policeman located at or near the center of the street. In congested streets this may be manifestly the only course consistent with due care. The test is what ordinary prudence demands.

On exceptions by plaintiff. An action to recover damages for personal injuries sustained by plaintiff by being struck by defendant's automobile while crossing Cumberland Avenue on the westerly cross-walk at its intersection with Preble Street in the city of Portland.

The sole question in controversy was that of the contributory negligence of the plaintiff, the negligence of the defendant being abundantly shown by the testimony. The case was tried to a jury and at the conclusion of the testimony for the plaintiff, counsel for defendant moved for a nonsuit which was granted, and plaintiff excepted. Exceptions sustained.

The case is fully stated in the opinion.

Verrill, Hale, Booth & Ives, for plaintiff.

Bradley, Linnell & Jones, for defendant.

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

DEASY, J. On exceptions to order of nonsuit.

From the evidence a jury would have been justified in finding the following facts: After dark on the evening of October 11, 1921 the plaintiff and her sister were walking northerly on Preble Street Portland, carrying between them a large pasteboard box containing dishes. Reaching the junction of Cumberland Avenue and Preble Street, the plaintiff looked to the right and left, saw no cars on Preble Street, two or three coming from the west on the Avenue, but none coming from the east.

They stepped off the sidewalk on to the crossing and again the plaintiff looked and saw no car approaching in a westerly direction. They then proceeded to cross the Avenue. When they had reached a point a few feet northerly of the center, at which point a silent policeman was located, the plaintiff was knocked down and injured by an unlighted automobile which was being driven by the defendant westerly along the Avenue at the rate of twenty-five miles an hour. The plaintiff did not see the defendant's automobile until it struck her.

In granting a nonsuit the presiding Judge said that the testimony was abundant to prove the defendant's negligence. We concur in this conclusion. The learned counsel for the defendant do not by their brief contend otherwise.

The sole controversy relates to the plaintiff's contributory negligence. The case involves the respective rights and duties of motorists and pedestrians at street crossings.

The defendant contends that the "look and listen" rule applies in case of foot passengers about to use street crossings and further that where a so-called silent policeman is maintained, the way is in effect divided into two parallel adjacent streets so that when the pedestrian has reached the center he is under legal obligation to again look and listen at all events for vehicles approaching from his right.

But the "look and listen" rule as a rule of law does not apply to ordinary street crossings.

The rule as relates to steam railroad crossings is well established and reasonable. Public convenience imperatively demands that steam railroad trains be heavy and swift. Such trains cannot ordinarily be kept under control so as to be stopped at street crossings.

But the rule does not apply even to street railway crossings. *Marden* v. *Railway,* 100 Maine, 41. *Driscoll* v. *Railway,* 159 Mass., 146.

With greater reason there is and can be no hard and fast rule that a foot passenger about to cross a street must as a legal duty look and listen. Thousands of streets and roads, some crowded with motors, others infrequently used by them, are being crossed by pedestrians every minute in the day. Each instance presents its own problem.

The only legal rule that can be laid down is that when entering upon crossings and at all times while traversing them foot passengers shall exercise due care, to wit, such care as an ordinarily prudent and careful person exercises under like circumstances. Under some conditions it may be manifestly negligent to cross a street without first looking and listening. Under some conditions it may be negligent to fail to look and listen again when reaching the center of the street especially when the center is marked by a silent policeman. But what ordinary care and prudence demands and whether the conduct of the traveler conforms to such demand are questions of fact to be left to the judgment of a jury.

"There is no absolute rule of law that to be in the exercise of due care one about to cross a public street must look and listen for approaching vehicles." *Hall* v. *Railway,* 168 Mass., 461.

"It cannot be ruled as a general proposition of law that a traveler is necessarily negligent because he attempts to cross a street even without first looking or listening to ascertain whether a vehicle is approaching." *Rogers* v. *Phillips,* 206 Mass., 308.

"The degree of care and prudence to be exercised by him (foot passenger crossing street) is measured by the care and prudence of a prudent man in like circumstances and whether he exercised due care measured by this rule was a question for the jury." *Hammond* v. *Harjohn,* (Vt.), 115 At., 100.

"When a pedestrian is about to cross a street he must use the care of a prudent man, but the law does not undertake to further define this standard. The law does not say how often he must look or precisely how far or when or from where." *Aiken* v. *Metcalf,* (Vt.), 97 At., 669.

The opinion of this court in *Wetzler* v. *Gould,* 119 Maine, 276 is in harmony with the above authorities. It recognizes as the final test what would be done by "an ordinarily careful and prudent person, under like circumstances, having in mind his own safety."

See to same effect: *McDonald* v. *Bowditch*, 201 Mass., 339; *Donovan* v. *Bernhard*, 208 Mass., 181; *Lynch* v. *Rubber Co.*, 209 Mass., 16; *Undhejem* v. *Hastings*, (Minn.), 38 N. W., 488; *Orr* v. *Garabold*, (Ga.), 11 S. E., 778; *Adler* v. *Martin*, (Ala.), 59 S. 597; *Rump* v. *Woods*, (Ind.), 98 N. E., 369.

There are authorities holding that a pedestrian who attempts to cross a street without looking is as a matter of law barred of recovery. *Knapp* v. *Barrett*, (N. Y.), 110 N. E., 428. Even under the doctrine of such cases when the pedestrian has once looked and found the way clear "he is not bound as a matter of law to look again." *Knapp* v. *Barrett*, supra. Huddy on Automobiles, Section 462.

But the sounder and better doctrine is that above stated. The railroad crossing rule of law has no application. Whether pedestrians and motorists in exercising their mutual and equal rights on street crossings use due care is a question of fact.

But granting, says the defendant, that the look and listen rule of law does not apply, still the facts in this case are such as to charge the plaintiff with negligence as an inescapable conclusion of fact. It may well be that if she had blindly, heedlessly, without looking for approaching vehicles, attempted to traverse, in the dark, that much used and dangerous crossing, she would have been so manifestly negligent, that a jury verdict exonerating her would be set aside.

But the plaintiff says that she looked. With reference to looking when she reached the center of the street her story is confused and contradictory, but her testimony that she looked both ways before stepping off the sidewalk and just afterward is positive and explicit.

The defendant, however, rejoins that the plaintiff's testimony on this point cannot be true or that if she did look, it was casually, perfunctorily and not with a seeing eye because he says that two witnesses standing upon the corner toward which she was walking saw the defendant's approaching automobile,—though their opportunitites for seeing were no better than the plaintiff's.

Undoubtedly this testimony has some tendency to discredit or at all events to weaken that of the plaintiff. Its weight, however, should be determined by a jury. Failure on the part of the plaintiff to see the defendant's unlighted car, while others saw it, does not necessarily disprove her story. She was not bound to anticipate the coming of an unlighted car at a rate of speed illegal even for a car with headlights burning. She was bound to obey the law and could properly

assume that no automobile driver would violate more than one law at a time. With eyes and mind focussed upon distant auto lights she might well overlook a nearer dark object. The court will not undertake to determine whether or not the plaintiff exercised due care, but we think that a verdict for the plaintiff upon the evidence before us would not have been so manifestly erroneous as to require reversal.

Exceptions sustained.

CELINA BECHARD

vs.

WATERVILLE, FAIRFIELD AND OAKLAND RAILWAY.

FRANK BECHARD *vs.* SAME.

Kennebec. Opinion February 12, 1923.

Contributory negligence of the plaintiff as shown by her testimony precludes recovery of damages.

In the instant case the evidence shows that the plaintiff (Mrs. Bechard) seeing a trolley car approaching her, about as fast as an ordinary walk, fully realizing that if it moved faster it would overtake her, assumed that it would maintain its slow speed, and acting upon that assumption stopped to close and latch a heavy gate, walked diagonally to the crossing and stepped upon the track directly in front of the on-coming trolley car without once glancing back to see if its speed had quickened. This is a typical case of contributory negligence which prevents the plaintiffs from recovering damages.

On general motion for new trial. The first action, that by Celina Bechard, was brought to recover damages for personal injuries resulting from being struck by a trolley car of defendant on February 2, 1921, as she was crossing Water street in Waterville. The second action, that by Frank Bechard husband of Celina Bechard, was brought to recover for loss of services of wife and expenses resulting from her injury. The two cases were tried together and the jury

rendered a verdict of $2,500 for plaintiff in the first case, and a verdict of $500 for plaintiff in the second case, and the defendant filed a general motion in each case for a new trial. Motions sustained. New trial granted.

The case is fully stated in the opinion.

Mark J. Bartlett and A. A. Matthieu, for plaintiff.

Perkins & Weeks, for defendant.

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

DEASY, J. On February 22, 1921, near the Lockwood Mills at Waterville the female plaintiff was run down and injured by the defendant's trolley car. The plaintiff in each case recovered a verdict.

The jury must have found the defendant's motor man negligent. It is unnecessary to analyze the testimony to determine whether or not such finding is justified, for contributory negligence on the part of Mrs. Bechard is clearly and manifestly shown.

Considering only the testimony most favorable to the plaintiffs it appears that Mrs. Bechard leaving the mill where she had employment, and coming to the fence bordering the mill yard opened a large gate used for teams as well as pedestrians. She then saw the defendant's trolley car on its track which is near, and substantially parallel with, the fence. When she saw the car it was approaching her at a distance of a little more than four hundred feet. Then giving no further attention to the coming car, not looking toward it again until the accident had occurred, she closed and latched the gate and walked diagonally apparently with her back to the approaching car, some twenty to thirty feet to and upon the crossing where the car struck her.

The only excuse offered by either the plaintiff or her counsel is that when she saw the car it was moving slowly "like an ordinary walk." In answer to cross-examination she said:

Q. "And if the car moved faster than it did when you first saw it you knew that you would not have time to cross didn't you?"

A. "Yes sir."

Counsel for the plaintiffs in their brief say:—"And from the rate of its movement she saw that she had ample time to cross before it would reach her."

Thus the plaintiff (Mrs. Bechard) seeing a trolley car approaching her about as fast as an ordinary walk, realizing that if it moved faster it would overtake her, assumed that it would maintain its slow speed, and acting upon that assumption stopped to close and latch a heavy gate, walked to the crossing, and stepped upon the track directly in front of the on-coming trolley car without once glancing back to see if its speed had quickened. This is a typical case of contributory negligence.

If the car had been due to stop before reaching the crossing the verdict would probably be sustained. *Verrill* v. *Electric Co.*, 116 Maine, 519. But while there was a white pole near the crossing it indicated a stop only on signal. This the plaintiff says that she knew and she also apparently knew that no signal had been given.

The authorities cited by the plaintiff bear but a remote analogy to the instant case.

In *Verrill* v. *Electric Co.*, supra, the defendant's trolley car negligently running by a platform, where it was its duty to stop, struck, with its overhang, the plaintiff, who was waiting to board it.

In *Marden* v. *Railway,* 100 Maine, 41, the plaintiff looked and seeing no approaching car attempted immediately to drive across the track.

In the present case the plaintiff entered upon a crossing knowing that an approaching trolley car, not due to stop, was so near that if it ran at an ordinary rate of speed she could not cross in safety.

The "last clear chance" rule does not apply in this case because the plaintiff's negligence was "progressive and actively continued up to the point of the collision." *Moran* v. *Smith,* 114 Maine, 57. *Butler* v. *Railway,* 99 Maine, 160.

The case of Frank Bechard depends upon and must abide the result of his wife's suit.

In each case the entry must be,

Motion sustained.
New trial granted.

ENSIGN OTIS, Trustee

vs.

SPRINGFIELD FIRE & MARINE INSURANCE COMPANY.

Knox. Opinion February 14, 1923.

A judgment against the trustee in a trustee process, the principal defendant having been defaulted, and all the goods, effects and credits in the hands of the trustee having been paid on execution against the trustee, bars a subsequent action by a trustee in bankruptcy of the principal defendant brought more than four months after the trustee process was begun. Such property only as the bankrupt can control and collect at the time his rights pass to his trustee in bankruptcy can be recovered by the trustee. The estoppel created by the judgment against the trustee in the trustee process, effective against the principal defendant before his bankruptcy proceedings, is effective also against his trustee in bankruptcy.

The principal defendant in a trustee suit has a legal interest in the adjudication of the alleged trustee's liability to be charged and in a subsequent suit brought by such principal defendant he is estopped by the previous judgment, followed by a delivery or payment by the trustee of the goods, effects and credits for which he was charged.

A trustee in bankruptcy can recover only such property as the bankrupt could have controlled and collected personally at the time when the rights of the bankrupt passed to his trustee. Under the circumstances of this case, Foster could not prevail in this suit, hence his trustee cannot.

On exceptions. An action to recover $400 and interest on an insurance policy, the property covered by the policy having been totally destroyed by fire, brought by the trustee in bankruptcy of the insured.

After proof of loss was filed with the company, and before the company had paid the insurance to the insured two creditors of the insured brought suits against the insured and in each case trusteed the company. The principal defendant in each case was defaulted,

and in each case the insurance company was adjudged trustee. Trustee executions were issued against the company and upon demand the entire amount due from it under the policy was paid to the two creditors of the insured on the executions. More than four months after the trustee processes were begun, Foster, the insured, went into bankruptcy and the plaintiff in this action was appointed his trustee, who brought this action to recover of defendant the amount of the insurance money, contending that at the time of the service of the trustee process on the trustee the money was not absolutely due and payable, but subject to the contingency of the company availing itself of its option within sixty days to either pay or replace the property. The general issue was pleaded and a brief statement alleging payment to the plaintiffs in the trustee processes.

The single Justice before whom the case was tried without a jury, right of exceptions being reserved, ruled that the plaintiff was not entitled to recover, and the plaintiff excepted. Exceptions overruled.

The case is fully stated in the opinion.

A. S. Littlefield, for plaintiff.

Elisha W. Pike, for defendant.

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

PHILBROOK, J. On February 17, 1920, the defendant issued its policy of insurance upon certain property owned by George W. Foster. The form of the contract was what is known as the Maine Standard Policy. The amount of the policy was four hundred dollars. On June 16th of the same year the insured property was destroyed by fire. On June 22d, proof of loss having been filed with the company an adjustment was made for the full amount of the policy. On the afternoon of the latter date, and after filing proof of loss, two suits were brought by separate plaintiffs against Foster in each of which the defendant company was named as trustee of Foster. Those suits were returnable to and entered in the Rockland Police Court, on the first Tuesday of August, 1920, at which session of the court the trustee filed its sworn disclosure in each suit as follows:

"Q. Had you, at the time of the service of the writ in this case upon you, any goods, effects or credits of the said principal defendant in your hands and possession?"

"A. The above named alleged trustee is a corporation carrying on a general fire and marine insurance business. On the date of the service upon it, to wit, June 22nd, A. D. 1920, it had in its possession $400 belonging to said defendant which represented an adjustment of a fire loss under policy No. 7450 issued to said defendant February 17th, A. D. 1920, for a term of one year, which adjustment was made on or about June 22nd, 1920. The amount thereof is not payable by law until forty-five days thereafterwards and subject to the right of prior attaching creditors if any there may be."

On the same first Tuesday of August the principal defendant was defaulted in each suit. On October 4, 1921, there was a hearing on the trustee disclosure and on the same day, by agreement, judgment was entered against the Insurance Company as trustee in one suit for one hundred eighty dollars and in the other for two hundred twenty dollars, these sums aggregating the total amount of the insurance. On October 12, 1921, trustee execution was issued in each case against the Insurance Company for the respective amounts agreed upon. Upon each execution thus issued the Insurance Company paid the amount for which it was charged, thus paying the full sum of four hundred dollars.

Meanwhile, and more than four months after the trustee attachment had been made, Foster had filed his voluntary petition as a bankrupt in the Bankruptcy Court. On November 12, 1921, the plaintiff was appointed, and in due time qualified, as the trustee of the estate of the bankrupt.

On December 6, 1921, the plaintiff as such trustee brought this suit against the Insurance Company to recover the four hundred dollars due under the policy and for interest upon said sum, alleging that the same was, by appointment of said plaintiff as said trustee, assigned and transferred to him.

The case was heard before the presiding Justice, without a jury and with right of exception. He ruled that the plaintiff was not entitled in law to recover, to which ruling the plaintiff duly excepted and the case comes to us upon that exception, the stipulation in the bill of exceptions being that the plaintiff is entitled to judgment unless the facts as stated in the report, tending to establish the defense set up in the brief statement, entitled the defendant to judgment.

R. S., Chap. 91, Sec. 55, Par. IV declares that no person shall be adjudged trustee by reason of any money or other thing due from

him to the principal defendant, unless at the time of the service of the writ upon him, it is due absolutely and not on any contingency. The Maine Standard Policy provides that after proof of loss the insuring company has a period of sixty days within which either to pay the amount for which it may be liable or replace the property with other of the same kind and goodness. Moreover, R. S., Chap. 53, Sec. 9, stipulates that no fire insurance company transacting business in this State shall pay any loss or damage until after the expiration of forty-five days from the date when the proof of loss is executed, with certain exceptions not herein applicable. For violation of this statute the Insurance Commissioner may suspend the authority of the company to transact business in this State for such length of time as he may deem advisable, such time not to exceed one year.

In *Godfrey* v. *Macomber and Hingham Insurance Co., Trustee,* 128 Mass., 188, a policy of insurance contained a provision that in the event of loss the company had a period of thirty days after ascertaining the loss in which to make payment, and a further provision of the policy gave the company the right to make good the damage by fire by replacing or repairing the property destroyed or damaged. Trustee service was made upon it before the expiration of the thirty-day period, and the court held that the company could not be held as trustee since at the time of service of process it had not in its hands money or other property due or belonging to the principal defendant absolutely and without any contingency.

Returning to the disclosure made by the insurance company, when it was summoned as trustee in the two suits brought against Foster, we note the present plaintiff's criticism as to its form and sufficiency. The trustee declared that "it had in its possession $400 belonging to said defendant." The present plaintiff says that this was not a statement of fact but a conclusion of law; that it was an attempt on the part of the trustee to decide a legal question, the decision of which should have been left solely to the magistrate who was to pass upon the liability of the insurance company as trustee of the defendant Foster. The present plaintiff urges also that the trustee did not disclose all the facts involved in the case; that it did not disclose that the policy was a Maine Standard policy; that the proof of loss had or had not been filed prior to the service of the trustee writs; that under the terms of the policy the company still had a right to exercise its

option to pay the money or to restore the property within sixty days.

"The trustee, in his introductory and general answer, denies in the language of the statute all liability as the trustee of the principal defendant at the time of the service of the process upon him. But such a denial must be considered in the nature of a plea which is to be sustained by answers to interrogatories propounded by the plaintiff if he seeks an investigation, and gives the trustee a full opportunity to disclose the true business relations subsisting between himself and the defendants; otherwise the trustee would be constituted the judge of the law as well as of matters of fact, with the exclusive privilege of drawing inferences and conclusions which more properly belong to the court." *Toothaker* v. *Allen*, 41 Maine, 324.

The person summoned as trustee is not to determine the question of his liability. It is a fundamental rule that the disclosure of a trustee must be full and complete. *Thompson* v. *Dyer*, 100 Maine, 421.

A failure on the part of the trustee to disclose the fact that the money due from him to the principal defendant was wages for his personal labor for a time not exceeding one month, was held in *Lock* v. *Johnson*, 36 Maine, 464, to be such neglect on the part of the trustee to fully disclose that when Lock, the defendant in the trustee suit, brought suit against Johnson, the trustee, the court gave judgment for the plaintiff even though Johnson had paid the plaintiff in the trustee suit a portion of the sum which was adjudged to be in the hands of Johnson as trustee. This case was cited with approval in *Daniels* v. *Marr & Tr.*, 75 Maine, 397, decided in 1883, where property in the hands of the alleged trustee was exempt from attachment in a suit against the principal defendant, which exemption was not disclosed by the trustee.

The liability to trustee process must be determined by the relations existing at the time when the process was served upon the alleged trustee, and no subsequent act of the trustee could render him chargeable. "The precise and only point to be determined is whether at the time of the service of the process upon it the trustee had in its hands money or other property due or belonging to the principal defendant absolutely and without any contingency." *Godfrey* v. *Macomber*, supra. It was there held that the right of the insurance company to rebuild instead of paying the money, within the terms of the policy, exempted the company from being charged as trustee

because no absolute liability to pay the insurance money existed at the time of serving the trustee process.

Marsh v. *Davis*, 24 Vt., 363, relied upon by the plaintiff, involves the liability of a trustee to repay a sum which he had paid upon a judgment charging him as trustee. The court held that important considerations were suppressed by Davis in his disclosure as trustee which in common prudence should have been disclosed by him. Because of this suppression of material facts in his disclosure the court said there was no propriety in permitting him to avail himself of his payment on the trustee judgment as a defense to an action brought on the claim against him by the principal defendant in the trustee suit or by his assignee. In that case the court strongly hinted the existence of fraudulent suppression of fact in the trustee disclosure.

In *Parker* v. *Wilson*, 61 Vt., 116, the court held that while the law generally protects a trustee in those cases where it appears that he has once paid a judgment rendered against him, at the same time it exacts the utmost good faith on his part and requires the disclosure of all the material facts affecting his liability and the legal and equitable rights of other claimants of the funds in his hands, and if the trustee fails fully to discharge the duty which the law imposes upon him in regard to making his disclosure, and therein setting forth all the facts within his knowledge which would affect his liability as trustee in the suit, he might be adjudged trustee and such judgment not be a protection against the collection of the indebtedness in a suit brought in favor of a transferee of the claim. In that case the Vermont court quoted the authority of our own court where, in *Larrabee* v. *Knight*, 69 Maine, 320, Mr. Justice Walton, speaking for the court said: "It is settled law in this state that, if one summoned as a trustee is notified before making his disclosure that the funds in his hands have been assigned, and he neglects to disclose the assignment, his being charged will not be a bar to a suit against him for the benefit of the assignee."

In *Enright* v. *Beaumond*, 68 Vt., 249, the same doctrine was declared as in the Vermont cases already referred to, the court saying that the trustee should have stated, in his disclosure all the facts material to the inquiry.

In view of all these statutory and common law authorities, and under the circumstances in this case, the plaintiff claims error in the ruling of the court below in giving judgment against him.

But the defendant, equally confident of its legal rights, presents for consideration certain provisions of law which it claims will fully support the ruling that forms the ground for the bill of exceptions.

R. S., Chap. 91, Sec. 77, provides that whoever, summoned as trustee, upon his examination, wilfully and knowingly answers falsely, shall pay to the plaintiff in the suit so much of the judgment recovered against the principal defendant as remains unsatisfied, with interest and costs; but in Section 76 of the same chapter it is provided without reservation or condition that "The judgment against any person as trustee discharges him from all demands by the principal defendant or his executors or administrators, for all goods, effects and credits, paid, delivered or accounted for by the trustee thereon; and if he is afterward sued for the same by the defendant or his executors or administrators, such judgments and disposal of the goods, effects and credits as above stated, being proved, shall be a bar to the action for the amount so paid or delivered by him."

This statutory provision appears in the R. S. of Maine for 1821, Chap. 61, Sec. 11, in these words: "That goods, effects and credits of any person so taken as aforesaid by process of law out of the hands of the trustee shall forever acquit and discharge such trustee from and against all suits, damages and demands whatever to be commenced or claimed by his principal, his executors or administrators of and for the same; and if any trustee shall be sued on account of any thing done pursuant to this act he may plead the general issue and give this fact in evidence." Under the statute as it then existed our court in *Wise* v. *Hilton*, 4 Maine, 435, held that only a trustee judgment which had been satisfied would protect the trustee from being answerable to the party whose trustee he had been adjudged to be.

In the revision of the statutes in 1840, Chap. 119, Secs. 83 and 84, the foregoing appeared thus in its revised form: "The judgment against any person as trustee shall discharge him from all demands by the principal defendant, or his executors or administrators, for goods, effects and credits paid, delivered, or accounted for by the trustee by force of such judgment. If he is afterward sued for the same by the defendant, or his executors or administrators, such judgment and disposition of the goods, effects and credits as above stated, being proved, shall be a bar to the action for the amount so paid or delivered by him."

These two sections were combined in the revision of 1857, Chap. 86, Sec. 76, the revision of 1871, Chap. 96, Sec. 76, and that of 1883, Chap. 86, Sec. 76. An amendment was made in Public Laws, 1893, Chapter 160, relating to the persons to whom payment, delivery or accounting may be made by the trustee. The original provisions, with the amendment of 1893, appear in the revision of 1903, Chap. 88, Sec. 76, and in the revision of 1916 as already quoted.

Thus it will appear that from the earliest history of our State until the present time, and necessarily covering the dates when *Lock* v. *Johnson,* supra, and *Daniels* v. *Marr,* supra, were decided, this statutory protection afforded to a trustee, who had paid the trustee judgment, has existed. The question might be asked, therefore, whether in making those decisions the court overlooked the statute, and whether those decisions are conclusively applicable to the case at bar. An examination of the opinions of the court in those cases shows that in neither of them was any mention made of the statute now under consideration. But we are of opinion that those cases may be easily differentiated from others where the statute has been given full force. In the Lock case the trustee process was an attempt to deprive a laborer of something of which the law had expressly said he could not be deprived. In the Daniels case there was an attempt to take from the defendant, by trustee process, property which, by statute, is declared to be exempt from attachment. These facts, in our opinion, make both decisions proper and applicable to cases which arose under the circumstances therein existing, but not applicable to the case at bar. This differentiation is suggested at least in *Provost* v. *Piche & Tr.,* 93 Maine, 455. The court there said: "In a case of this kind, where there is no claimant for the funds in the trustee's possession, and no controversy as to the amount due, and where the only question is whether or not the funds in the trustee's hands are exempted from attachment by this process, because of the provision of the statute that an amount due the principal defendant as wages for his personal labor performed within one month next before the service of the process, except where the suit is for necessaries, cannot be attached—the principal defendant is the only one, except the plaintiff, who has any real interest in the determination of the question." In another part of the same opinion the court said: "Under our statutes a principal defendant has a legal interest in the adjudication of the alleged trustee's liability to be charged, and in a

subsequent suit brought by such defendant he is estopped by the previous judgment, followed by a delivery or payment by the trustee of the goods, effects and credits for which he was charged."

Were we now called upon to pass upon the liability of the trustee to be charged, much of the law relied upon by the plaintiff would be applicable and perhaps decisive. But Foster took no appeal from the decision of the magistrate charging the insurance company as trustee, nor has there been any attempt to procure a review as provided for in the act creating the Rockland Police Court. We are of opinion that were Foster the plaintiff in the present case he could not prevail. "The trustee can recover only such property as the bankrupt could have controlled and collected personally at the time when his rights passed to his successor." *Bennett* v. *Aetna Insurance Company*, 201 Mass., 554; 88 N. E., 335; 131 Am. St. Rep., 414.

It is the opinion of the court that the decision of the presiding Justice in the court below is in harmony with legal principles and that the mandate must be

Exceptions overruled.

LUTE L. ROGERS *vs.* WILLIAM B. KENDALL et al.

Waldo. Opinion February 20, 1923.

The burden of showing that chemicals purchased for potato fertilizer purposes contained a sufficient amount of borax poison to diminish the potato crop is upon the plaintiff alleging such affirmative proposition and in the case at bar is not sustained. It is exceptional error to exclude evidence tending to prove that the use of chemicals for fertilizer purposes such as are the same as those in issue in the case at bar, combined in the same proportions, and using the same amount of potatoes, on farms in the same vicinity resulted in producing crops ranging from two hundred bushels per acre to three hundred bushels per acre.

The plaintiff avers he had a small crop of potatoes from seed planted upon the fertilizer involved in the instant case and that the presence of borax poisoning was the sole cause. Whether borax poison was present in the chemicals, in sufficient quantity to diminish his potato crop was the only issue. The burden was on the plaintiff to establish his contention. We think he has failed to do so.

A proper interpretation was given to the meaning and application of R. S., Chap. 36, Sec. 12, which provides that "for the purposes of this chapter, an article shall be deemed to be adulterated . . . ." "In case of commercial fertilizer . . . . . if it contains any material deleterious to growing plants." Under that clause of the statute is presented the only issue in this case. The court held that "deleterious meant deleterious matter in such a quantity as to be deleterious to growing plants," and instructed the jury that the statute was malum prohibitum and applied regardless of scienter on the part of the defendants. The instruction was correct.

The exception is based upon the exclusion of the following offer of evidence, namely: "Defendant offers evidence of various other farmers tending to prove that such farmers, using chemicals on farms located in the town of Troy and vicinity, purchased from the defendants in 1919, and coming out of the same mess, and combined by them in the same proportions, and using the same amount of potatoes, applying 1200 pounds per acre to one ton per acre,—these figures being given as the equivalent of mixed goods, that is, a weight of 87½ pounds being equal to 100,—produced crops ranging from 200 bushels per acre to 300 bushels per acre." It will undoubtedly be conceded that the above evidence, if admissible, is very important. We think that the evidence was admissible.

On exceptions and a general motion for a new trial by defendants. This is an action on the case in which the plaintiff seeks to recover

from the defendants, damages for breach of implied warranty in the sale of chemicals for fertilizer purposes. The plaintiff alleged that the chemicals purchased by him of defendants contained a sufficient amount of borax poison to be deleterious to the potato plants thus resulting in a small potato crop. The case was tried to a jury and a verdict for plaintiff for $3,737.31 was rendered. The defendants excepted to the exclusion of certain testimony and also filed a general motion for a new trial. Motion sustained. Exceptions sustained.

The case is very fully stated in the opinion.

Dunton & Morse and Carroll N. Perkins, for plaintiff.

McLean, Fogg & Southard and A. S. Littlefield, for defendants.

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

SPEAR, J. This case comes up on motion and exceptions. In some respects it is a case of novel impression. The plaintiff purchased of the defendant a quantity of chemicals represented by a certain proportion of nitrate of soda, phosphate, potash, sulphate of ammonia and tankage, to be mixed by him into a fertilizer designated when completed by the formula 4-8-6, meaning a composition of four per cent. available ammonia, eight per cent. available phosphate, and six per cent. soluble potash. The plaintiff's sole complaint is, that the chemicals which he bought were not suitable for the mixture as a fertilizer for potatoes, "but contained borax in sufficient quantities to prevent the germination of seed potatoes and killed the young plants and sprouts."

The plaintiff avers he had a small crop of potatoes from seed planted upon this fertilizer and that the presence of borax poisoning was the sole cause. Whether borax poison was present in the chemicals, in sufficient quantity to diminish his potato crop was the only issue. The burden was on the plaintiff to establish his contention. Historically, it appears from the testimony of the plaintiff's expert that in 1919, the time when the chemicals were purchased by the plaintiff the fact that borax, or boron, was deleterious to the germination of potato seed or injurious to the plants was entirely unsuspected, if indeed it was not regarded as beneficial, as shown by the following question put to Professor Woods, the plaintiff's expert, and his answer. Q. "As a matter of fact, those experiments were conducted for the purpose of finding whether the difficulty

with the crop was due to borax?" A. "Not primarily. The experiment was really started to find if there might be a beneficial effect from the addition of borax." This statement related to a bulletin published in 1920. In further confirmation of the foregoing statement of the effect of borax on potatoes, Professor Woods, in reply to the question "Wasn't it a fact that the learning at that time was that twenty pounds of borax per acre didn't do any harm," testified, "But I am frank to say that if I had been asked in the Spring of 1919 if twenty pounds of borax, or any other material, distributed over an acre of land would be likely to produce serious deleterious effects, I should have said it probably wouldn't have."

The case, therefore, starts out with the conceded fact that the defendants had no knowledge that borax to the extent of six and six tenths pounds, the maximum quantity found in the present mixture, would injure potato seed or the plants. This was immaterial, however, as to their liability. It further appears, that up to the season of 1919, no one, expert or grower, had any definite knowledge which enabled them to detect the symptoms of borax poisoning. All of Professor Woods's experiments were made after July, 1919. It is hence evident from the foregoing facts that the witnesses who testified to the symptoms of borax poisoning had meagre opportunity to gain definite and reliable information upon that subject. But upon proof, by affirmative evidence, not conjecture or unwarranted inference, that six and six tenths pounds of borax to the acre practically destroyed the plaintiff's crop of potatoes, depends the decision of his case. A mere statement in the face of inherent contradiction is not sufficient to sustain a verdict, as we have many times declared. It was incumbent upon the plaintiff to prove that the presence of six and six tenths pounds of borax to the acre impaired his crop of potatoes. The only evidence in the case which tends to prove that less than six and six tenths pounds of borax to the acre will prove deleterious to a potato crop is the ipse dixit of Professor Woods, who testified upon this point, as an expert, as follows: Q. "What is the effect of borax on growing potatoes?" A. "In quantities of more than three pounds per acre it has been found to be deleterious and increasingly deleterious as the amount is increased, so that ordinarily, under ordinary conditions, as high as twenty pounds would practically stop a crop."

There is no evidence in the case by which that opinion is supported. But, on the contrary, it is contradicted by Professor Woods's own experiment as confirmed by him in bulletins issued under his approval, and by other testimony as to the symptoms of borax poisoning. It seems that the question of the effect of the presence of borax in fertilizers had come to a point of more or less agitation in the latter part of 1919. Therefore, Professor Woods, as the head of the Maine Experiment Station connected with the University of Maine, at Orono, began an official investigation of the borax question in 1919 and 1920, at Presque Isle, a typical potato soil, in the county of Aroostook. As before stated by Professor Woods, this investigation was begun upon the theory that borax was beneficial rather than deleterious. Woods admitted that these experiments were made in conjunction with his department, the results of which were manifested by the following questions put to, and answers made by, him:

Q. "Didn't the experiment upon soil at Presque Isle show that the crop of potatoes was larger when about six pounds of borax was found to be in the fertilizer or they were planted with fertilizer that contained six pounds of borax,—larger than without borax?" A. "Within an experimental error of a field experiment." Q. "Those experiments showed also that when there was about twelve pounds of borax per acre in the fertilizer, the yield was greater than it was when the fertilizer was free from borax?" A. "Within experimental error; yes, sir." Q. "And when there was nearly eighteen pounds of borax there was less yield per acre than there was in the corresponding test rows planted without any borax?" A. "But still within experimental error." Q. "And when there was a little over $23\frac{1}{2}$ pounds of borax per acre present there was a somewhat less production than where no borax was present?" A. "The same answer to that; within experimental error." He undertook to parry the effect of that investigation made under his own direction, by saying, that the fertilizer was mixed with more soil than in the ordinary process of planting, intending that an inference might be drawn that the seed would not thereby come in the usual contact with the fertilizer. But in his experiment, according to his own testimony, the fertilizer was so mixed with soil that twelve pounds of borax at least would be beneficial, while he must have known that the farmer so mixed his fertilizer with his potato planter that six pounds would practically destroy his crop. The whole force of his

testimony upon this point was to convey the idea to the jury that the difference in the method of distributing the fertilizer in the row made the difference in the beneficial and deleterious effect of the borax upon the crop. And it was well calculated to confuse and mislead the jury who could not possibly analyze the evidence as it went along. Notwithstanding his testimony in court he nevertheless permitted to be published in his bulletin to the farmers, for the purpose of giving information "that would be helpful to the farmer," the following statement with reference to the distribution in his Presque Isle experiment, namely: "It would seem, therefore, that the method of distributing the fertilizer in the experiment being slightly different from the practice of the farmers, aided no doubt by the weather conditions at the time of planting, contributed toward less harm from borax than was experienced by many of the farmers in that locality." That bulletin was either true or false. It was not contradicted by any evidence at the trial. It was the last word based on any experiment. It was true, of course, and intended for information upon which the farmers could act with safety. And it says plainly that, with a method of distribution "slightly different" the experiment of Professor Woods and Mr. Brown showed that twelve pounds of borax to the acre was not deleterious. If the phrase "slightly different," in the sense in which it was used in the bulletin, meant the difference between the use of twelve pounds of borax without harm and the use of three pounds with harm and the use of six and six tenths with disaster, then the bulletin was a fraud and deception for failing to fully explain the full import of the phrase. It was not the bulletin, however, but the testimony in an attempt to avoid the force of the bulletin that was wrong. It would, moreover, seem unreasonable upon the face of the statement to say that the "slight difference," indicated by the language of this bulletin, in the distribution of the fertilizer in the experiment, would mark the difference between rendering twelve pounds of borax beneficial and six and six tenths well nigh destructive to the crop. The bulletin effectually contradicted the attempted explanation that the difference was due to the method of distribution. Notwithstanding the statement that three pounds would injure a crop, it, nevertheless, remains that the only evidence based upon experiment was that six, or even seven pounds of borax per acre did not injure the seed, plants, or the crops.

It furthermore appears from another question and answer of Professor Woods that he had made no experiment which modified his testimony as to the results of the trial test at Presque Isle, as shown by the following question and answer: Q. "I was asking you whether there were any other experiments aside from the plant pot experiments and the one you say the result of which has not been given out, that were the foundation of your information?" A. "Experiments conducted by me. So far as I know, my knowledge is based on field observations in 1919, on Mr. Brown's experiments as published in the bulletin which you have shown, on Mr. Brown's unpublished work, on the work in our own greenhouse at the Maine Agricultural Experiment Station, and on work under my direction done cooperatively by the eight northeastern experiment stations, at the University of Vermont greenhouse." With regard to the foregoing answer it should be noted that Brown's experiment was the Presque Isle test; that the greenhouse experiments were of no value; and that no result of the eight northeastern experiments was reported, and yet, the Professor says that his knowledge (from which he testified) is based upon the above tests, not one of which shows that three pounds of borax is deleterious, but, on the contrary, so far as they disclosed any evidence in regard to the matter, show that six and six tenths pounds are not harmful, but beneficial. It is highly significant that no evidence from any experiment or test up to the date of the trial was offered to prove that six pounds, or six and six tenths pounds, of borax, to the acre would do any harm to the seed, or the growing plants, or had done any. If such evidence had resulted from any experiment, up to that time made, it is very evident that it would have been produced. There is then no evidence except the ipse dixit of Professor Woods, and the opinions of other lesser experts, unsupported by any experiment or other test, that tends to show that six and six tenths pounds of borax per acre is deleterious to a potato crop. When the evidence upon this point is analyzed, every test, as to the quantity of borax that will do injury, is eliminated except the Presque Isle experiment which shows that six and six tenths pounds per acre is beneficial rather than otherwise.

The contention that the injury to the plaintiff's potato crop was due to the presence of borax is further contradicted by the testimony of Alfred N. Soule, Chief Deputy in the Department of Agriculture, called by the plaintiff. It was testified by all the witnesses on both

sides that the seed planted upon the plaintiff's field was either all gone or so decayed as to leave only the skin. Mr. Soule, it seems, in the season of 1919, made a very careful and exhaustive study of the effect of borax, covering one hundred and seventeen fields. In regard to its effect upon the pulp of the seed, he says: Q. "And if you had gotten a history that the seed pieces rotted within a few weeks after they were put into the ground would you attribute that to borax poisoning?" A. "Not in all cases." Q. "Would you in any case?" A. "I don't think that I could ever say that I have seen where the rotting of the seed pieces was caused by borax injury." His testimony is not contradicted as to the effect of borax as acting as a preservative rather than a cause of decomposition. His testimoney should be regarded as very significant, as the rights of the parties should be determined from the necessary effect of the evidence. If Soule is right, therefore it practically confutes the fact that rotted seed could be caused by coming in contact with a preservative compound. The force of this testimony is especially significant as it is conceded by all, experts and potato growers alike, that borax is not the exclusive cause of the failure of a crop of potatoes, but there are many other causes, including the method of mixing the chemicals, proximity of the seed to the normal fertilizer, which causes decay of seed and hence failure of crop, just as the evidence shows the seed in the present case appeared as the hills were dug into, . . weather conditions and other causes. The contradictory testimony of Soule proved that something beside borax caused the rot. It, therefore, follows, that if the cause of the rot was the cause of the crop failure, it was some other cause than that of borax. Soule, however, in the face of his own testimony as to the preservative properties of borax, gives it as his opinion that borax poisoning was the cause of the failure of the potato crop, but we think that his positive testimony, based upon a broad investigation, is controlling over an opinion in direct conflict with his experiment as to the preservative effects of borax and with the testimony of all the witnesses that the seed in the plaintiff's field had decayed.

The preservative effect of borax on the seed is of fundamental importance, as it is a distinctive charactistic of borax poisoning and can no more be rebutted by the appearance of the leaves and other symptoms which are common to every crop of potatoes than can the characteristic symptoms of tuberculosis or heart disease be

rebutted by the presence of toothache or the many other common ills that effect the human system. Like tubercular effect the preservative effect is peculiar to the disease of borax poisoning and when that effect is found the cause is found. Borax preserves; it does not decay. The effect of preservation of seed is traced to borax. The effect of decay of seed is not traced to borax. Hence if decay is general, as in the plaintiff's case, the cause was other than borax. Soule's testimony should be read in connection with the evidence of the experiments that even as high as twelve pounds of borax was beneficial. There is one other symptom of borax poisoning to which Professor Woods testified, manifested, as he stated, by "a bright, golden yellow on the margin" of the foliage. Upon this point the following question and answer further illuminate his meaning: Q. "Given a case where a field showed numerous skips, weakly plants, retarded germination, and a considerable number of yellow edged leaves when the plants are young, do you know of anything except borax that would cause all these things?" A. "Not all these things together." Q. "Would borax cause them all . . . borax poisoning?" A. "In my opinion it would." Q. "You say that you know of nothing that would cause all of these things together. Do you know of anything that would cause all of them, each of them separately?" A. "I don't recall anything that would cause the particular golden yellow margin." Q. "Every other thing you have mentioned you know well founded causes for in potato culture, that have been known for years." A. "You might have similar results from other causes." It therefore follows that the only symptom, among the several named, which exclusively indicates borax poison, is the "bright, golden yellow margin," and that when the plants are young. Witnesses on both sides testified with reference to the appearance of the leaves of the potato plants in question and only one out of the whole number testified to observing a golden yellow, and that in the following language: "I noticed the leaves, after awhile, they turned a golden yellow around the edges." This witness leaves off the adjective "bright" and defines the time as "after awhile." But the testimony shows that this symptom appears in the early stages of the growth. None of the other witnesses describe the appearance of the leaves as a golden yellow around the edges. Three of the witnesses simply noticed a yellowing, which of course is common. Two others state the yellowing was brownish,

while only one says it was golden. In no instance is the peculiar and characteristic "bright, golden yellow" around the edges of the leaves described as appearing in the early stages. Moreover, the testimony of the witnesses who examined these potato plants from time to time and described them as yellowing, or a yellow brown, cannot be regarded as negative testimony as they are describing affirmatively what they actually saw. It should also be noted, in this connection, that the witnesses who testified as to the appearance of these potatoes were not defendant's witnesses alone but the plaintiff's as well. We are of the opinion that the plaintiff has failed to establish, by any reliable evidence, even the presence of the symptom of a bright, golden yellow. The evidence to the contrary is overwhelming.

All the evidence including Professor Woods, admits only what is a matter of common knowledge, that all the appearances, except, "the bright, golden yellow," that were present in the foliage of the plants in question are common and ordinary to potato fields all over the State.

There is a great deal of opinion evidenced in this case attributing failure of this particular crop of potatoes to borax poisoning, but such evidence is entitled to weight only when it is fortified by established facts and is consistent with probability and reason. As before shown, the established facts in this case clearly prove that six and six tenths pounds of borax per ton, or per acre, in a fertilizer, is not deleterious to plants. We are of the opinion that the motion should be sustained.

We now come to the exceptions, only one of which we shall consider at length. In passing, it may not be improper to add that a proper interpretation was given to the meaning and application of R. S., Chap. 36, Sec. 12, which provides that "for the purposes of this chapter, an article shall be deemed to be adulterated . . ." "In case of commercial fertilizer . . . . if it contains any material deleterious to growing plants." Under that clause of the statute is presented the only issue in this case. The court held that "deleterious meant deleterious matter in such a quantity as to be deleterious to growing plants," and instructed the jury that the statute was malum prohibitum and applied regardless of scienter on the part of the defendants. The instruction was correct.

The exception, however, which we desire to discuss, is based upon the exclusion of the following offer of evidence, namely: "Defendant

offers evidence of various other farmers tending to prove that such farmers, using chemicals on farms located in the town of Troy and vicinity, purchased from the defendants in 1919, and coming out of the same mass, and combined by them in the same proportions, and using the same amount of potatoes, applying 1200 pounds per acre to one ton per acre, — these figures being given as the equivalent of mixed goods, that is, a weight of 87½ pounds being equal to 100,— produced crops ranging from 200 bushels per acre to 300 bushels per acre." It will undoubtedly be conceded that the above evidence, if admissible, is very important. The plaintiff, however, denies its admissibility upon the ground that it does not state that all the elements in the cases offered correspond with the elements proven in the case at bar. It is true that certain elements are not specifically alluded to, but in view of the plaintiff's statement of the excellent quality of his land, and of his husbandry in planting his crop of potatoes, we think the question should not be excluded upon that ground. Without quoting the testimony, it will be found that the plaintiff strenuously contends that everything which he did in planting his crop of potatoes, from the mixing of the fertilizer to the final cultivation of his crop, was done in an unusually workmanlike manner, and his witnesses, so far as interrogated in that regard, support his contention. Therefore, it is apparent from his statement of the manner in which he planted and cultivated, that his neighbors could not be presumed to have employed any better husbandry in the cultivation of their crops than he had in the cultivation of his. It accordingly follows that if they planted their crops in any degree in a less workmanlike manner, in proportion to that degree they would have obtained a lighter crop. Accordingly, if the evidence was admitted, wherever the planting and cultivating was inferior to that of the plaintiff, the diminished size of the crop on that account would inure to the advantage instead of the disadvantage of the plaintiff, upon the admission of the testimony. The evidence was not offered to prove that the chemicals would produce a crop, or to prove the value of the chemicals as a fertilizer; but to prove that the presence of borax did not render the mixture unsuitable.

The question at issue was, "Is borax present in a quantity, as found in the chemicals sold by the defendant to the plaintiff, deleterious?" In other words, is from five to six and six tenths pounds of boron to the ton practically destructive to growing plants? The

only way to determine whether any substance has a deleterious effect is to try it. Under this principle the plaintiff was permitted to offer evidence tending to show that borax in some quantities was deleterious. Without objection he introduced expert testimony to show that, from their reading, observation of conditions in the field, and experiments conducted in person or in conjunction with others, their conclusions were that boron in sufficient quantity was deleterious. The only thing in the record to show in what amount it was deleterious was the unsupported statement of Dr. Woods that three pounds was harmful and that twenty pounds would kill. All the knowledge possessed by these experts came from conditions not similar to those confronting the plaintiff. The fertilizer was not the same, that is, in the same ratio, and it was in the form of fertilizer, not raw chemicals; the climatic conditions were not the same; the experiments were not conducted in the same vicinity; and the experiments were not a duplicate of field conditions, except in the Presque Isle experiment, where, when six pounds of boron was present a larger crop was obtained than where none was present. This evidence having been offered and given by the plaintiff, the defendant asked to be allowed to show that the same chemicals, from the same mass, used in the same proportion, and the same locus, the same vicinity, by farmers trying to raise a crop of potatoes and not trying to substantiate a theory, used at the same time, under the same climatic conditions as the plaintiff used his, raised two hundred bushels per acre, a fair crop according to the testimony, to three hundred bushels per acre, a large crop, which the defendants contended tended to show that the chemicals contained nothing deleterious.

It must be borne in mind, all the time, that borax is a plant poison and that the evidence shows that there was the definite quantity of six and six tenths pounds of borax in the Sagadahoc fertilizer, and that the question is, and the sole question, whether six and six tenths pounds destroyed the plaintiff's crop? All the testimony shows that borax is an active plant poison when present in such a quantity as to become effective as a poison. Its effect may not be precisely alike in all cases, but when present in poisonous quantities it must be substantially the same. It is like a drug to the human system; up to a certain quantity it may be beneficial; beyond that, poisonous; and a little more, a deadly poison. We think it a reasonable

deduction, that if six and six tenths pounds of borax was sufficiently injurious to practically kill a potato crop in one case, it must necessarily follow that the same quantity would do some injury in any other similar case. The defendants offered to show the converse of this to be true by proving that in the several cases in which the evidence was offered, six and six tenths pounds did not do any harm whatever, and, consequently, it did not do the harm which the plaintiff claimed. And they undertook to do this by offering evidence of actual results from the use of the same kind of fertilizer that was used by the plaintiff. We think the logical effect of the evidence offered tended to rebut the plaintiff's contention.

The plaintiff in his brief makes this comment: "Counsel for the defendants argue that the land on which the whole seed were used produced better than that on which cut seed were used. Their inference is, that the potash, which they say was too close to the seed, thus more easily drew the sap from the seed. But until it is explained why the Bradley's and the manure produced where the Sagadahoc didn't, it seems to counsel for the plaintiff that the only proper inference from these facts is, that the poison from the borax, and not the method of cutting the seed, was the cause of the trouble." According to that comment the plaintiff used the evidence that Bradley's and the manure produced a large crop in proof that the presence of borax in the Sagadahoc was the cause of the small crop. To meet that claim was the very purpose of the offer of the evidence excluded. The offer was to show that, in several cases, some in the same town, the Sagadahoc did produce an unimpaired crop and in some cases a large crop, as large as that produced on Bradley's, and that it was a fair inference from that evidence that six and six tenths pounds of borax, the common factor in the Sagadahoc, was not the cause of the plaintiff's small crop. In view of the fact that there are numerous causes for a failure of a potato crop, the evidence offered becomes of vital importance in tending to prove that the plaintiff's small crop might be due to other things than the presence of borax as the defendants strenuously contended it was, and presented much evidence in support of their claim.

We think the evidence should have been admitted as having a legitimate and logical tendency to rebut the evidence of the plaintiff that six and six tenths pounds of borax, present in the fertilizer which he used, practically destroyed his crop.

The plaintiff contends, however, that the inadmissibility of this evidence has already been determined in *Fertilizer Works* v. *Logan*, 116 Maine, 33. That was a case in which the plaintiff Company had brought suit upon a note given to it by the defendant for commercial fertilizer. The defense was that the fertilizer was guaranteed to contain certain definite percentages of nitrogen, phosphoric acid and potash, and that it was deficient in all three of these particulars. The barrels in which the potash was sold contained the legend 5-8-7. The printed statement affixed to each barrel was the guaranty for breach of which the defendant claimed the right to recoup. The court in stating the issue, said: "The crucial question is one of fact; it is whether the percentage of one or more of the three ingredients referred to was lower than that guaranteed." It is important to note that percentages are the only issue. In proof of that contention the defendant presented evidence of three classes: First, that his own potato crop in 1914, which had been fertilized with 5-8-7, which he bought, yielded only forty barrels to the acre; next, that some of his neighbors, whose lands were near, or contiguous, to his own, and some of them similarly situated, used substantially like amounts per acre of the same brand of fertilizer, taken from the same barge, and experienced a like unsatisfactory result of a small crop.

With reference to the offer of that evidence, the court observes "All this evidence must be viewed with reference to the single point, namely, the percentages of nitrogen, phosphoric acid and potash, because nothing else was guaranteed and no other guaranty is pleaded or relied upon. There was no guaranty of suitableness nor of results from the use of the fertilizer." It was held that the objection to the first class, the defendants' own experience, was tenable on the ground that the proof is too uncertain, too speculative or conjectual, and enumerates numerous other reasons involving all the elements of husbandry in planting and including climatic conditions. It should be observed, however, that the exclusion was not general but limited to the particular issue on trial, as clearly appears from the following language in the opinion namely: "And it has been held that such evidence is inadmissible when the fertilizer was sold on a guaranteed analysis basis only." The phrase "on a guaranteed analysis basis only" is the crucial test that distinguishes the cases cited from the case at bar. In the next sentence after expressing the limitation in the

above language, Chief Justice SAVAGE, with reference to the exclusion of the testimony and the limitation of the exclusion to a fertilizer sold "on a guaranteed analysis basis only," says, "With this view we agree." Then follows a statement of the ground upon which he agrees, namely, "Had there been a guaranty of suitableness, or of results, the evidence would undoubtedly be admissible to be considered with the other facts." In other words, upon a guaranty that a fertilizer is suitable, the excluded evidence, he declares, would not only be admissible, but, by way of emphasis, "would undoubtedly be admissible."

It seems hardly debatable that this differentiation made by the court clearly distinguishes between the issue upon which the evidence was offered in the case at bar and the issue upon which it was offered in the case cited. In the present case there is no question of percentages, which was the only issue in the case cited. There is no question raised but that the percentages 4-8-6 were as guaranteed. The only issue, therefore, was whether the fertilizer containing the elements 4-8-6, as represented, was further guaranteed to be suitable for the raising of potatoes. In other words, its unsuitableness on account of boron was the only issue in the present case. That such was the issue conclusively appears from the plaintiff's declaration in which he avers, speaking of the chemicals, that the goods "were not suitable for mixture as a fertilizer to be used in fertilizing land for the production of potatoes, but contained borax in sufficient quantity to prevent the germination of seed potatoes and to kill the young potato plants and sprouts."

In support of the rule that the excluded evidence would be undoubtedly admissible upon the issue of suitableness, Chief Justice SAVAGE cites two opinions; one from Maryland and one from South Carolina. The Maryland case excluded the evidence upon the ground that "the appellee selected a specific article which was well known to him and the risk of its affecting the object for which he bought it, he, therefore, took upon himself." The South Carolina case excluded the evidence upon the ground of percentages only. The opinion was concurred in by three of the Justices. A dissent was entered by two of the Justices including the Chief Justice. The dissenting opinion held that the evidence should have been admitted, saying "His Honor, the Presiding Judge, allowed the defendant to introduce testimony as to the condition of the crops upon which the fertilizer

was used for the sole purpose of showing that the guaranteed analysis did not contain all the ingredients therein stated. . . . There is no good reason why such fact could not be proved by circumstantial as well as direct testimony, in the absence of a legal requirement providing the manner in which such fact should be established."

We are of the opinion, therefore, that both upon reason and authority the evidence excluded in the case at bar should have been admitted.

Motion sustained.
Exceptions sustained.

JEROME W. COLE *vs.* DANIEL S. CHELLIS.

JEROME W. COLE *vs.* LUCINDA M. CHELLIS.

York. Opinion February 20, 1923.

An action is maintainable under R. S., Chap. 87, Sec. 159, to recover damages in case of a judgment obtained by perjury, but a defendant who authorizes the court to assume that the plaintiff's testimony is true for the purpose of passing on a motion for a nonsuit and agrees that if a nonsuit is refused, final judgment may be entered for the plaintiff for the amount of his claim, does not present a case within the intendment of the statute.

The plaintiff brought these actions against the defendants under R. S., Chap. 87, Sec. 159, alleging that in former suits wherein he was defendant judgment was obtained against him by the perjury of the present defendants.

It appears that in each of the former cases, Mr. Cole at the close of the plaintiff's testimony made a motion for a nonsuit. This motion was granted subject to an agreed stipulation that if for any cause the Law Court should overrule the order of nonsuit judgment should be entered for the plaintiffs. The Law Court did in effect overrule the order of nonsuit and did enter judgment for the plaintiffs.

On exceptions by plaintiff. These are actions brought under R. S., Chap. 87, Sec. 159, to recover damages as the result of alleged perjury committed by these defendants in two former cases wherein the

defendants in these cases were plaintiffs, and the plaintiff in these actions and another were defendants, which cases resulted unfavorably to the defendants in those cases. In the former cases a nonsuit was granted with the following stipulation: "Motion for nonsuit granted in consideration of the agreement on the part of the defendants, that if for any cause the Law Court shall overrule the order of nonsuit, the Law Court is hereby authorized to enter judgment for the plaintiffs for the full amount of their respective claims and injuries." In these cases, being tried together, before any testimony was introduced, counsel for defendants moved for a nonsuit on the ground that the plaintiff, who was one of the defendants in the former cases, was barred from maintaining these actions by the stipulation entered into in the former cases, and a nonsuit was granted in each of these cases and plaintiff excepted. Exceptions overruled.

The cases are stated fully in the opinion.

Emery, Waterhouse & Paquin and Elias Smith, for plaintiffs.

Mathews & Stevens, for defendants.

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

DEASY, J. Mr. and Mrs. Chellis brought actions of deceit against Mr. Cole. In each case the defendant moved for a nonsuit. In each the nonsuit was granted subject to the following stipulation: "Motion for nonsuit granted in consideration of the agreement on the part of the defendant that if for any cause the Law Court shall overrule the order of nonsuit, the Law Court is hereby authorized to enter judgment for the plaintiffs for the full amount of their respective claims and interest thereon." The Law Court in effect overruled the order of nonsuit and entered judgments for the plaintiffs. *Chellis* v. *Cole,* 116 Maine, 283.

The suits now under consideration are brought by Cole against Mr. and Mrs. Chellis under R. S., Chap. 87, Sec. 159. It is alleged that Mr. and also Mrs. Chellis in the former actions of *Chellis* v. *Cole* gave certain testimony on oath therein making statements that "were false and knowingly made as false and were material and pertinent then and there to the issue being tried and that the plaintiff has been injured and damnified."

At common law (4 Blackstone 137) and by statute (R. S., Chap. 124, Sec. 1) perjury is a crime. It is punished by drastic penalties.

At common law, however, there is no civil action for perjury. *Garing* v. *Fraser*, 76 Maine, 41. It is a cause for review (R. S., Chap. 94, Sec. 1) and by R. S., Chap. 87, Sec. 159 an action for damages is authorized. The statute is as follows: "When a judgment has been obtained against a party by the perjury of a witness introduced at the trial by the adverse party, the injured party may bring an action on the case within three years after such judgment or after final judgment in any proceedings for a review thereof, against such adverse party, or any perjured witness, or confederate in the perjury, to recover the damages sustained by him, by reason of such perjury; and the judgment in the former action is no bar thereto."

To maintain an action under the statute it must appear (1) that a judgment has been obtained against the plaintiff (2) by the perjury of a witness introduced at the trial by the adverse party (3) resulting in damage to the plaintiff.

In the instant case judgments were obtained against the present plaintiff in one case for four thousand dollars and in the other case for one thousand dollars with interest. But these judgments were obtained by consent and not "by perjury of a witness introduced at the trial by the adverse party." The stipulation provides that "if for any cause the Law Court shall overrule the order of nonsuit the Law Court is hereby authorized to enter judgment for the plaintiffs for the full amount of their respective claims and interest thereon." A judgment thus authorized cannot be said to be obtained by perjury. But it is argued that while final judgment in these cases was entered by consent, such consent was conditional upon the overruling of the order of nonsuit, and that such overruling by the court was a judgment "obtained against the plaintiff by perjury."

But the judgment contemplated in the statute is a judgment based on a judicial finding of fact. A refusal to grant a nonsuit or a reversal of an order of nonsuit is a judgment, but it is not so founded. A defendant in moving for a nonsuit says in effect "assuming the evidence offered by the plaintiff to be true, a jury is not justified in finding a verdict for the plaintiff." This presents an issue of law. The determination by the court of a pure question of law cannot properly be denominated a judgment obtained by perjury.

The law abhors fraud and perjury. It also abhors interminable litigation. We do not say that a party may in no cause withhold

his defense and set it up in an action to recover damages for perjury. But this is a course not to be commended.

In case of "judgment obtained by perjury" an action is under the statute maintainable to recover damages, but a defendant who authorizes the court to assume that the plaintiff's testimony is true for the purpose of passing on a motion for a nonsuit and agrees that if the nonsuit is refused final judgment may be entered for the plaintiff for the amount of his claim does not present a case within the intendment of the statute.

In each case the judgment must be,

Exceptions overruled.

ELIZABETH MEYERS *vs.* PEPPERELL MANUFACTURING COMPANY.

York. Opinion February 22, 1923.

A landlord is liable for damages for injuries sustained by a lawful traveler on a public highway, by ice or snow falling from the roof of a building on such highway, if the building is let to different persons occupying different parts thereof, whether as lessees or tenants at will; otherwise when the whole building is let to one tenant or lessee. If it does not appear that the tenant or lessee might not, by reasonable care, have prevented the accident, he is liable.

When a lawful traveler on a public highway is injured by ice or snow falling from the roof of a building on such highway, the landlord is not liable when the building is let to a tenant who has entire control and occupancy of the whole building, since the tenant and not the landlord is bound, as between himself and the public, to keep buildings abutting upon a highway in such repair that they may be safe for travelers thereon.

Nor is the landlord liable for such injuries when he lets a building with a steep, unguarded roof, reserving only the right to enter the premises for the purpose of making repairs, the whole building being let to one tenant and it not appearing that the tenant might not, by the use of reasonable care, have prevented the accident.

But the landlord is the responsible party when the separate parts of his building, consisting of stores and tenements, are let to many different tenants by lease or as tenants at will, and he has general supervision over the whole, with entire

control of outside doors and passageways so far as may be necessary to enable him to make repairs, and the obligation rests upon him to make those repairs.

Where the building is occupied by several tenants, even when one tenant has special facilities for getting upon the roof, but it does not appear that the place where ice and snow accumulated was under the control of the tenants or that they had anything to do with the outside of the roof, and damage results wholly from the shape of the roof and the proximity of the building to the street, the tenants are not liable, for their responsibility is confined to so much of the premises as they occupy respectively and exclusively. The responsibility rests upon the landlord who has the right to go upon the roof and so alter its construction that at all seasons of the year it may not cause danger to travelers on the highway in front of the building.

On report and motion for a new trial. This is an action on the case to recover for personal injuries sustained by the plaintiff by ice and snow falling from the roof of a building owned by defendant while she was walking along a public highway in Saco. At the close of the testimony, by agreement of the parties, the question of damages only was submitted to the jury, and the case reported to the Law Court for the determination of the question of liability of the defendant, with the stipulation that in the event the defendant was found liable, judgment was to be for the amount of the verdict less such remittitur, if any, as might be ordered and accepted. The jury returned a verdict for plaintiff for four thousand nine hundred ninety-one dollars and forty-six cents. Motion overruled. Defendant adjudged liable.

The case is fully stated in the opinion.

Leroy Haley, for plaintiff.

Emery, Waterhouse & Paquin, for defendant.

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

DUNN, WILSON, JJ., concuring except as to the amount of damages.

PHILBROOK, J. While walking on a sidewalk, which was part of a public highway, and when in front of a building owned by the defendant, the plaintiff, then in the exercise of due care, suffered injuries caused by ice and snow sliding from the roof of said building and striking her person. At the trial the question of the amount of her damages only was submitted to the jury. The question of liability was reserved upon report to be determined by this court.

The testimony came wholly from the plaintiff and her witnesses; the defendant offered none. From that testimony it appears that the building is a three-story brick building with five stores on the lower floor and tenements on the second and third floors; that no part of the building was occupied by the defendant at the time of the accident; that it has a slated roof sloping on one side toward the street, on the sidewalk of which the plaintiff was walking when she received her injuries; that more or less irons of small size, known as snow-guards, were fastened under the roof slates; that all the tenants of the building were tenants at will; that no one tenant hired or occupied the entire building; that from time to time the defendant, through its agents or employees, replaced broken glass, attached and removed outside windows and window screens, repaired chimneys, painted the front of the building, repaired leaks in the roof, and removed snow therefrom. It also appears that during winter seasons snowslides from the roof had occurred frequently and for a number of years.

The contention of the defendant is that tenants at will were bound to remove such snow and ice as might accumulate upon the roof and that if there be any cause of action for the injury which the plaintiff received it should be against the tenants at will and not against the landlord.

It is well settled in this State that when a lawful traveler on a public highway is injured by ice or snow falling from the roof of a building abutting on such highway the landlord is not liable when the building is let to a tenant who has entire control and occupancy of the whole building, since the tenant and not the landlord is bound, as between himself and the public, to keep buildings abutting upon a highway in such repair that they may be safe for travelers thereon. *Lee* v. *McLaughlin*, 86 Maine, 410. Nor is the landlord liable for such injuries when he lets a building with a steep, unguarded roof, reserving only the right to enter the premises for the purpose of making repairs, the whole building being let to one tenant and it not appearing that the tenant might not by the use of reasonable care have prevented the accident. *Clifford* v. *Atlantic Cotton Mills*, 146 Mass., 47; *Leonard* v. *Storer*, 115 Mass., 86.

But the landlord is the responsible party when the separate parts of his building, consisting of stores and tenements, are let to many different tenants by lease or as tenants at will, and he has general

supervision over the whole, with entire control of outside doors and passageways so far as may be necessary to enable him to make repairs and the obligation rests upon him to make those repairs. *Kirby* v. *Boylston Market Association,* 14 Gray, 249. Where the building is occupied by several tenants, even when one tenant has special facilities for getting upon the roof, but it does not appear that the place where ice and snow accumulated was under control of the tenants or that they had anything to do with the outside of the roof, and damage results wholly from the shape of the roof and the proximity of the building to the street, the tenants are not liable, for their responsibility is confined to so much of the premises as they occupy respectively and exclusively. The responsibility rests upon the landlord who has the right to go upon the roof and so alter its construction that at all seasons of the year it may not cause danger to travelers on the highway in front of the building. *Shipley* v. *Fifty Associates,* 106 Mass., 194.

Applying these rules of law to the facts disclosed by the testimony we are of the opinion that the liability of the defendant in this case is established.

Upon the question of damages we are called upon to alter the finding of the jury reached after seeing the witnesses, hearing them testify, and taking all the facts into consideration. The verdict is large but not so grossly excessive in the opinion of a majority of the court as to warrant our interference.

Motion overruled.
Defendant adjudged liable.

INHABITANTS OF PRESQUE ISLE *vs.* INHABITANTS OF CARIBOU.

Aroostook. Opinion February 23, 1923.

A legitimate child of a former marriage does not follow the pauper settlement of its mother acquired by another marriage, when its father had a pauper settlement in this State, but retains that of its father.

A woman having a pauper settlement by virtue of marriage loses that settlement by another marriage to a man having a pauper settlement in this State and acquires that of her husband of the later marriage.

A child of the former marriage does not follow the mother's newly-acquired settlement when its father had a pauper settlement in this State but retains the father's settlement.

No question of settlement by an apprenticed or emancipated minor is involved in the case at bar.

On report on an agreed statement. This is an action of assumpsit to recover for pauper supplies furnished to a minor son of Joseph Langley, deceased, who had at the time of his death a pauper settlement in defendant town. After the death of his father, his mother married Ramie Landry who had a pauper settlement in plaintiff town, whose pauper settlement the mother acquired by said second marriage. The case was reported to the Law Court under an agreed statement with the stipulation that if the minor, James Langley, had a pauper settlement in the town of Caribou, judgment was to be for plaintiffs for the amount claimed. Judgment for the plaintiffs for the amount claimed.

The case is stated in the opinion.

Philip D. Phair, for plaintiff.

Cyrus F. Small, for defendant.

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

PHILBROOK, J. This is an action to recover for pauper supplies furnished to James Langley by the plaintiff town. The case is

reported to this court for determination, upon agreed statement, with stipulation that we are to render such final judgment as the legal rights of the parties require.

AGREED STATEMENT.

"James Langley is the minor son of Joseph Langley, deceased, and Ada Landry, formerly Ada Langley. He was born in 1908 in the town of Caribou where his father, Joseph Langley had a pauper settlement. Joseph Langley died August 10th, 1916, at said Caribou. Ada Langley moved to the town of Presque Isle with said son, James Langley, in 1916. January 13th, 1918, she married Ramie Landry of said Presque Isle who had a pauper settlement in said town. The family have resided in Presque Isle since that date.

"The supplies were legally and properly furnished to the said James Langley by said town of Presque Isle as described in the account annexed to the plaintiffs' writ and to the amount therein claimed. A legal notice was given by the plaintiffs and a legal denial made by the defendants. If the pauper settlement of said minor, James Langley, is in the town of Caribou judgment is to be for the plaintiffs for the amount claimed."

The only question involved in this case is that relating to the pauper settlement of James Langley, who, during his minority, received the pauper supplies furnished by the plaintiff town. The report does not, in terms, state that he is the legitimate son of Joseph and Ada Langley, but we shall answer the question upon the hypothesis that he is a legitimate child, believing that if he were illegitimate the parties would have clearly indicated that fact in their agreed statement.

The plain provision of our statute is that legitimate children have the pauper settlement of their father, if he has any in the State; if he has not, they have the pauper settlement of their mother within it. R. S., Chap. 29, Sec. 1, Par. II. The question of settlement by an apprenticed minor does not enter into this discussion. Neither is the question of emancipated minors involved.

It is agreed that Joseph Langley, father of James, had a pauper settlement in the defendant town of Caribou. The agreed statement is not explicit upon the point but we assume that this pauper settle-

ment of the father continued until his death on August 10, 1916, at which time James was eight years old. The pauper residence of James was in Caribou at that time. Was it changed by the marriage of his mother to Ramie Landry who had a pauper settlement in the plaintiff town of Presque Isle? That the marriage changed the pauper settlement of the mother to Presque Isle must be conceded, since a wife by marriage loses her settlement and acquires that of her husband. *Bangor* v. *Wiscasset*, 71 Maine, 535. But, while the marriage of the mother to Ramie Landry, whose settlement was in Presque Isle, transferred her settlement to that town, it had no effect upon the settlement of James for it is only when the father has no settlement in this State that the children follow the settlement of the mother. *Thomaston* v. *Greenbush*, 106 Maine, 242. *Fairfield* v. *Canaan*, 7 Maine, 90; *Farmington* v. *Jay*, 18 Maine, 376.

The pauper settlement of James Langley is in the town of Caribou and the mandate must be, in accordance with the terms of the agreed statement.

Judgment for plaintiffs for the amount claimed.

ALONZO P. RICHARDS *vs.* JOHN TOLMAN.

Franklin. Opinion February 23, 1923.

A defective and insufficient declaration should be taken advantage of by a demurrer; however, if a nonsuit has been ordered, it will not be set aside inasmuch as a judgment upon such defective declaration could not be sustained. Therefore exceptions to an order of nonsuit, under such circumstances, the plaintiff suffering no injury, must be overruled.

All the necessary allegations in an action of deceit must not only be set out in the declaration but must be affirmatively proved.

On exceptions. This is an action for deceit to recover damages alleged to have been suffered by plaintiff by reason of alleged misrepresentations made by defendant to plaintiff in the purchase of some hay by plaintiff of another party.

After the plaintiff had completed his testimony and rested, counsel for the defendant moved for a nonsuit on the ground that the declaration did not set out a legal cause of action, which motion was granted and plaintiff excepted. Exceptions overruled.

The case is stated in the opinion.

Sumner P. Mills, for plaintiff.

Frank W. Butler, for defendant.

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

PHILBROOK, J. After the plaintiff had offered all his testimony, and rested, the defendant presented a motion for an order of nonsuit. The motion was granted, nonsuit ordered, and to this order plaintiff excepted.

The action is for deceit. The necessary allegations in a declaration charging deceit are so well established and have been so recently

stated by this court in *Crossman* v. *Bacon & Robinson Company*, 119 Maine, 105, that repetition here is unnecessary. Every such allegation must not only be made but must also be affirmatively proved.

The declaration does not contain all the allegations essential to the maintenance of an action for deceit nor, if those allegations had appeared, would the testimony support all such allegations.

The proper way to take advantage of a declaration which does not set out any legal cause of action is by demurrer. But when a nonsuit has been ordered in such case the court will refuse to set it aside on the ground of convenience, it being clear that the plaintiff cannot sustain a judgment upon such defective declaration. There being no legal cause of action exhibited by the plaintiff's declaration, he has suffered no injury by the order of nonsuit and therefore has no cause for exceptions.

Exceptions overruled.

FRED I. ALBEE *vs.* TIMOTHY LAROUX.

Cumberland. Opinion February 24, 1923.

More is required to sustain an action of deceit, based as it is upon false and fraudulent representations as to existing material facts, than to support an action of fraud, as there is a clear distinction between the general term fraud and the specific term deceit or fraudulent representations, and the facts to substantiate the latter may be inadequate to sustain the former.

Such an action cannot be maintained upon a broken promise by defendant to pay for purchased goods at a certain time, even though it appear that the defendant had a preconceived design never to pay for the goods.

On report. This is an action of deceit to recover the purchase price of $2,191.05 for seventy-three hogs, the defendant having promised at the time of delivery that he would pay for them in about three weeks.

The cause was tried in the Superior Court of Cumberland County without a jury, exceptions being reserved, and at the conclusion of the testimony by agreement of the parties it was reported to the Law Court. Judgment for defendant.

The case is stated in the opinion.

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

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

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

CORNISH, C. J. On report. This is an action of deceit brought to recover the value of certain hogs purchased by the defendant from the plaintiff. The false and fraudulent representations are alleged in the writ in these words: "The defendant . . . . did then and there falsely, deceitfully and fraudulently assert and affirm to the said plaintiff that if said plaintiff would deliver and transfer to him said hogs, he the said defendant would pay to the said plaintiff as purchase price of said hogs the sum of two thousand, one hundred and ninety-one dollars and five cents, ($2191.05) at a certain future time, to wit, three weeks, more or less, from said time . . ." The declaration further alleges a preconceived fraudulent design never to pay for said hogs, and it is upon this preconceived design that the plaintiff rests his cause of action in this case, relying upon *Burrill* v. *Stevens,* 73 Maine, 395, and *Atlas Shoe Co.* v. *Bechard,* 102 Maine, 197.

In the former case suit was brought upon a promissory note given by the defendant in consideration of a promise by the payees to deliver to him certain personal property at a future time. The defense set up was fraud, and the court stated the issue to be whether getting property by a purchase upon credit with an intention on the part of the purchaser never to pay for the same constitutes such a fraud as will entitle the seller to avoid the sale, "although there are no fraudulent misrepresentations or false pretenses." Although the authorities elsewhere are divided, the court held that such a doctrine should obtain here and upheld the defense on the ground of fraud. The same principle was affirmed in *Atlas Shoe Co.* v. *Bechard,* 102 Maine, 197, supra, where an action of trover was sustained on the ground that at the time the defendant purchased the goods in question he

had the intention never to pay for them. The sale was there held to be avoided by the fraud and no title passed.

But those cases are not in point here. There is a clear distinction between the general term fraud and the specific term deceit or fraudulent representations, and the facts to substantiate the one may be inadequate to substantiate the other. The opinions in these very cases carefully noted the distinction. They both said when at the time of the purchase of the goods there is an intent never to pay for them, the sale may be avoided for fraud "although no false and fraudulent representations are made by the purchaser." The facts in those cases were deemed by the court to constitute such fraud as to avoid the sale, but also were deemed insufficient to support the charge of false and fraudulent representations, because a broken promise cannot supply the necessary elements.

As the pending case is presented to the Law Court it is simply an action of deceit and is based upon so-called false and fraudulent representations. To sustain such an action, the representations if material and false must be of some existing facts. They speak of the present and not of the future. Here the representation as alleged and supported by proof is merely a promise to do something in the future which the defendant did not do. It was in no way connected with an existing fact. Clearly this form of action cannot be maintained. *Carter* v. *Orne,* 112 Maine, 365: *Dawe* v. *Morris,* 149 Mass., 188.

Judgment for defendant.

LEO MICHAUD'S CASE.

Kennebec. Opinion February 27, 1923.

A petition under the Workmen's Compensation Law should conform to the statute, and particularly state the fact of disagreement between the parties, and "the matter in dispute and the claims of the petitioner in reference thereto." Especially is this essential in such proceedings inasmuch as frequently claimant is without counsel, and his interests might thus be jeopardized. The issue of the degree of impairment of usefulness is one for the determination of the Commission in its sound judgment, based upon some competent evidence, drawing reasonable inferences from proven facts.

The petition in this case lacks allegations of material facts essential to a proper presentation of claimant's case. A petition under the last clause of section sixteen of the Workmen's Compensation Act of 1919 should conform to the requirements of section thirty and particularly should state the fact of disagreement between the parties, and "the matter in dispute and the claims of petitioner in reference thereto."

When, as in the instant case, an answer is not filed, the Commission in proceeding upon the petition may treat the allegations of fact, which are well pleaded in the petition, as admitted, and may make such award as the facts so admitted will support.

The award of the Commission upon the question of the degree of impairment must stand if based upon some competent evidence, drawing reasonable inference from proven facts. The rule in this particular must be the same in relation to determination of extent of incapacity by the Commission, as in cases of findings of fact by the Chairman.

The extent of impairment rests for determination in the sound judgment of the Commission upon consideration of the evidence, and in the instant case the evidence warrants the award.

On appeal. Claimant received a compensable injury while in the employ of the Cushnoc Paper Company. He was awarded and paid compensation for the period of disability, and was admittedly entitled to compensation for permanent impairment to the usefulness or physical functions of his right foot.

The parties could not agree as to the extent of the impairment, and claimant filed a petition for its determination. A hearing was had on the petition and the Commission decreed a forty per cent. permanent impairment, and awarded claimant fifteen dollars per week for fifty weeks, and respondents appealed. Appeal dismissed. Decree of sitting Justice affirmed with costs.

The case is stated in the opinion.

Claimant was without counsel.

Andrews, Nelson & Gardiner, for respondents.

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

MORRILL, J. This is an appeal by an employer and insurance carrier from a decree upon a petition filed under the Workmen's Compensation Law of 1919, Chapter 238, Section 16, asking for compensation for permanent impairment of the usefulness of the right foot.

The record shows an entire disregard of the simple procedure marked out by statute, which has become so common, that it merits our attention.

In the first place the petition lacks allegations of material facts essential to a proper presentation of claimant's case. A petition under the last clause of Section 16 should conform to the requirements of Section 30, and particularly should state the fact of disagreement between the parties, and "the matter in dispute and the claims of the petitioner in reference thereto." Attention was called to the insufficiency of the forms of petition, which appear to be generally in use, in *Maxwell's Case,* 119 Maine, 504. The claimants in these cases are quite frequently, as in the instant case, without counsel, and if forms of petitions are provided under Section 37, they should conform to the requirements of the act, lest they become a pitfall for the inexperienced.

Searching the record to ascertain the matter in dispute, we next look for the answer, which should "state the claims of the opponents with reference to the matter in dispute as disclosed by the petition." If the petition was defective, the respondents by answer, or by motion if the defect was apparent upon the face of the papers, should have called attention seasonably to the defect, that it might have been remedied by amendment. The proper procedure was pointed out

in *Maxwell's Case*, supra, but the respondents did not file an answer. "If any party opposing such petition does not file an answer within the time limited, the hearing shall proceed upon the petition." (Section 30). We think that the filing of an answer should be insisted on. The instant case illustrates the possible consequences of a failure to do so. The petition alleges a permanent impairment to the usefulness of the right foot to the extent of seventy-five per cent. With no answer filed, the petitioner could not know whether the permanency of the impairment or the extent of the impairment was in dispute. The Commission found forty per cent. permanent impairment; not having indicated by answer "the matter in dispute as disclosed by the petition," the respondents are in no position to complain of an award of little more than one half of the claim. The Commission in proceeding upon the petition may treat the allegations of fact which are well pleaded in the petition as admitted, and may make such award as the facts so admitted will support, after the analogy of procedure upon bills in equity taken pro confesso for want of appearance or answer.

The record shows, however, that the case proceeded to a hearing before the Chairman and the Commissioner of Labor, upon the single question of the degree of impairment of the injured foot, with result above stated.

The award must stand if based upon some competent evidence, drawing reasonable inferences from proven facts. *Jacques's Case*, 121 Maine, 353. The rule in this particular must be the same in relation to determination of extent of incapacity by the Commission, as in cases of findings of fact by the Chairman.

The claimant suffered the loss of the fourth and fifth toes of the right foot which were amputated including the metatarsal bones of each, thus narrowing the foot about one inch and impairing the functions of the second and third toes. At the first hearing he was the only witness and testified in answer to questions from the Chairman as follows:

"Q. How much less useful do you think it is now than it was before you were injured . . . how much do you think it is impaired?

"A. I think sixty to seventy per cent.

"Q. That is one third as good.

"A. Yes, about one third as good, that is what it is."

If this was all of the claimant's case, the mere guess of an uneducated man, the probative force would be very limited. But the claimant fully explained the effect which the operation had upon the use of the foot in walking and while at work. This was evidence of the highest quality from which the Commission could determine the extent of impairment.

The opponents rely upon the statements of three physicians. At the suggestion of the Chairman, Dr. Herbert W. Hall and Dr. Richard H. Stubbs were appointed to make impartial examinations, Dr. Hall as an expert to take X-ray pictures. Their reports, not under oath, are in the record. Dr. Hall concludes his report with this remark: "It would seem that about 30 per cent. of disability is occasioned by the loss of bones in the outer part of the foot." This is far from a positive expression of opinion by an expert witness, "an educated guess," and it leaves out of consideration the condition of the other toes.

Dr. Stubbs says: "I believe it is fair to call the big toe one third of the anterior support of the foot. The second and third toes to be one third of the support of the same. And the fourth and fifth to be one third of the same. In this manner I should say that, for a laboring man, there was 33% impairment of this foot." This estimate leaves out of consideration "much impairment of flexion and extension of the third toe," and "the weakening of the whole arch of the foot," as found by Dr. Stubbs. He further says, "The foot is, surely, much less stable than before the injury, and surely cannot stand nearly so much prolonged labor."

At an adjourned hearing Dr. W. H. Harris was called by the respondents; he fixed the degree of impairment at twenty-five per cent. which he arrived at in the following way: He valued the posterior part of the foot at twenty-five per cent., and dividing the anterior part as divided by Dr. Stubbs, he values each division at twenty-five per cent. At the close of a long explanation he says: "There is no schedule of values by which you can estimate the degree of disability in such cases."

The respondents contend that there is no proper evidence in support of the findings of the Commission of forty per cent. permanent impairment to claimant's foot, and that therefore the appeal must be sustained and the award of compensation reversed.

The extent of impairment rests for determination in the sound judgment of the Commission upon consideration of the evidence, and we think that the testimony of the plaintiff, viewed in the light of the findings of Dr. Stubbs, warrants the award. We are convinced that the award is a just determination of what is a difficult problem in every similar case.

Appeal dismissed.
Decree of sitting Justice affirmed with costs.

STATE *vs.* AUTOMOBILE.

BOSTON BUICK CO., Claimant.

Cumberland. Opinion March 1, 1923.

The rights of a claimant in an automobile seized for alleged illegal transportation of intoxicating liquors, are unaffected by a forfeiture or sale under the statute, as the county under the forfeiture acquires no greater rights than had the person unlawfully using such vehicle, claimant as mortgagee or vendor under a conditional sale agreement having taken, prior to the seizure, no steps to enforce his rights.

This case is governed by the rules laid down in *Paige Touring Co. Case*, 120 Maine, 496.

The enforcement of the rights of a mortgagee against his mortgagor or of a vendor against his vendee under a conditional sale agreement is not within the scope of these proceedings.

No steps were taken by the claimant to enforce its rights under its agreement prior to the seizure, and as against the State they must be held to remain the same as at the time of the seizure.

In case of a forfeiture the county acquires no greater rights by forfeiture than the person unlawfully using the vehicle, and may be divested of those rights, if conditional, in the same manner as the person whose rights are thereby acquired.

The county can only sell the title of the conditional vendee which it acquires by forfeiture, and from such sale it is entitled to the entire proceeds. The claimant's title and rights remain unaffected by such forfeiture or sale.

On report. On February 2, 1922, a Buick automobile was sold in Boston by the Boston Buick Company, Claimant, to one Joseph A.

Kirby under a conditional sale contract, and on the following morning the said Kirby was arrested in Cumberland County for the illegal transportation of liquors and the car was seized and libelled and a claim made for it by the Boston Buick Company. The car was declared forfeited in the Municipal Court of Portland, and the claimant appealed to the Superior Court of Cumberland County. Upon an agreed statement the cause was reported by agreement of the parties to the Law Court for such determination as the law and facts required. Rights of John A. Kirby in said Buick Automobile, February 3, 1922 under a conditional sale agreement entered into between him and the Boston Buick Company, February 2, 1922, ordered forfeited to the county of Cumberland to be held in accordance with the provisions of Chapter 63 of the Public Laws of 1921, but subject to all rights of the Boston Buick Company under said conditional sale agreement.

The case is fully stated in the opinion.

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

Raymond S. Oakes, for respondent.

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

WILSON, J. This case, which is a proceeding for the forfeiture of an automobile under Chapter 63 of the Public Laws of 1921, is fully covered by the rules laid down in the *Paige Touring Car Case,* 120 Maine, 496, and followed in the *Packard Motor Car Case,* 121 Maine, 185. The claimant in the case at bar asks the court to order the automobile to be delivered into its possession on the ground that under a conditional sale agreement entered into in Massachusetts it retained the title thereto, and as against the conditional vendee in whose possession it was found while being used in the unlawful transportation of intoxicating liquors in the State by reason of a breach of the conditions of said agreement, it is entitled to possession.

The enforcement of the rights of a mortgagee against the mortgagor, or of a vendor under a conditional sale agreement against his vendee is not within the scope of these proceedings, which are instituted solely for the purpose of determining whether the vehicle in question was at the time of the seizure being used in violation of the statute

above referred to; and if an innocent claimant appears, whether the person so using has an interest therein which is subject to forfeiture.

No steps appear to have been taken by the claimant in this case to enforce its rights under its conditional sale agreement prior to the seizure, and as against the State they must be held to remain the same as at the time of the seizure. Until final judgment herein the vehicle remains *in custodia legis.*

In case of forfeiture of the alleged contraband vehicle, or any interest therein, the county, to which under the statute, it is forfeited, acquires no greater rights by forfeiture than the person or persons unlawfully using the vehicle or consenting to its unlawful use had at the time of the seizure, and may after title is acquired by forfeiture be divested of any interest it so obtains in the same manner as the person whose interests it thereby acquires, and can give no other or better title to the vehicle by sale under R. S., Chap. 127, Sec. 33, than the person could have done whose rights therein are forfeited. That the vendee under such conditional sale agreement has an interest in the property that is the subject of the agreement, which may be conveyed, is beyond question. *Keepers* v. *Fleitmann,* 213 Mass., 210.

Inasmuch as the county cannot give to a purchaser as against the claimant in this case, who is admitted to be innocent as to any unlawful use of the automobile, full title thereto, there is no occasion to decide the second request made by claimant's counsel, viz.: as to what part of the proceeds of any sale made by the county the claimant is entitled to. The county can only sell the title or rights of the conditional vendee which it will acquire by forfeiture and from such sale it is entitled to the entire proceeds. The claimant's title and rights under said conditional sale agreement, however, will be unaffected by such sale.

Entry will be:

Rights of John A. Kirby in said Buick Automobile February 3, 1922, under conditional agreement entered into between him and the Boston Buick Co., February 2d, 1922, ordered forfeited to the county of Cumberland to be held in accordance with the provisions of Chapter 63 of the Public Laws of 1921, but subject to all rights of the Boston Buick Co. under said conditional sale agreement.

STATE *vs.* WALTER CHOROSKY.

STATE *vs.* BUICK AUTOMOBILE, WALTER CHOROSKY, Claimant.

York. Opinion March 1, 1923.

In a complaint alleging unlawful possession of intoxicating liquors, and also alleging illegal transportation of intoxicating liquors, if the language setting out either offense is insufficient, it may be rejected as surplusage, and the complaint held good as to the other offense. An automobile carrying intoxicating liquors intended for unlawful sale, having arrived at point of destination, but not unloaded, is subject to seizure. All defects are waived except such as are raised by bill of exceptions.

The complaint in this case contains two counts, the first charging the respondent with the commission of an offense under Chapter 137, R. S., and the second setting forth the grounds for the issuing of a warrant for the seizure of certain intoxicating liquors and an automobile which is an entirely separate proceeding from that against the respondent.

The first count while containing an allegation of having in possession intoxicating liquors cannot be sustained as a charge of unlawful possession, because the place where the liquors were alleged to be kept was not sufficiently described.

It does contain, however, all the necessary allegations of a charge for illegal transportation, and it was upon this charge that the respondent was tried. The allegation of keeping and depositing the liquors may be rejected as a surplusage.

The evidence warranted the submission of the case to the jury on charge of illegal transportation as the question of whether the automobile was properly seized has no bearing on his guilt upon the offense charged.

As to the exceptions presented in the proceeding upon the libel, it is only the issues raised by the bill of exceptions which this court may consider. In the relief sought in this court the claimant must be confined to his bill of exceptions and be held to have waived all other defects.

The ground of the seizure is not that of unlawfully keeping and depositing but of unlawfully transporting intoxicating liquors. The grounds of the seizure set forth in the second count of the warrant are insufficient, but not for the reasons set forth in the claimant's bill of exceptions.

An automobile which has reached the end of its journey, but is not unloaded, that is, its load still remains to be delivered, may still be considered as being used for the transportation of its contraband cargo.

The evidence was, therefore, properly submitted to the jury even if the seizure of automobile was based upon the allegations in the first count.

On exceptions. On the twenty-ninth day of November, 1921, the respondent was on his way from some point in Massachusetts to his home in Biddeford in his Buick automobile, having in his automobile alcohol and Jamaica Ginger intended for unlawful sale. He called at a garage in Kennebunk to obtain some gasoline, and while there the officers without a warrant seized the liquors and car and arrested the respondent, afterward procuring a warrant from a local Trial Justice, and on a hearing respondent was found guilty and the car ordered forfeited, and an appeal was taken to the Supreme Judicial Court, where the case was tried to a jury and respondent was found guilty and the car ordered forfeited. Exceptions during the trial were taken by respondent to refusals to rule as requested, and also to several rulings of the presiding Justice. Exceptions overruled. Judgment for the State. In the second case, exceptions overruled. Automobile ordered forfeited to the county of York.

The cases are fully stated in the opinion.

Edward S. Titcomb, County Attorney, for the State.

Leroy Haley and Charles T. Read, for respondent.

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

WILSON, J. These two cases, one a charge against the respondent either for unlawfully having in possession intoxicating liquors or for unlawfully transporting the same in this State; the other a proceeding in rem for the forfeiture of the automobile in which it is claimed intoxicating liquors were being unlawfully transported, grew out of the same state of facts, were argued together and may be disposed of in one opinion.

On the twenty-ninth day of November, 1921, the respondent was on his way from some point in Massachusetts to his home in Biddeford in his Buick automobile in which he was transporting nine gallons of alcohol and twenty-seven bottles of Jamaica Ginger. No con-

tention is now raised that the liquors were not intended by the respondent for unlawful sale in this State, and the evidence was ample on this point to warrant the jury's verdict.

At some point in the town of Kennebunk the respondent missed his way and finally called at a garage in the rear of Greenleaf's Hotel, so called, in Kennebunk, for a supply of gasoline and while there the officers without a warrant seized the liquors and car and arrested the respondent following which warrant was obtained from the local Trial Justice on which the liquors and car were formally seized and the respondent arrested and brought before the Trial Justice for hearing. At the hearing the respondent was found guilty, though the record does not show of what offense, and the car was ordered forfeited.

On appeal the respondent was tried on the complaint, and a hearing was had on the libel against the automobile, in which proceedings the respondent had appeared as a claimant before the Trial Justice.

COMPLAINT.

At the trial on the complaint in the Supreme Judicial Court the respondent at the opening of the trial requested the court to rule that the proceedings against the respondent were upon the ordinary search and seizure process under Secs. 29 and 30 of Chap. 127, R. S., and that the complaint did not sufficiently set out the "place to be searched, and where the property seized was found."

The court refused to so rule and held that the complaint charged the respondent with the illegal transportation of intoxicating liquors.

The respondent then asked the court to rule that as a complaint charging the respondent with the illegal transportation of intoxicating liquors it did not sufficiently set forth that the respondent "knowingly transported intoxicating liquors" in violation of law. The court refused this request.

At the conclusion of the State's case the respondent requested the court to rule that the evidence was not sufficient to warrant a verdict of guilty, and the court also refused this request.

To these refusals to rule and rulings the respondent excepted, and so the case against the respondent is before this court on these several exceptions.

The complaint contains two counts, the first undertaking to charge the respondent with the commission of an offense under the statutes

and the second setting forth the grounds for the issuing of a warrant for seizure of the liquor and automobile which is an entirely separate proceeding, and both counts being unskilfully drawn. The first contains terms appropriate for a charge of unlawfully having in possession intoxicating liquors, but wholly unnecessary in alleging unlawful transportation. It could not be sustained as a charge of unlawfully having in possession intoxicating liquors because the place where the liquors are alleged to have been kept is insufficiently described. It does, however, contain all the necessary allegations of a charge of illegal transportation, though not in commendable form. The unnecessary allegations of keeping and depositing the liquors in the automobile may be rejected as surplusage, the remainder of the count alleging in substance that the automobile described was then and there being used by the respondent to "knowingly transport intoxicating liquors" between certain points in the town of Kennebunk, viz.: from the intersection of Main and Dane Streets to Greenleaf's Hotel on Summer Street, intending the liquors to be sold in this State in violation of law, and further containing the necessary allegation that the automobile was not then being used in the business of common carrier. The first two exceptions, therefore, must be overruled.

As to the third exception to the refusal to rule that the evidence is not sufficient to warrant a verdict of guilty, or in effect to direct a verdict for the respondent, the only question raised is whether the evidence is sufficient to warrant a conclusion that the liquors were transported by the respondent between the points named in the complaint. The evidence on this issue was sufficient to be submitted to the jury. The question of whether the automobile was properly seized, that is, while being so used, has no bearing on this point, *State* v. *Schoppe*, 113 Maine, 10; hence the third exception in this case must also be overruled.

LIBEL.

In the proceedings on the libel against the automobile in which the respondent appears as claimant, the case also comes before this court on exceptions which are as follows: The claimant asked the court to rule that such proceedings *in rem* cannot be maintained unless based upon a legal seizure, and that the warrant in this case on which

the seizure was made is not a legal warrant in that the complaint upon which it was issued did not sufficiently describe the place where the liquors were kept and deposited.

At the conclusion of the case the claimant asked the court to further rule that the automobile was not the subject of forfeiture unless it was seized while it was being used in the unlawful transportation of intoxicating liquors, and that it could not be seized after it had reached its destination and the end of the course over which it is alleged to have been used in the transportation of liquors as set forth in the complaint, upon which the libel is founded; second, that the evidence did not warrant the conclusion that the automobile was seized while it was being used in transporting the liquors over and along the course described in the complaint; third, that the automobile was seized after it had ceased being used to transport liquors over and along the course described in the complaint and for that reason was not the subject of forfeiture under Chapter 63 of the Public Laws of 1921. To the refusal of the court to so rule exceptions were taken.

It is to the issues raised by these exceptions that this court is confined. If the complaint, warrant and libel or either of them is defective in other particulars, the claimant does not seek by his bill of exceptions to take advantage of it. In his relief sought in this court he must be confined to his bill of exceptions and must be held to have waived all other defects, *Harwood* v. *Siphers*, 70 Maine, 464; *Verona* v. *Bridges*, 98 Maine, 491; *Lenfest* v. *Robbins*, 101 Maine, 176, 179.

These proceedings relate only to the forfeiture of the automobile, the seizure of which the statute above referred to authorizes while being used in the unlawful transportation of intoxicating liquors as defined therein.

As stated above, the respondent in the other case, who is the claimant in this, was not charged with unlawfully having liquors in his possession, nor is the seizure of the automobile based upon the ground that intoxicating liquors were unlawfully kept and deposited in it, but were being transported in it intended for unlawful sale. The grounds of the seizure set forth in the second count of the complaint on which the warrant of seizure was issued are undoubtedly insufficient, but not for the reason stated in the claimant's first exception. The legality of the seizure is not submitted to this court except upon the points raised in the claimant's bill of exceptions.

The other three exceptions of the claimant all relate to the same question: As to whether, or under what conditions, if any, an automobile can be seized which admittedly has been engaged in the unlawful transportation of intoxicating liquors, but has reached its destination as defined in the complaint, the liquors still remaining in the car. It may be noted, however, that the count in the complaint setting forth the seizure and the grounds therefor does not define the limits of the unlawful transportation, and the evidence clearly discloses that the automobile as a matter of fact had not reached its final destination, but was still being used when seized to transport intoxicating liquors at least from Kennebunk to Biddeford. But assuming the limits were defined as in the first count we think these exceptions should not be sustained.

It may well be that after transportation is ended, a vehicle cannot be seized because it had been used in the unlawful transportation of intoxicating liquors. An automobile cannot be seized under this statute because the week before it was used to unlawfully transport intoxicating liquors; yet an automobile which has reached the end of its journey, but is not unloaded, that is, its load still remains to be delivered, may still be considered as being used for the transportation of the contraband cargo. This is a question of fact for the jury under proper instructions.

It would be a too narrow construction to put upon this statute to say that the moment a vehicle draws up to its final destination it is no longer being used in transportation. The evidence in this case, even if the seizure could be said to be based upon the first count, which we think it cannot, was properly submitted to the jury, and, as we must assume, under proper instructions. The exceptions taken by the claimant in the proceedings upon the libel must, therefore, be overruled.

The entry, therefore, in the case against the respondent Chorosky will be:

Exceptions overruled.
Judgment for State.

And in the case of *State* v. *Buick Automobile*:

Exceptions overruled.
Automobile ordered forfeited to the County of York.

CONNELLY'S CASE.

Penobscot. Opinion March 1, 1923.

Under the Workmen's Compensation Act, the burden is on the petitioner for review, to establish as facts the grounds for review. Total disability does not depend upon inability of the injured to perform the same kind of labor he was performing when injured, but his inability by reason of his injury to obtain any kind of work he can do. The findings of the Commission based upon a ruling of law not warranted by the evidence are erroneous.

In the instant case sufficient evidence was offered by the petitioner to warrant a finding that total disability had ceased, unless the employee presented evidence that he had sought for work of the kind he could perform and could not obtain it by reason of his injury.

The question at issue was one of fact; not whether the injured employee could perform the same kind of labor he was performing when injured, but whether his earning capacity had diminished.

The finding by the Chairman that the evidence submitted did not warrant diminishing the compensation to which the injured employee was entitled from that of total disability appears according to his decree to have been a ruling of law, which was not warranted by the evidence in the case.

Case should be recommitted for the determination as a matter of fact, whether the earning capacity of the employee has increased and if so, the extent of his present disability.

On appeal. On July 11, 1921, claimant, an employee of the Stickney & Babcock Coal Company, received an injury which for a time at least produced total incapacity, and by agreement he was awarded compensation for total disability for an indefinite period. On January 28, 1922, the insurance carrier petitioned for a review alleging that the incapacity of the employee had diminished. A hearing was had on the petition and the Chairman of the Commission dismissed the petition and ordered the compensation for total disability to continue.

The employer and the insurance carrier appealed. Appeal sustained. Decree of justice below reversed. Case recommitted to the Industrial Accident Commission for determination upon the

evidence submitted or upon further hearing whether the injured employee has any capacity to earn and if so, the extent of his disability now due to his injury.

The case is stated in the opinion.

Terence B. Towle, for plaintiff.

Andrews, Nelson & Gardiner, for respondents.

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

WILSON, J. The employee in this case while at work in a coal yard received a fracture of the scapula or shoulder blade, which for a time at least totally incapacitated him for work. An agreement was entered into between him and his employer, which was duly approved August 8th, 1921, allowing him compensation based on total disability and for an indefinite period.

On January 28th, 1922, the insurance carrier filed a petition for review under Section 36 of the Compensation Act upon the ground that the incapacity of the injured employee had diminished. The Chairman of the Industrial Accident Commission after hearing the parties ordered the petition dismissed and compensation for total disability continued under the agreement approved August 8th, 1921.

A decree was entered in court in accordance with this finding and the case comes before this court on appeal from this decree by the employer and insurance carrier.

From the manner, often *ex parte*, in which this class of cases is presented to this court it is not always clear upon what grounds the rulings of the Chairman of the Commission are based.

In the case at bar the Chairman specifically finds that the employee was still totally incapacitated to perform "the labors being performed by him at the time of the accident" or work of the same nature, which was that of shoveling coal or carrying it in baskets when delivered.

Petitioner's counsel assumes from these findings that the Commissioner has based his ruling, in part at least, on the ground that under the Compensation Act of this State total disability continues so long as the injured employee is totally incapacitated from performing the same kind of labor as he was performing at the time of the injury. If so, it was erroneous.

The Compensation Act of the State of Michigan in effect seems to so provide, and the Michigan Court to so hold. *Foley* v. *Detroit United Rwy.*, 190 Mich., 507. The Compensation Act of this State, however, does not so provide. It is for the total or partial "incapacity for work," the loss of earning power, for which the Act of this State provides compensation. *Thibeault's Case,* 119 Maine, 336. *Sullivan's Case,* 218 Mass., 141, 142. Partial disability is defined by the Act, Section 15, as being the difference between what he was earning, his weekly wages, before the injury and the weekly wages "which he is able to earn thereafter." It does not limit it to the same kind of employment in which he was engaged at the time of the injury.

The differences between the Chairman of the Commission and petitioner's counsel, however, may be chiefly due to different views as to where the burden of proof lies in a proceeding of this nature, i. e., in case of a petition for review. The petitioner taking the position that the burden of proving his right to continued compensation remains on the injured employee whenever challenged by the employer or insurance carrier by a petition for review.

But while the rule is well established that in the first instance the burden of establishing his right to compensation rests on the injured employee, *Mailman's Case,* 118 Maine, 172, and it would continue to rest upon him so long as the question of his right to compensation is held open on the original petition, or in case he petitions for review upon the ground of increased disability, we see no reason when the employer or insurance carrier petitions for review for reversing the ordinary rule that the burden rests on the moving party to establish the grounds upon which he seeks relief.

None of the cases cited by the petitioner's counsel upon this point appears to have been petitions for review under provisions similar to Section 36 of the Compensation Act of this State. Either they are proceedings upon the original petition or rehearings in cases where the proceedings on the original petition appear to have been kept open, in which cases it may well have been held that the burden was on the claimant to establish his right to compensation.

Where, however, his rights have already been established, and by proceedings having the effect of a judgment, and it is sought to review them, the burden must rest upon the moving party to establish the grounds upon which his petition is based. *Orff's Case,* 122 Maine, 114.

But assuming the burden is upon the petitioner in this case, the Chairman of the Commission by his decree appears to have come to his final conclusion, that total disability still existed, as a matter of law. Such a conclusion cannot be said to follow as a matter of law, either from the facts found by him as set forth in his decree, or from any evidence in the case.

According to the decree it is found as a fact that the injured employee is still incapacitated to perform the same labor, or work of the nature being performed by him at the time of the accident, which may be said in passing to be immaterial in the determination of this case. The decree then states that evidence was submitted in the form of medical opinion that the employee was sufficiently recovered to engage in some "light work," but that no evidence was furnished showing the particular nature of any light work available to Mr. Connelly, nor any evidence that the petitioner or employer could or would furnish him with any such work. The decree then concludes: "In accordance with the previous rulings of the Industrial Accident Commission it is found that the evidence submitted was not sufficient to warrant diminishing Mr. Connelly's right to compensation for total disability to work."

If it is meant by "evidence submitted," the evidence specifically referred to in the decree, then clearly by no rule of law,—and any previous rulings of the Commission must, of course, be rulings of law,—does it follow that Mr. Connelly was totally incapacitated at the time of the hearing; because if it be admitted,—and from the language of the decree the final conclusion must be held to be based upon such admission,—that he had sufficiently recovered to perform some kinds of light work, the fact that the petitioner for review did not show the particular nature of the light work available or offer to furnish him with such work would not alone warrant the conclusion as a matter of law that he was still totally incapacitated for work within the meaning of the Compensation Act of this State. When a petitioner for review has shown an ability to do such work as is ordinarily available in the community in which the injured employee resides, and the kind of work suggested by the physician testifying in this case was "driving a team or working around a place," he has sustained the burden upon him as the moving party in a petition of the kind now before us. It then, we think, becomes the burden of the employee to meet this by showing he has used

reasonable efforts to obtain such work and failed by reason of his injury. *Lacione's Case,* 227 Mass., 269.

If he fails to use reasonable efforts to find work such as he could perform or insists that he could not perform it, if available, no burden rests upon the petitioner to offer him work or to prove that some particular kind of work is available which he could perform.

The evidence in the case discloses that notwithstanding the physician who examined him and by an X-ray impression of the fractured bone found it had "healed solid," and unqualifiedly expressed the opinion that the only way the normal use of the shoulder muscles could be restored was by use in performing some light work of the kind mentioned, Connelly admitted that he had not sought such work and insisted he could not do such work, even if it could be obtained.

It may be, that the Chairman of the Commission who is made the trier of facts in these cases might, from the evidence in this case, find as a matter of fact that total disability still existed, but it cannot be said to follow as a matter of law from the premises set forth in his decree.

His conclusion, therefore, that under the previous rulings of the Commission Connelly was still totally incapacitated for work, must be held to be error. The case, however, should be recommitted for the purpose of determining upon the evidence already submitted or upon further hearing, if deemed necessary, whether Connelly as a matter of fact is possessed of any capacity to earn, based upon whether he can perform any kind of available work; and in determining whether it is available, the fact of whether the work which he can perform is such as is ordinarily available in the community where he lives and whether he has made reasonable efforts to obtain it and failed by reason of his injury should be considered. *Lacione's Case,* supra. *Chimora* v. *International Ice Cream Co.,* 184 N. Y., Suppl., 500.

Appeal sustained. Decree of Justice below reversed. Case recommitted to the Industrial Accident Commission for determination upon the evidence submitted or upon further hearing, whether the injured employee has any capacity to earn and if so, the extent of his disability now due to his injury.

STATE *vs.* LEON FREEMAN.

Cumberland. Opinion March 3, 1923.

A deputy sheriff without a warrant requested by the sheriff with a warrant to assist in making an arrest, or otherwise enforce the criminal law, is as much justified in assisting his superior officer as though he had a warrant in his own hands. An officer with a warrant for the arrest of a person while driving an automobile may block the way to an oncoming car of such person, as the officer has the same right to stop or pursue one trying to escape in an automobile as though he were on foot.

In the instant case both exceptions to the exclusion of evidence and to the requested instruction involved the same principle. Deputy Sheriffs, Wheeler and Williams were each asked, on cross-examination, if they personally had a warrant when they attempted to intercept the respondent and stop his car. Both questions were properly excluded.

The exception to a refusal to give a directed verdict should be overruled as the evidence was ample to prove, if the jury believed it, that the respondent was guilty in both cases.

On exceptions by respondent. The respondent was found guilty at the September term, 1922, of the Superior Court of Cumberland County, under two complaints tried together relating to the same set of circumstances, one of the complaints being for "reckless driving" of an automobile, and the second complaint for exceeding the speed limit of thirty miles an hour. The respondent took two exceptions to the exclusion of testimony; an exception to a refusal to give an instruction; an exception to an instruction given, and an exception to a refusal 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.

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

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

SPEAR, J. This case involves two complaints against the respondent which were tried together. The first complaint was based upon the charge that the defendant "did operate and control a certain automobile in a reckless manner so that the lives of the public were in danger;" the second, that he "being then and there a driver of a certain vehicle then and there propelled by a certain gasoline motor, so-called, did then and there drive such vehicle along and over Veranda Street and Washington Avenue, so-called, in said Portland, at a greater rate of speed than thirty miles an hour for a distance of one-half a mile." The evidence, upon which the jury had a right to found a verdict, disclosed that at about noon on March 24, 1922, Sheriff Graham, armed with a warrant for automobile No. 5500, and accompanied by Deputies Wheeler and Williams, motored to Martin's Point Bridge, just outside Portland, on the federal highway, placed his car across the road, and attempted to intercept the respondent, driving, toward Portland, the automobile named in the warrant. The sheriff and his deputies stood on the bridge and waited for the respondent. Deputy Wheeler attempted to step before the respondent car and stop the respondent, but the latter speeded his car, drove past the deputy, and in his flight sidescraped the sheriff's automobile. He was pursued some distance toward the city, but escaped. After a verdict of guilty the case is before the Law Court on two exceptions to the exclusion of evidence; on an exception to a refusal to give an instruction; on an exception to an instruction given; and on an exception to a refusal to give a directed verdict. Both exceptions to the exclusion of evidence involved the same principle. Deputy Sheriffs Wheeler and Williams were each asked, on cross-examination, if they personally had a warrant when they attempted to intercept the respondent and stop his car. The questions were objected to on the ground that the sheriff had a warrant and that the interrogatories were, therefore, irrelevant and immaterial. Both questions were excluded. The jury found, and the evidence was ample to prove, if they believed it, that the respondent was guilty in both cases. The exceptions, therefore, would seem to be based upon the theory of a justification, provided it could be shown that the deputy sheriff did not personally have in his possession a warrant

against the respondent at the time of the attempted interception. But such is not the law. When a deputy sheriff is called upon by the sheriff to assist in making an arrest, or otherwise enforce the criminal law, a warrant in the hands of the sheriff is equivalent to a warrant in the hands of the deputy, so far as the justification of his action is concerned in assisting his superior officer. Moreover, by R. S., Chap. 85, Sec. 61, and Chap. 124, Sec. 19, even a civilian could be called upon by the sheriff to assist him, with a penalty upon neglect or refusal so to do. Accordingly, the question whether a warrant was in the possession of the deputy was properly excluded.

We are not quite sure of our interpretation of the requested instruction of the respondent, but as we understand it, it was that the presiding Justice should instruct the jury that there was a distinction between a situation produced by the intentional blocking of the way to an oncoming car, and the blocking by natural or extraordinary conditions, not intentionally created; and that the statute in regard to "reckless manner" contemplated a situation not intentionally created. This request was covered in the charge in which the presiding Justice instructed the jury that what the officers were doing, or how they did it, by way of obstructing the passage of the respondent car, was immaterial upon both charges. The request was properly refused. The issue was the reckless manner of control and overspeeding, not what the officers might be doing with reference to the movements of the defendant car.

The instruction to the jury, to which exception was taken, was as follows: "Now, then, take this situation as the testimony presents it to your minds there, and see whether or not this respondent, regardless of his motives, regardless of justification, that is, so far as the testimony here discloses, or of what he may have thought or feared, did operate his automobile recklessly in disregard to the safety of the public so as to endanger the lives or safety of the public."

This paragraph in the charge involves precisely the same question as that presented in the request, and in effect, declared that the action of the officers in an attempt to stop the respondent and serve the warrant upon him, did not operate to condone the illegal acts of the respondent. We think the paragraph quoted correctly stated the law. The officers had a warrant for the apprehension of the respondent and had the same right to stop or pursue him trying to escape in an automobile as they would have had to stop him or pursue

him if he was trying to make his escape on foot. Moreover, the sheriff and his deputies would have been derelict in the discharge of their duties under the requirements of the statute of the State, had they not made every effort to serve the warrant placed in the sheriff's hands. R. S., Chap. 127, Sec. 49, in part reads as follows: "Any sheriff, deputy sheriff, or county attorney, who shall wilfully or corruptly refuse or neglect to perform any of the duties required by this Section, shall be punished by fine not exceeding one thousand dollars or by imprisonment not exceeding one year."

It would be somewhat of a paradox to announce the doctrine that the holding up of the car of a fleeing offender by a sheriff armed with a warrant to apprehend him, should be invoked by such offender as a condonation of his actual guilt as found upon the facts by a jury.

The motion for a directed verdict was properly denied.

Exceptions overruled.
Judgment for the State.

H. GRANT DUFF *vs.* THE HOLLAND SYSTEM.

York. Opinion March 7, 1923.

A communication is admissible if the circumstances are such that if, in the natural course of business, it would require an answer. Exceptions do not lie to the admission of a communication not prejudicial to the excepting party.

In this case the exception was to the admission of a letter written by the plaintiff to the defendant with reference to the terms and conditions upon which the plaintiff was willing to render his services to the defendant. The letter was as follows: "Dear Sir: After our talk Sunday, I am going to make the following proposition to you. I will come to Newton and build as many houses as you like for the following: $7.00 per day salary and ($300.) three hundred dollars, bonus on each house; also I will do the York Inn Job for $7.00 per day salary and ($800.) eight hundred dollars, bonus. This means that I am to devote my entire time to you and use my equipment." The objection to the letter was in this language: We object "because it is a self serving statement." It seems that previous to this letter the plaintiff and

Mr. Holland representing the defendant Company, had talked the enterprise over. The plaintiff testified that after he had sent the letter he received a telephone call from Mr. Holland in which he said that he would accept the proposition stated in the letter. The letter was admissible upon the ground that it was a communication which in the natural course of business would require an answer.

The exceptions should also be overruled upon the ground that the admission of the letter was not prejudicial to the defendant.

On exceptions and motion by defendant. This is an action of assumpsit to recover commissions plaintiff claimed to be due him under a contract for building operations in constructing for defendant certain buildings in York, Maine, Newton and Boston, Massachusetts. Plaintiff claimed that he was to receive seven dollars per day, straight time, and in addition thereto a commission of four per cent. on the total cost of construction, except on one building where it was to be one thousand dollars. The defendant claimed that the contract was for seven dollars a day and eight hundred dollars for a bonus on one building. The case was tried to a jury and a verdict for plaintiff for $14,407.09 was rendered. The defendant excepted to a ruling of the presiding Justice admitting a certain communication, and also filed a general motion for a new trial. Exceptions overruled. Motion overruled.

The case is stated in the opinion.

E. P. Spinney, Sewall & Waldron, for plaintiff.

Stewart & Putnam, Henry V. Cunningham, Emery & Waterhouse, for defendant.

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

SPEAR, J. In this case the verdict upon trial was rendered for the plaintiff and comes to this court on exceptions and on a motion for a new trial. Without discussing the testimony at any length we are of the opinion that there was ample testimony upon which the jury were authorized to base their verdict. It is true that there was a sharp contradiction upon essential facts, but it was the exclusive province of the jury to pass upon, and determine, all questions of credibility.

The plaintiff contended that he made a contract for services with the defendant company for the supervision of a large building enter-

prise around Boston, including the use of his building apparatus in connection therewith, upon a per diem and commission basis. The only controversy was whether he was entitled to commissions on the cost of the building operation. Upon this contention he was corroborated by the architect of the building operation and by entries made in the books of the corporation by its own servants. We do not think the intervention of the court could be justified upon the evidence.

The motion should be overruled.

The exception was to the admission of a letter written by the plaintiff to the defendant with reference to the terms and conditions upon which the plaintiff was willing to render his services to the defendant. The letter was short, and, omitting dates, it read as follows: "Dear Sir: After our talk Sunday, I am going to make the following proposition to you. I will come to Newton and build as many houses as you like for the following: $7.00 per day salary and ($300.00) three hundred dollars bonus on each house. Also I will do the York Inn job for $7.00 per day salary and ($800.00) eight hundred dollars bonus.

"This means I am to devote my entire time to you and use my equipment.

Yours truly."

The objection to this letter at the time it was offered, as appears by the exceptions, was in this language, "We object, because it is a self serving statement."

It seems that previous to this letter the plaintiff and Mr. Holland, representing the defendant Company, having long known each other, had talked the enterprise over. Having had that talk, Mr. Duff testified that he then sent this letter and that, within a short time after sending the letter, he was called over the phone by Mr. Holland, with whom he had had his previous conversation, and who said to the plaintiff, as the plaintiff testified, "I am going to accept your proposition and I want you to come to Boston as soon as possible and we will go over the matter together." As a matter of fact, the only part of the proposed contract referred to in the letter, which was subsequently carried out between the plaintiff and defendant, was the per diem of $7.00 and the eight hundred dollars bonus on the "York

Inn job." We think that the letter was admissible upon the ground that in view of the testimony it was a communication which in the natural course of business would require an answer, and, according to the testimony which the jury had a right to believe, did receive an answer. Upon this point we think the letter was clearly admissible under the doctrine laid down in *Ross* v. *Reynolds,* 112 Maine, 223.

The exception should also be overruled upon the ground that the admission of the letter was not prejudicial to the defendant. *Ross* v. *Reynolds,* supra. Under the evidence, in our opinion, it was prejudicial to the plaintiff rather than to the defendant. In other words, if the defendant had adhered to the contents of the letter as an expression of the contract, it would have been greatly to its advantage, particularly if his contention had been sustained. It could not have been harmed by the admission of the letter.

Exceptions overruled.
Motion overruled.

INHABITANTS OF TOWN OF LIBERTY

vs.

INHABITANTS OF TOWN OF LEVANT.

Waldo. Opinion March 7, 1923.

A divorced father of a child may emancipate such child notwithstanding that the care and custody of such child in the divorce proceedings were decreed to the father, as such a decree does not impose upon him a greater duty than the law imposes upon him in his parental relation. Emancipated minors take the settlement of their father, if he has one in the State, at the time of emancipation.

In this case the defense was emancipation, but the plaintiff contended that the relation of the father to the son, created by a decree of the court, giving him the care and custody of the boy at the time of his divorce, imposed a legal impediment, or estoppel, to the right of the father, either by written agreement or parental conduct, to place him in the legal status of emancipation; that he was in the hands of the court.

The evidence proved a typical case of emancipation. The decree of the court, giving the father the care and custody of the child, imposed upon him no greater duty than the law imposed upon him from the fact of his parental relation, and whether in the custody of the father or that of the grandparents, his welfare was still in the hands of the court.

On report. This is an action to recover for pauper supplies furnished by plaintiff town to one Mildred Perkins and her two minor children. The only question involved was the pauper settlement of John Edgar Perkins, husband of Mildred Perkins and father of the two minor children. The plaintiff claimed that the father, John Edgar Perkins, never having acquired any pauper settlement of his own, took the pauper settlement of his father, John F. Perkins, when he, John Edgar Perkins, became twenty-one years of age, which was in the defendant town. Defendant claimed that John F. Perkins had emancipated his son, John Edgar Perkins, and as a result, the son on arriving at the age of twenty-one years, did not take the pauper settlement of his father, John F. Perkins, in defendant town. By agreement of the parties the case was reported to the Law Court. Judgment for defendant.

The case is stated in the opinion.

Dunton & Morse, for plaintiff.

George E. Thompson, for defendant.

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

SPEAR, J. This case involves a suit for pauper supplies and comes to this court on report. An admission was offered which made out a prima facie case for the plaintiff. The admission shows that on the 22d day of December, 1920, Mildred Perkins, wife of John E. Perkins, and her two minor children, called upon the town of Liberty for pauper supplies. No question is raised but that the supplies upon proper call were legally furnished by the plaintiff town. John E. Perkins, the father of the children and husband of Mildred Perkins, is the son of John F. Perkins. The admission and testimony show that John F. Perkins on the fifteenth day of September, 1902, became a resident of Levant, resided continuously in that town until John E. Perkins became twenty-one years of age, in 1913. From the foregoing dates and the testimony there is no question but that John F.

Perkins had a pauper settlement in the town of Levant when John E. Perkins, his son, became twenty-one years of age. It further appears that in 1900 John F. Perkins was divorced from the mother of John E. Perkins in the county of Penobscot and that the care and custody of their minor child, John E. Perkins, was given to the father by the court. The defense was emancipation.

We are of the opinion that the evidence proved a typical case of emancipation. We shall allude to the testimony but meagerly. It appears that John F. Perkins, the father of John E. Perkins, whose wife and children were in distress, in 1900, then residing in Bangor, when the boy was eight years of age, made a stipulation in writing, in duplicate, with the grandparents of the boy, whereby they were to take custody of the child, support him and bring him up. The written instrument, which was drawn up by D. Benson Young, was lost and could not be produced at the trial, but John F. Perkins testified that the import of its contents was as follows: "Well, of course a good many years since the paper was made out, and I doubt if I could state it as it is, but as near as I can remember I gave the boy to his grandparents. They were to support him and take care of him all free of charge to me. I gave up right and title to the child as far as controling the child and he gave me a paper that he would do that." In his cross-examination he said, when asked if he did not reserve the right, if he wished to do so, to give the boy a high school education, answered "that is the impression that is in my mind. It was so long I had forgot, but it seems that was it, but to say that it was, I wouldn't." And he further says, that he, having provided for the boy, had lost all interest in him.

It further appears from the uncontradicted testimony, that John F. Perkins, the father, did not hear from the son directly until he received a letter from him dated September 12, 1919, a period of nineteen years, and did not see him for twenty years after he left him with his grandparents.

It is held in *Thomaston* v. *Greenbush*, 106 Maine, 242, that the legal effect of a father's conduct may be sufficient to establish an emancipation of his children; and the general scope of the term is defined by several citations at Page 244. The plaintiff, however, contends that the relation of Perkins to his son, created by the decree of the court giving him the care and custody of the boy at the time of his divorce, imposed a legal impediment or estoppel to the right of the

father, either by written agreement or parental conduct to place him in the legal status of emancipation; that he was in the hands of the court. We think the answer to that contention is, that the decree of the court, giving the father the care and custody of the child, imposed upon him no greater duty than the law imposed upon him from the fact of his parental relation, and whether in the custody of the father or that of the grandparents, his welfare was still in the hands of the court. *State* v. *Smith*, 6 Maine, 462.

The plaintiff further contends, even though the evidence shows emancipation, and the decree of custody does not work an estoppel, that, nevertheless, "under the provisions of the Revised Statutes, Chapter 29, Section 1, Paragraph 2, John Edgar Perkins, after he became twenty-one years of age, took the settlement of his father which is admitted to have been in the defendant town at that time." While a technical construction would seem to justify the contention of the plaintiff in invoking the statute, it is nevertheless true that our decisions have changed the strict wording of the statute in its application to emancipated minors and hold that such minors take the settlement of their father, if he has one in the State, at the time the emancipation is consummated.

Our courts have followed the above interpretation for many years.

In *Lowell* v. *Newport*, 66 Maine, 78, the reasons for giving an interpretation to the statute apparently different from its literal meaning are fully discussed, the result of which is to hold that "the derived settlement of an emancipated minor is that of his father at the time of emancipation and not that acquired by his father at any time thereafter." In *Orenville* v. *Glenburn*, 70 Maine, 353, it was held that "The emancipated child ceases to follow any settlement acquired by the father after such emancipation;" and finally, in *Thomaston* v. *Greenbush*, 106 Maine, 242, it is said, "Being emancipated these minors took at the time of emancipation the settlement which their father then had."

As the case comes up on report, the conclusion of the court is, that the entry must be,

Judgment for the defendant.

MACHIAS LUMBER COMPANY *vs.* INHABITANTS OF MACHIAS.

Washington. Opinion March 7, 1923.

The owner of logs on which a tax has been assessed in order to be entitled to an abatement must show that the logs were, on the first day of April of the year of assessment, actually or constructively employed in some place other than that where the tax was assessed, either in the mechanic arts or in trade; and further show that such owners on the first day of April occupied in such other place for such employment either a store, shop, storehouse, wharf, mill or landing place.

In the instant case the plaintiff has failed to show either that the logs so assessed were employed in trade in the town of Whitneyville on April 1st, 1922, or that it was occupying any store, shop, storehouse, mill, wharf or landing place for the purpose of employing such logs in trade in said town.

If such logs were to be employed in trade it was not in Whitneyville, but in the town of Machias where its main business was located.

It is not the mere ownership of a river bank where logs may be hauled out, but a landing place set apart, prepared and occupied on April 1st, for the purpose contemplated by the statute, that fulfills the requirements.

It is not decided that a place on a bank of a river where logs may be, or are hauled out, that is, a place merely for receiving logs, and not used in connection with their sale or the sale and delivery of the products manufactured from them is a landing place within the meaning of the statute.

On report. This is a process by petition seeking an abatement of taxes assessed by the town of Machias on logs April 1, 1921. On April 1, 1921, the petitioner was the owner of approximately fifty-five hundred cords of pulp wood logs which it had cut during the preceding winter on its lands near the headwaters of Machias River and landed them during the winter on Machias River, its lakes and tributaries, where they were on April 1, 1921, intending to drive them as soon as the driving season opened, to a landing place in the town of Whitneyville, where the petitioner was intending during the summer of 1921 to erect a mill for cutting up and rossing the pulp wood. The petitioner had its place of business in the town of Machias where a tax of $840 was assessed on these logs for the year of 1921, and paid by the petitioner under protest. The question involved was as to

whether these logs were taxable on April 1, 1921, in the town of Machias, or in the town of Whitneyville under R. S., Chap. 10, Sec. 14, Par. I.

From the refusal of the assessors of the town of Machias to abate the taxes and return the money paid an appeal was taken to the Supreme Judicial Court where a hearing was had before the presiding Justice, and by agreement of the parties the cause was reported to the Law Court. Appeal dismissed.

The case is fully stated in the opinion.

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

Phillips B. Gardner, for defendant.

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

WILSON, J. An appeal to the Supreme Judicial Court from the decision of the assessors of the town of Machias refusing an abatement of taxes and a return of the sum paid in discharge thereof under Secs. 78-83, Chap. 10, R. S. The case was heard in the court below by the presiding Justice and comes before this court on report.

In the winter of 1920-21 the petitioner which conducts a lumber business and has its principal place of business in the town of Machias cut approximately fifty-five hundred cords of pulp wood on the upper reaches of the Machias river and its tributaries which was put into the river in the log in the spring of 1921 with a view to landing it in the town of Whitneyville where the petitioner was proposing during the summer of 1921 to erect a mill for cutting it up and rossing it, as it is termed, which is a mechanical process for removing the bark.

The petitioner had, in 1918, purchased a tract of land in the town of Whitneyville, on the bank of the Machias River and convenient of access to the Maine Central Railroad and situated about three miles above its main plant at Machias. This land was acquired with the intention of erecting thereon a plant for cutting up and rossing pulp wood and shipping therefrom by rail.

It was not until the winter of 1921, however, that any steps were taken by the petitioner to carry out such intent; and in January of that year it purchased machinery for its proposed mill and ties and rails for a railroad track to connect it with the main track of the Maine Central Railroad, but nothing was done on the site toward the

erection of the mill until sometime in May of the same year. It was not finished ready for operation until October or November of 1921, and owing to the state of the market no products of the mill have yet been sold.

In the spring of 1921 the pulp wood logs cut by the petitioner the previous winter were put into the river with other logs intended for its plant at Machias, with the intent when they reached Whitneyville of sorting out the pulp wood logs and landing them there for cutting up into the customary lengths and rossing or preparing them for sale and shipment.

About the time the drive reached Whitneyville, which was in May. forest fires broke out endangering the petitioner's property and the drive was halted, the logs hauled out on the banks at various points along the stream above Whitneyville, and the crew taken from the drive to fight forest fires.

Until the drive reached Whitneyville, no preparation had been made by the petitioner to sort and land any logs at its proposed mill site; but in May a sorting boom, so called, was constructed across the river above the proposed mill site and a side boom for holding the logs intended for the new plant was strung from and along the shore to the sorting boom. About five hundred cords of the drive were sorted in May and turned into the side boom, which after the mill was completed in the fall of 1921 were cut and rossed. From time to time the remainder of the 1920-21 cut was put into the stream and floated down to the sorting boom and the pulp wood logs turned into the side boom at Whitneyville. A small amount of the pulp wood logs got by the sorting boom and were taken out and sold at Machias, but it appears from the evidence that it was not by any design of the petitioner, and, therefore, had no bearing on the determination of this case.

To entitle the petitioner in this case to the abatement of the tax assessed on these logs by the town of Machias, which is conceded to be the town in which the petitioner may be considered as an inhabitant April 1st, 1921, it must establish two main propositions: First, that the logs in question were on April 1st, being actually or constructively employed in the town of Whitneyville either in the mechanic arts or in trade, omitting the erection of buildings and vessels as having no possible connection with the case; and, second, that on April 1st it occupied in said town for such employment either a store, shop, storehouse, wharf, mill or landing place.

Whether the cutting up of logs into pulp wood lengths or the rossing of them can be said to be a mechanic art, it is not necessary to decide, because it is not contended that the petitioner on April 1st, 1921 was occupying any mill or other plant in Whitneyville for such purpose.

The plaintiff bases its claim for relief upon the ground that the logs in question were on April 1st, 1921 employed in trade in Whitneyville and that it was on that date occupying a landing place within the meaning of the statutes.

We are of the opinion that it has failed in both respects. This case does not fall within *Farmingdale* v. *Berlin Mills Co.*, 93 Maine, 333, where the defendant company had had in the plaintiff town on April 1st of the year in which the tax was laid a long established business, and where it was selling the manufactured product to the local trade as well as to its customers elsewhere, but clearly falls within the rules laid down in *New Limerick* v. *Watson*, 98 Maine, 379; *McCann* v. *Minot*, 107 Maine, 393, and *Morton* v. *Wilson*, 115 Maine, 70. The evidence reported does not disclose any intent or expectation of selling any of this pulp wood locally or that there was any possible local market. On the contrary the evidence discloses only one purpose, to ship by rail to points where pulp mills are located, and that all such sales would be negotiated and made at its principal place of business in Machias. The petitioner like the owner of the starch in *New Limerick* v. *Watson*, the owner of the lumber in *McCann* v. *Minot*, and the owner of the potatoes in *Morton* v. *Wilson* intended to employ it in trade when prepared for market, not in the town where it was prepared, but in the town where the owner's main business was located, viz.: Machias.

But even if it were so employed in Whitneyville, we think the evidence as reported fails to establish that the petitioner was occupying any landing place in that town on April 1st, 1921 within the meaning of the statute. Assuming for the moment that in connection with its employment in trade a landing place as used in the statute includes a place used solely for landing or receiving logs on the bank of a river as well as a place for shipment in case of sale as in *Gower* v. *Jonesboro*, 83 Maine, 142 and *Georgetown* v. *Hanscome*, 108 Maine, 131, the evidence only goes to show that the petitioner was on April 1st occupying a site for a proposed landing place. It was not until May, according to the evidence, that it actually converted it into a landing place for receiving these logs in connection with the

proposed mill by the construction of the necessary booms. It is not the mere ownership of a river bank where logs may be hauled out, but a landing place set apart, prepared and occupied for the purpose on April 1st that fulfills the statute.

This court in order to carry out the purpose of the provisions of Sec. 14 of Chap. 10, R. S., has held that logs cut, but not actually located in a town on April 1st, but intended for employment or use in a mill located therein, may be held to be constructively in that town as of the first day of April for purposes of taxation, *Inhabitants of Ellsworth* v. *Brown*, 53 Maine, 519; but it has not yet gone so far as to hold that a mill, store, shop, storehouse, wharf, or landing place not actually in existence on April 1st, but intended to be constructed later, even though preparation for construction had already begun, was constructively in existence and occupied as of the first day of April in order to meet the requirements of Par. I, of Sec. 14 of Chap. 10.

There is no occasion for straining the language of the statute to accomplish this result. The property does not escape taxation. Except as to rates it should be immaterial to the owner where he pays his tax.

Entry will be:

Appeal dismissed.

CARL M. ROBINSON *vs.* ADAM P. LEIGHTON.

Cumberland. Opinion March 7, 1923.

A tenant of an office building, who, without his landlord's invitation so to do in mutuality of interest, and even without the latter's knowledge, used the building's defective fire escape as a balcony or veranda, with resultant personal injury, cannot maintain tort for damages against the landlord.

There is evidence in this case that the plaintiff and another tenant of offices on the same floor and an office girl in their employment had used the fire escape, with more or less frequency, for balcony and somewhat related purposes, through several years. But no right or license so to use the escape was ever asked of or granted by the landlord. And there is nothing on the record driving notice home to the landlord that it was being so used; except, perhaps, that the presence of mops and dusters on its inclosing rail, might have imported notice that the office girl was drying them there.

On report. This is an action in tort for negligence, brought by plaintiff, a tenant at will, against defendant, his landlord, to recover damages for personal injuries sustained by him as he stepped through a doorway from the public corridor on the second floor on which his office was situated onto a fire escape, the grating of which tipped in such a manner as to cause him to fall through the opening to the ground below. Plaintiff contended that the fire escape was defective and unsafe. Defendant contended that if the fire escape was defective he had no knowledge of such defective condition, and further contended that the fire escape was not constructed for the purposes for which plaintiff was using it without his knowledge, when injured. By agreement of the parties at the conclusion of taking out testimony before the Justice of the Superior Court in Cumberland County without a jury, the case was reported to the Law Court to render such decision as the law and evidence required, and in the event of a finding for plaintiff the Law Court was to assess the damages. Judgment for defendant.

The case is fully stated in the opinion.

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

William H. Gulliver and William B. Mahoney, for defendant.

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

DUNN, J. The owners of certain kinds of buildings are required to provide fire escapes from every story above the level of the ground. R. S., Chap. 30, Sec. 38. The duty remains the same although the buildings are in the possession of tenants. *Carrigan* v. *Stillwell*, 97 Maine, 247.

This defendant owned a four-story building within the statute's sway. On the second floor of the building, the plaintiff, a physician and surgeon, had his offices as a tenant at will. One January afternoon, in 1921, he desired to indicate to a patient the whereabouts of another doctor's office. So he and the patient left the plaintiff's offices, the plaintiff preceding. They walked down an adjoining hallway or corridor, a distance of five or six feet, to a door in the rear wall of the building. The door had a spring lock on the inside. The plaintiff opened the door, and then stepped down, six inches, on to a fire escape intending to point out the location of the other doctor's office.

The fire escape was made of iron. It was accessible only, from the second story, through the opening of the door. At one end stairs or steps entered from a similar platform on the next story, and there were still other stairs leading from another part toward the ground. In construction the fire escape comprised a three-foot rail-inclosed frame, extending lengthwise from supporting brackets on the building, in which was set as a platform or floor, a grating about seven feet long and four feet wide. This grating was made of slats laid an inch apart and held in place by lateral rods. Clamps or plates, two inches in length and one half inch less in width, bolted together from the bottom to the top of the grating, with the bolt resting against a cross-bar, fastened the platform in position. These clamps had become displaced. They were, to use the expression of a witness, "on the wrong side" of the bar. Consequently, when the plaintiff stepped on the grating, it tipped beneath his weight, and he was precipitated, through the open space presenting, to the ground. For the personal injuries thus sustained he is seeking damages. The case, both of law and fact, is referred to the court.

A rule similar to that of caveat emptor applying, it certainly may be defined as a general proposition applicable to premises actually

let, that the lessor, in his relation to the lessee, does not warrant their condition, and that he is not liable for any injury suffered by the tenant during his occupancy by reason of defects. There must be proof of exceptional circumstances to make the landlord liable in such case; some proof of fraud or misrepresentation or direct concealment of a fact known to the lessor which the lessee did not have any reasonable opportunity of discovering. There must be proof of some direct omission by the lessor of the performance of a duty which he owed to the lessee in order to make the landlord liable. *Libbey* v. *Tolford*, 48 Maine, 316; *McKenzie* v. *Cheetham*, 83 Maine, 543; *Whitmore* v. *Orono Pulp & Paper Co.*, 91 Maine, 297; *Bennett* v. *Sullivan*, 100 Maine, 118; *Hill* v. *Day*, 108 Maine, 467.

It is established that when the landlord has reserved to himself, for the common use of the tenants of a building, the control of such portions as its stairways, and hallways, and balconies, he owes it to the tenants to see that such parts are maintained in a reasonably safe condition, or at least to exercise common care and prudence to that end. *Toole* v. *Beckett*, 67 Maine, 544; *McCarthy* v. *York Bank*, 74 Maine, 315; *Sawyer* v. *McGillicuddy*, 81 Maine, 318; *Miller* v. *Hooper*, 119 Maine, 527.

The plaintiff concedes that no other right than to use the fire escape as an emergency exit was granted to him by contract, and that he never asked permission to use it otherwise. He would base his claim to an indemnity, not upon the theory of the breach of a contractual liability, but on the law of negligence. His insistence is, that he was using the fire escape, not as a trespasser, nor yet as a mere licensee, but as a licensee upon the owner's invitation.

If, in its use, he were a trespasser, his position would be that of one coming upon the property of another without right, and, therefore, speaking in a broad phrase, bound to accept the existing situation. Were he allowed to come there for his own interest or convenience, as a mere licensee, (*Stanwood v. Clancy*, 106 Maine, 72; *Patten* v. *Bartlett*, 111 Maine, 409) the owner owed him no duty, except not to wilfully cause him harm. *Parker* v. *Portland Publishing Co.*, 69 Maine, 173; *Dixon* v. *Swift*, 98 Maine, 207; *Russell* v. *M. C. R. R.*, 100 Maine, 406; *Stanwood* v. *Clancy*, supra; *Austin* v. *Baker*, 112 Maine, 267. If he were impliedly invited there, that is, if he were there by the owner's inducement or enticement, it was the duty of the owner to maintain the place in a reasonably safe and suitable condition. *Stanwood* v. *Clancy*, supra; *Austin* v. *Baker*, supra.

Invitations, like contracts, may be divided into two great classes, express and implied. An express invitation may be said to be one expressly extended. When the owner in terms invites another to come upon his premises, or to make use of them, or to use something thereon, the invitation is express. An invitation is implied when the owner by acts or conduct leads another to the belief that the use is in accordance with the design for which the place was adapted and allowed to be used in mutuality of interest. *Stanwood* v. *Clancy*, supra; *Patten* v. *Bartlett*, supra; *Elie* v. *Lewiston Railway*, 112 Maine, 178; *Austin* v. *Baker*, supra.

The plaintiff's argument is predicated upon the premise that, by reason of the leasehold in reference to his offices and of an habitual, continual, and open use made of the fire escape, as a sort of balcony or veranda, by himself and at least one other tenant of the building, and by an office girl of theirs, he became a licensee by implied invitation. And that the duty owing to him in that situation being violated negligently, the owner of the building may be held liable therefor in an action of tort.

In the first instance, let it be noticed again, the plaintiff was not using the fire escape for the purpose for which, primarily, the landlord intended it to be used. But, nevertheless, if the plaintiff were on the escape at the defendant's invitation, and the evidence shows no contributing fault on the plaintiff's part, and shows too that by the exercise of ordinary care the defendant could have discovered the defective condition, then the plaintiff's action would lie.

There is evidence that, counting an earlier tenancy of one year, and a later one of two years, the plaintiff was out on the fire escape possibly thirty to fifty times, in brief respites from his offices, to indulge himself in tobacco smoking, or to watch passing parades in a nearby street. Also, that another physician, whose offices were on the same floor, went there, two hundred times or more in nearly three years, for his smokes, or for short outdoor breathings. Further, the office girl attests that she had gone on to the fire escape, "every day or every other day," to hang her mops and dusters out to dry. This girl witnesses that she once had seen the plaintiff and the other doctor on the fire escape, and that within two days of that of the accident she reported the condition of the platform to the building's janitor, who ascribed the cause as an excessive weight of snow. The janitor testifies that he supposed the girl to have referred, not to

what she now relates her testimony, but to the tipping downward of the lowest flight of stairs. And there is testimony that the plaintiff's wife was on the platform one day, and that, in summer days, a screen door only barred the way from the hall to the fire escape.

If all that was done was without the landlord's invitation, the plaintiff's cause is not justiciable. Evidence of an express invitation there is none. There is no pretension that the landlord himself knew of the uses being made. The landlord's agent, who, with more or less frequency, visited the premises and inspected the fire escape, and who says that on his latest inspection it was in good order, is not shown to have had knowledge of that which was going on. The same janitor had been about the building daily for years. Apparently he never knew of the use made by the plaintiff and the other physician, for, while testifying, the subject was not mentioned either to or by him. If the inference be warranted that, although he never saw the men there, and never saw anything indicative of their having been there, still he must have seen the mops and dusters drying on the rail, and seeing them should have realized the import which their presence would convey, the obvious answer is that such knowledge concerned the girl's acts, nothing else appearing. Of the different persons in and about the building none but the plaintiff, his fellow physician, and their office girl offers testimony of uses being made of the escape, and no one drives notice home to the defendant.

Nor may it be rightly urged that the absence of warning signs, and the door which stood ready to be opened, and other attendant features perhaps, led the plaintiff unawares into a trap, for, upon his own authority, the plaintiff long had known the situation. Instances are easily imaginable where, consonantly with reason, it could be said that an owner ought to have anticipated that a person, unfamiliar with conditions and unwarned, might be lured to use the fire escape for other than its original design; and, so anticipating, that the owner ought to have been on guard against injury possible to be done by a structural defect. This, however, as already has been seen, is not contended here.

Upon this record, in point of law, as a matter of fact, the parties must be left in the position they were in immediately before the plaintiff opened the fire escape door.

Judgment for defendant.

EUSEBE SENECHAL, Appellant from decree of Judge of Probate;

In re, Estate of CHARLES W. COFFIN.

York. Opinion March 9, 1923.

A decree of the Judge of Probate ordering an administrator to file his account, is not barred, on the ground of res adjudicata, by a former decree ordering him to file an account which was not fully complied with.

An appeal from a decree of Judge of Probate ordering appellant to forthwith file his account as administrator, was dismissed in the Supreme Court of Probate and exceptions taken.

An order for the same trust officer to file his account, made fifteen years earlier, which order was never fully complied with, is no bar, on the ground of res adjudicata, to a later order to comply with the duty imposed upon him by statute as well as by order of court.

On exceptions. Charles W. Coffin late of South Berwick died November 11, 1903, testate, leaving a widow and an infant son. The widow, Alma Coffin, was appointed executrix, but died soon after before the administration of the estate was completed. On April 5, 1904, appellant, a brother-in-law of the widow, residing in Frazerville, Province of Quebec, was appointed administrator d. b. n. c. t. a. and filed an inventory, none having been filed by the widow, on June 7, 1904. On December 17, 1907, he was cited to file his account and settle the estate. On April 7, 1908, he filed an account but never took any steps to have it allowed or to settle the estate. On December 14, 1921, Joseph Fred Coffin, the infant son and sole heir, having become of age, petitioned the Probate Court to order the administrator to settle his account, which was granted and the administrator took an appeal to the Supreme Court of Probate, where the appeal was dismissed and appellant excepted. Exceptions overruled.

The case is fully stated in the opinion.

Emery, Waterhouse & Paquin, for appellant.

E. P. Spinney, for appellee.

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

PHILBROOK, J. From the record and from the bill of exceptions we learn that this case is on appeal from a decree of the Judge of Probate ordering the appellant to forthwith render and settle his final account as administrator d. b. n. c. t. a. of the estate of Charles W. Coffin, to which trust position he was duly appointed April 5, A. D. 1904.

The appellant states that he is aggrieved by the decree of the Judge of Probate, dated March 29, A. D. 1922, whereby he was ordered forthwith to render and settle his final account as administrator. His reasons for appeal are as follows:

"*First*; That on the seventeenth day of December A. D. 1907, the Hon. Nathaniel Hobbs, Judge of Probate for said County of York, ordered said Eusebe Senechal to render account of his administration into our said court, on oath, on or before the third Tuesday of January, 1908; that in pursuance of said order and citation said Eusebe Senechal on the seventh day of April, 1908, did file his first and final account in the Probate Court for the County of York, which said account is still pending, undismissed, and without any decree of the Judge of Probate thereon, other than the same was ordered filed on the fifth day of September, 1911.

"*Second*; That the said Judge of Probate could not make a valid order or decree that said Eusebe Senechal should file and settle account of his administration while there was already pending within the Probate Court a first and final account of the said Senechal filed as a result of the citation of the Judge of Probate on the seventeenth day of December, 1907.

"*Third*; Because said Judge of Probate exceeded his authority in ordering said Eusebe Senechal to settle final account of his administration while there was already pending in his said court a first and final account of his administration of said Senechal in full force, undismissed and not allowed.

"*Fourth*; That the order and decree of said Judge of Probate is a nullity."

We have fully quoted the reasons for appeal in order that the legal claims of the appellant may be stated in his own language, which, presumably, is a statement in terms most favorable to his contention. The appeal was heard by a single Justice who caused

the following ruling to be filed. "Appeal dismissed with costs. Decree of Judge of Probate affirmed. Appellant may file exceptions within ten days after this decision is filed." Exceptions were duly filed. The contention raised by the same are that the Judge of Probate could not make a valid order or decree that Senechal should file and settle final account of his administration while there was already pending in the Probate Court a first and final account of such administration filed as a result of the citation of the Judge of Probate on December 17, 1907. This contention is raised upon the alleged ground of res judicata, the claim being that the matter in controversy has once been inquired into and settled by a court of competent jurisdiction and cannot be again drawn in question in another matter between the same parties or their privies.

As to the proceedings which resulted in the order of December 17, 1907, the appellant claims (a) that the court had jurisdiction in those proceedings; (b) that the parties were the same; (c) that the issue was the same; (d) that final judgment was rendered. Having established these claims in the affirmative, to his own satisfaction, he says that the order of December 17, 1907, is a final judgment of such nature and from which no appeal was taken, that its rendition stands as a bar to any subsequent litigation along the concurrent line.

This contention cannot be sustained. R. S., Chap. 68, Sec. 57, expressly gives the Judge of Probate authority to require of every executor or administrator an account of his trust when he deems the same to be necessary. In the admissions shown by the report as well as from the reasons of appeal, it appears that a so-called first and final account was presented, by Senechal to the Probate Court for notice on April 7, 1908, which account was never settled nor allowed by the Judge of Probate. For fourteen years this trust officer has neglected to present himself in court with his vouchers as he should have done on the return day of the notice. The appellee, who is the son and sole heir of Charles W. Coffin, adopted the proper course to compel the rendering of an account to date. The appellant, by leave of court, should either amend his former account, bringing it down to date, or file another account beginning with the balance of his former account and stating the account to date. His former account, denominated a final account, is such no longer because of lapse of time, and the appellee is entitled to an accounting to date, with proper interest charges. The appellant should present himself,

with his vouchers, for examination under oath in relation to his accounts since his appointment as provided by R. S., Chap. 68, Sec. 57.

The mandate must be,

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

EUSEBE SENECHAL, Appellant, from decree of Judge of Probate;

In re, Estate of CHARLES W. COFFIN.

York. Opinion March 9, 1923.

Exceptions to an order by the Judge of Probate removing an administrator, residing out of the State, for failing to comply with a decree of Judge of Probate ordering him to file his account, and settle the estate, are groundless.

R. S., Chap. 68, Sec. 24, expressly provides that when an executor or administrator, residing out of the State, after being cited by the Judge of Probate, neglects to render his accounts and settle the estate according to law, he may be removed from such trust position. This appellant resides in the Dominion of Canada. He has ignored orders of the Judge of Probate, having jurisdiction of the case, to file his account and settle the estate. Exceptions to an order removing him from office are groundless.

On exceptions. Charles W. Coffin late of South Berwick died November 11, 1903, testate, leaving a widow and an infant son. The widow, Alma Coffin, was appointed executrix, but died soon after before the administration was completed. On April 5, 1904, appellant, a brother-in-law of the widow, residing in Frazerville, Province of Quebec, was appointed administrator d. b. n. c. t. a. and filed an inventory, none having been filed by the widow, on June 7, 1904. On December 17, 1907, he was cited to file his account and settle the estate. On April 7, 1908, he filed an account but never took any steps to have it allowed or to settle the estate. On December 14, 1921, Joseph Fred Coffin, the infant son and sole heir, having arrived to the age of twenty-one years, petitioned the Probate Court for the

removal of the administrator, which petition was granted, and the administrator took an appeal to the Supreme Court of Probate, where the appeal was dismissed, and appellant excepted. Exceptions overruled.

The case is fully stated in the opinion.

Emery, Waterhouse & Paquin, for appellant.

E. P. Spinney, for appellee.

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

PHILBROOK, J. This case arises from a petition by Joseph Fred Coffin, son and sole heir at law of Charles W. Coffin, praying for the removal of the appellant from the office of administrator d. b. n. c. t. a. of the estate of said Charles W. Coffin, upon the grounds that said Senechal has neglected and refused to settle an account of his administration; that he has refused to distribute the property of said estate as required by law; that he has refused, after a vacancy in the office of agent, to appoint an agent in the State of Maine; and that he has fraudulently converted the property of said estate to his own use.

Removal as prayed for was decreed by the Judge of Probate, an appeal was taken, hearing was had in the Supreme Court of Probate, where the decree of the Judge of Probate in the court below was affirmed. Exceptions were taken to the finding in the Supreme Court of Probate.

The opinion in the case wherein the same administrator presented exceptions to a finding of the Supreme Court of Probate ordering such administrator to forthwith file his final account, states the facts more fully and is hereby referred to.

The exceptions are groundless. R. S., Chap. 68, Sec. 24, expressly provides that when an executor or administrator, residing out of the State, after being cited by the Judge of Probate, neglects to render his account and settle the estate according to law, he may be removed from such trust position. This appellant resides in the Dominion of Canada. He has ignored orders of the Judge of Probate, having jurisdiction of the case, to file his account and settle the estate.

Exceptions overruled.
Appeal dismissed with additional costs.
Decree of Judge of Probate affirmed.

LERMOND'S CASE.

Sagadahoc. Opinion March 12, 1923.

An accident to an employee on a steamship caused by the slipping of a ladder down which he was going from the deck to the wharf, resulting in injury by striking either the wharf or a bumper log maintained in front of the wharf, to prevent impact, or both, is within the jurisdiction of the State Court, and admiralty does not take jurisdiction.

In the instant case the Associate Legal Member of the Industrial Accident Commission found that the bumper, or dead log, was actually a part of the wharf, and further found that the injury was received upon the bumper log, which was equivalent to finding that the petitioner received his injury by striking upon the wharf.

The bumper log being a part of the wharf the injury was consummated upon the wharf.

To come within the admiralty jurisdiction the wrong and injury complained of must have been committed wholly upon the highways and navigable waters, or at least the substance and consummation of the same must have taken place upon these waters, and the cause of damage must have been there complete.

Where an injury begins upon the ship and culminates upon the land, admiralty does not take jurisdiction, and the case comes within the jurisdiction of the State Court, under the Compensation Act.

On appeal. This is a proceeding by petition for compensation under the Workmen's Compensation Act. On August 29, 1920, the claimant, George P. Lermond, was in the employ of the Texas Steamship Company as a pipe fitter on the ship "Alabama," regularly engaged in interstate commerce. While descending a ladder from the deck to the wharf, the ladder slipped, and he fell into the water, on the way coming in contact with either the wharf, or a bumper log fastened to the wharf by wire cables and there maintained to prevent impact between the wharf and boats, or striking first the wharf and then the bumper log, and sustained severe injury. At a hearing before the Associate Legal Member of the Industrial Accident Commission, it was contended by claimant that the bumper

log was a part of the wharf and the court so found, and further found that the injury was received upon the bumper log, and awarded compensation, and an appeal was taken. Appeal dimissed. Decree below affirmed.

The case is fully stated in the opinion.

Edward W. Bridgham, for claimant.

Robert M. Pennell and Strout & Strout, for respondents.

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

SPEAR, J. This case involves a petition for award of compensation filed with the Industrial Accident Commission February 10, 1922, by *George P. Lermond* v. *Texas Steamship Company and U. S. Fidelity and Guaranty Company*. A hearing was held at Bath, at which all parties in interest were represented. The Associate Legal Member of the Industrial Accident Commission heard the case and made a statement of facts from which an abbreviated statement of the case would appear to be as follows:

On August 29, 1920, the claimant was employed by the Texas Company as a pipe fitter on the ship "Alabama," regularly engaged in interstate commerce, belonging to the Texas Company, and while so employed sustained a severe injury arising out of his employment. He was going down a ladder from the deck to the wharf below; the ladder slipped and he fell into the water, on the way bruising his left side and breaking his right leg by striking against a bumper log, so called. The log was seventy or eighty feet long and two feet through at both ends, fastened to the wharf by wire cables. It was permanently attached and had been there for a long time prior to the accident. Its purpose was to act as buffer, or fender, to protect boats and the wharf from impact. At high water it would lie close against the wharf; at low water it would swing out the length of the cables, seven and one half feet. Taking into account the closeness and firmness of its attachment to the wharf, its permanency, and the purpose for which it was used, it is found that this bumper, or dead log, was actually a part of the wharf. At the time of the accident the boat was ten or twelve feet from the wharf, the floor of which was some four feet above the water. The ladder was perhaps thirty feet long, extending two feet or so above the deck, its foot resting about four feet from the edge of the wharf.

It was not fastened in any way either to the vessel or to the wharf. Claimant was five or six rounds down the ladder—about one quarter way—when it started to slip, due presumably to the swinging out of the boat. A controversy arose as to whether the claimant, in his fall, struck the wharf and then fell upon the bumper log, or whether he struck the bumper log only. Upon this point the Associate Legal Member stated: "It cannot be found that claimant struck the wharf, but rather that he received his injury by striking the bumper, or dead log." This is an affirmative finding that the injury was received upon the bumper log. We have no occasion, therefore, to inquire whether he struck upon the wharf proper or not.

It further appears that, on November 12, 1920, Mr. Lermond signed a settlement receipt and common law release for the sum of $350.00, but this receipt contained no reference to the settlement of an admiralty claim, and, consequently, was not binding upon the claimant unless approved by the Industrial Accident Commission. The Legal Associate so found. Whereupon the following statement and decree were entered. "It is agreed that in addition to the $350. already paid the liability, if any, of the respondent Company as to the injury up to the date of the hearing on March 29, 1922, is $696.50: $662.50 being for loss of time, including whatever amount may be due on account of permanent impairment, and $34. for medical bills.

"IT IS THEREFORE ORDERED AND DECREED that the Texas Steamship Company or its insurance carrier, the U. S. Fidelity & Guaranty Company, pay to George P. Lermond the aforesaid sum of $696.50 on account of the injury sustained by him August 29, 1920, while in the employ of the said Texas Steamship Company."

This decree was affirmed by a Justice of the Supreme Judicial Court from which an appeal was taken to bring the case here.

There is no question but that a contract to do repairs on a vessel engaged in interstate commerce and lying in navigable waters is of a maritime nature. *McClellan* v. *Robert Morris*, 1 Wall. 33; The Iris, 100 Fed. 104. Lermond was so engaged.

It is the opinion of the court, however, that this case turns upon the mixed question of law and fact, whether the bumper log can be regarded as a part of the wharf, it being well settled that an injury to fall within the rules of maritime jurisdiction must end, as well as begin, upon navigable waters. While an award under the Work-

men's Compensation Law is not made on the theory that a tort has been committed, but that the statute giving the Commission power to make an award is read into and becomes a part of the contract of employment, it is nevertheless true that, in order to determine whether admiralty or State jurisdiction controls the form of procedure, the accident from which the injury proceeds is treated in the nature of a tort.

In *State Industrial Commission of the State of New York, Petitioner* v. *Nordenholt Corporation and the Travelers Insurance Company*, U. S. Supreme Court's Advance Opinions, July 1, 1922, the court says: "The general doctrine, that in contract matters admiralty jurisdiction depends upon the nature of the transaction, and in tort matters upon the locality, has been so frequently asserted by this court that it must now be treated as settled."

In 1 R. C. L., 417–19, with reference to jurisdiction of maritime torts, it is said, "In determining whether a tort was committed on land or on water, consideration must be given to the place where the injury and damage arise rather than to the place where the negligent act was committed, or had its inception. It is the locality of the person or thing injured, not that of the offending person or thing, that determines the question. The consummation of the wrong must have taken place, and the cause of action have been completed, upon navigable waters." The leading case upon this subject, to which all the subsequent cases seem to refer and affirm, is found in *The Plymouth*, 3 Wallace, 20. This was a case in which a ship anchored in the Chicago River, navigable water, owing to the negligence of those in charge, took fire and communicated the flames to packing houses and other property along the wharf which was damaged and consumed by the fire. The court, with reference to this case, where the fire originated on the vessel, in navigable waters, and did damage upon the land, said: "but it has been strongly argued that this is a mixed case, the tort having been committed partly on water and partly on land; that as the origin of the wrong was on the water, in other words, as the wrong began on the water, where the admiralty possesses jurisdiction, it shall draw after it all the consequences resulting from that act." In answer to this argument the court said: "This class of cases may well be referred to as illustrating the true meaning of the rule of locality in cases of maritime torts, namely, that the wrong and injury complained of

must have been committed wholly upon the high seas and navigable waters, or, at least, the substance and consummation of the same must have taken place upon those waters to be within the admiralty jurisdiction. In other words, the cause of damage, in technical language, whatever else attended it, must have been there complete . . . . The jurisdiction of the admiralty over maritime torts does not depend upon the wrong having been committed on board the vessel but upon its having been committed upon the high seas, or other navigable waters. . . . The jurisdiction of the admiralty does not depend upon the fact that the injury was inflicted by the vessel, but upon the locality—the high seas or navigable waters—where it occurred. . . . . We can give, therefore, no particular weight or influence to the consideration that the injury in the present case originated from the negligence of the servants of the respondents on board the vessel except as evidence that it originated on navigable waters—the Chicago river; and as we have seen, the simple fact that it originated there, but, the whole damage done upon land, the cause of action not being complete on navigable waters, affords no grounds for the exercise of the admiralty jurisdiction. The negligence of itself furnishes no cause of action; it is damnum adsque injuria." To the same effect is *Gerry* v. *Insurance Company*, 120 Me., 457.

As we understand the finding of the Associate Legal Member, he decides the present case upon the authority of the Berry case, but the two cases are not exactly parallel. If the claimant had fallen upon the wharf proper the Berry case would be decisive. The State would have jurisdiction. If the accident, beginning on the ship, had culminated in the water without the claimant touching the wharf, admiralty would have had jurisdiction. 3 *Wallace*, supra. In order then to determine which jurisdiction controls, we must revert to the question already suggested,—was the bumper log upon which the complainant was injured a part of the wharf or a part of the navigable water? Upon this question *Cleveland Terminal and Valley Railroad Company* v. *Cleveland Steamship Company*, 208 U. S., 216, seems to give some light. The syllabus states the case as follows: "The admiralty does not have jurisdiction of a claim for damages caused by a vessel to a bridge or dock which, although in navigable waters, is so connected with the shore, that it immediately concerns commerce upon land." In the body of

the opinion reference as to what constitutes the land as distinguished from navigable waters in determining the question of jurisdiction, the court say: "That this is a case for damages to shore, dock, and to bridge protection, piling and pier," and in holding that these instrumentalities of commerce were not within the admiralty rule, conclude as follows: "All the bridges, shore, docks, protection piling, piers, etc., pertain to the land. They were structures connected with the shore and immediately concerned commerce upon the land. None of these structures were aids to navigation in the maritime sense but extensions of shore and aids to commerce on land as such." The bumper log was no aid to navigation in the maritime sense. It was simply a fender to protect the wharf as well as the vessel, not a medium of navigation.

In 8 Words and Phrases, 7434, the word "wharf" is defined as follows: "A wharf is a structure erected on a shore below high water mark . . . To a structure of this description and built for such purposes, floats necessary for the use of such wharf and usually occupied with it, may pass as appurtenant." *Doane* v. *Bradstreet Assn.*, 6 Mass., 332.

As a matter of fact, from the foregoing definitions of a wharf, and appurtenances thereto, it seems clear that the bumper log was a part of the wharf and not a part of the navigable water. It then follows, as a matter of law, that it was not within the scope of admiralty jurisdiction as such jurisdiction applies only to navigable waters.

The finding of the Associate Legal Member was correct as to the character of the bumper log, and upon that finding the case is clearly within the decision of the *Berry case*, 120; Maine, 437.

Appeal denied.
Decree below affirmed.

LAURE SAUCIER'S CASE.

Androscoggin. Opinion March 12, 1923.

An employee, having completed her work for the forenoon and in going from her place of work through two intervening rooms to the dressing-room, put her hand up in front of an exhaust fan, situate twenty-one feet from the entrance of the dressing-room and over five feet from the floor, to see if there was any current of air, and her hand was drawn into the fan and injured, is not entitled to compensation as the accident resulting in the injury did not arise out of and in the course of her employment.

In this case the question to be determined is whether or not the injury described was the result of an accident arising out of and in the course of the employment of the petitioner, and that depends upon the question as to whether there was any evidence to support the decision of the Commission granting compensation.

The action did not arise out of the petitioner's employment.

On appeal. This is an appeal from a decree of a sitting Justice approving the decision of the Chairman of the Industrial Accident Commission. On June 6, 1918, the petitioner, Laure Saucier, was employed by T. A. Huston & Company at its factories in Auburn. Her duties were to put frosting or icing on small cakes. On the day of the accident having completed her work for the forenoon at 11:30, she left the room with other employees to go to the dressing-room, preparatory to leaving for her lunch, passing through two intervening rooms, and stepped up to an exhaust fan situate about twenty-one feet to the right of the entrance to the dressing-room and about five feet from the floor and put up her hand to see if any air was coming into the room, and her hand was drawn into the fan and injured. The question involved is, whether the accident arose out of the employment, and that depends upon whether there was any evidence to support the finding of the Commission. Appeal sustained. Decree reversed. Petition dismissed.

The case is fully stated in the opinion.
Dana S. Williams, for claimant.
Andrews, Nelson & Gardiner, for respondents.

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

SPEAR, J. This is an appeal from a decree of the sitting Justice approving the decision of the Chairman of the Industrial Accident Commission. We think this case turns entirely upon the question of fact, whether the injury for which the plaintiff seeks compensation arose out of, and in the course of, the employment. The decisive question is, whether the accident arose out of the employment; and that depends upon whether there was any evidence to support the finding of the Chairman. The statement of facts sufficiently appears from the decision of the Chairman. So much of the decision as is pertinent to the issue here raised is as follows: "On the 6th day of June, 1919, the petitioner, Laure Saucier, was employed by T. A. Huston & Company at its Auburn factories. Her duties were to put frosting or icing on small cakes. On the day of the accident petitioner had been engaged at her regular work until 11:30, when she finished her work for the forenoon and in company with other employees, left the room where she had been working and started toward the dressing-room preparatory to leaving for the lunch hour. In order to reach the dressing-room Miss Saucier passed out of the room in which she performed her regular duties through an adjoining room and into a large room the entire length of which she had to traverse before reaching the dressing-room. The distance from the table where petitioner was stationed when occupied, to the dressing-room, by the route she would ordinarily take, was approximately 225 feet. To the right of the entrance to the dressing-room, a distance of approximately 21 feet, and at a height of over five feet from the floor of the room, was an exhaust fan. On the day of the accident the petitioner instead of going directly to the dressing-room, went over to the exhaust fan and put her hand up in front of it to see whether any air was coming into the room from it. Her hand was drawn into the fan and as a result she lost the thumb and index finger of her left hand and a part of the wrist bones. No part of the work of the petitioner required her to be at or near the fan. The testimony showed, however, that some times some of the girls who

worked in the factory, including Miss Saucier, ate their lunches in that part of the room where the fan was located, using the boxes which might be there for seats. The question to be determined is whether or not the injury described was the result of an accident arising out of and in the course of the employment of the petitioner."

The Chairman then proceeds to cite several decisions bearing upon the issue; and upon those cases states the ground upon which he finds the petitioner was entitled to recover. After substantially repeating some of the facts which he had already found he proceeds further to say, "She went to that part of the factory where the girls were allowed to eat their lunches and spend the noon hour. She had left no duties undone. It was not yet time to leave the factory for the noon hour. She was at a part of the mill where she had a right to be from an established custom. The exhaust fan was one of the appliances used by T. A. Huston & Company to keep the factory in a sanitary condition. Using that part of the mill as she did at times with other employees, to eat her lunch, it would be only natural for a girl of her age, only fifteen years, to investigate to see whether the air was coming through the opening where the exhaust fan was located. Such an act may have been negligent on her part, but it was not such negligence as would deprive her of the benefits of the compensation act. It was a natural thing for a girl of her age to do under the circumstances.

"It is found that inasmuch as Miss Saucier was rightfully at that part of the factory when she was injured and was not neglecting any duties required of her or performing any duty in a manner contrary to instructions or rules properly in force, and was acting in a manner reasonably to be expected of one of her age, that the injury received by her, as described was due to an accident arising out of and in the course of her employment, and that she is therefore entitled to compensation."

The right to compensation is purely a statutory right. The statute prescribes the terms and conditions upon which it may be claimed and upon which it may be awarded. The statute is based solely upon the theory, that, regardless of age, sex, ignorance or intelligence, any person whose injury comes within the terms of the statute shall be compensated, and any person whose injury does not come within the terms of the statute shall not be compensated. The Chairman three times alludes to the age of the petitioner, apparently upon the

ground that a girl of her age might be expected to do what she did; that it was a natural thing for a girl of her age to do under the circumstances; and that she was acting in a manner reasonably to be expected of a girl of her age. Granting that a girl of her age might be likely to do just what she did, does the fact of her age in the slightest degree make available to her the provisions of the statute? We think not. The question of negligence does not, in any form, arise under the statute. It was the purpose of the statute to compensate for negligence that is not wilful. Therefore, the question of whether the petitioner was doing what she did through the indiscretion of youth is entirely immaterial. Whatever induced her to try the fan, whatever her intelligence, indiscretion or purpose, if the accident arose out of and in the course of her employment, she was entitled to compensation. If it did not, whatever her intelligence, indiscretion or motive, she was not entitled to it. Accordingly, so far as the decision was based upon the fact that the petitioner was only fifteen years of age, it must be disregarded.

Regardless of her age, and of what a girl of her age might be expected to do, whether thoughtlessly, negligently or otherwise, the question is, did the accident in which the petitioner was injured arise out of her employment?

We are not able to so find. At the time of the injury, the Chairman finds that "it was no part of her work to be at or near the fan." Unless her right to compensation can be predicated upon the inference that, when she traveled twenty-one feet out of her way to reach the fan, she did what a girl of her age might naturally be expected to do, the above finding of the Chairman would exclude the conclusion that the accident "arose out of her employment." The fact that she and other girls had at times eaten their lunch on boxes near the fan can have no probative force in the case at bar, on the observance of a custom, as she was not on the boxes for the purpose of eating her lunch, nor was she going there for that purpose, at the time of her injury, as above found. She was not within the pale of the custom, if there was one. On the contrary, at the time, the petitioner was passing from her workroom, a distance of two hundred twenty-five feet, to the dressing-room, preparatory to leaving for her lunch. No custom led her to the fan. The fan was no part of the machinery for the operation of the defendant's business. It was a sanitary arrangement properly installed and presenting no dangers not

incident to any such device. The petitioner had no more occasion to go to that fan and test it than she would have had to go to the place of a circular saw, or any other dangerous machine that might be properly installed for the conduct of business, for the purpose of testing whether such saw and machine were in motion.

She went out of the way over which her business took her twenty-one feet to enable her to reach the fan. Instead of being engaged in the pursuit of her business, which was going from the workroom to the dressing-room, she left her business, not passively, but voluntarily and intentionally, to interfere with a fixture with which she, nor any other employee of the factory, had any business whatever. It is evident that the accident had no connection with her employment.

Nor are we able to find any legal principle within which it can be said that the accident "arose out of the employment." In *Westman's Case,* 118 Maine, 123, as a summary the authorities cited, it was there declared, "It might with safety be said that, in order for the accident to arise out of the employment, the employment must have been the proximate cause of the accident." It should be noted that it was not her presence in the factory nor what she might be doing, but that her employment must be the proximate cause. Proximate cause has generally been defined as the cause without which the accident would not have occurred. It has been defined in different jurisdictions as follows: "The test of proximate cause is whether the facts constitute a continuous succession of events, so linked together that they become a natural whole, or whether the chain of events is so broken that the final result cannot be said to be the natural and probable consequence of the primary cause." *Quinlan* v. *The City of Philadelphia,* 54 Atl., 1026. *Thomas* v. *Central R. Co.,* N. J., 45 Atl., 344. "The practical construction of a proximate cause has been said to be one from which a man of ordinary experience and sagacity could foresee that the result might probably ensue." *City Counsel and Montgomery* v. *Wright,* 72 Ala., 411. See numerous other cases cited in 6 Words and Phrases, Page 5763, under the caption "Foreseen or Expected Results." "In determining what is the proximate cause the true rule is that the injury must be the natural and probable consequence of the negligence . . . such a consequence as under the surrounding circumstances of the case might and ought to have been foreseen by the wrong doer as likely

to flow from his act." *Robb* v. *Pennsylvania Co.*, 40 Atl., 969; 186 Pa., 456. "The proximate cause of an injury is that which naturally lead to, and which might have been expected to be directly instrumental in producing the result." *Consolidated Electric Light and Power Company* v. *Koepp*, 68 Pac., 608; 64 Kan., 735. "But if the injury results to employee from the doing of something which the employment neither required nor expected, or in a place where his employment did not take him, it cannot be said to arise out of the employment." *Larke* v. *John Hancock Mutual Life Insurance Company*, 97 Atl., 320.

We are unable to apply the above definitions to the petitioner's employment as the proximate cause in the present case. We are unable to see how her employment can be ascribed at all as the cause of her injury; it did not call her or require her to go to or near the fan; it was not something that happened as the natural and probable consequence of her employment, but was the result of her own voluntary act, entirely independent of any duty she was required to perform, and done for the sole purpose of satisfying her curiosity.

Paraphrasing the last case cited, which was a compensation case, her injury resulted from the doing of something which her employment neither required nor expected her to do and in a place where her employment did not take her. The foregoing definitions of proximate cause also proceed upon the assumption that the cause was one from which a man of ordinary experience and sagacity could foresee that the result might probably ensue.

We are of the opinion that it cannot be declared under the circumstances of this case that any man of ordinary prudence and sagacity could be held to anticipate that the petitioner, or anyone else, would approach that fan and voluntarily put a hand into its whirling machinery.

In the *Mailman's Case*, 118 Maine, 122, 172, we also find another definition of the phrase, "arise out of and in the course of," in which it is said, "The accident must have arisen out of and in the course of the employment." In other words, it must have been due to a risk to which the deceased was exposed while employed and because employed by the defendant. "Because" is defined in Webster's New International "by reason of; on account of." As before noted, it cannot be said that the act of the petitioner was done by reason of, or on account of, her employment.

In discussing these questions we should not confound the meaning of proximate "cause" with the meaning of "occasion." Her employment presented the occasion of her being in the factory just as the highway furnishes the occasion for a traveler to drive his team upon a defective bridge; but the defect and not the highway is the proximate cause.

From the facts as stated in the Chairman's finding, they present no evidence of, but, on the contrary, negative any causal relation between the petitioner's employment and her interference with the fan.

Appeal sustained.
Decree reversed.
Petition dismissed.

WILMER L. AMES *vs.* JOHN T. YOUNG.

Knox. Opinion March 12, 1923.

In an action of forcible entry and detainer where the only issue is that of title and the plaintiff relies upon a purchase of the property at a sheriff's sale, upon him rests the burden of showing that all of the proceedings leading up to and including the sale were conducted in accordance with the provisions and requirements of the statute.

In this case it was incumbent upon the plaintiff to prove the various steps leading up to and including the sheriff's sale, as the burden was upon him to prove title. Upon this point the plaintiff has obviously failed. The execution and the return thereon was not produced to show whether the sale was regular or not and the recitals in the sheriff's deed were not sufficient to supply the possible omission. Consequently, there is a missing link in the plaintiff's chain of title.

On report. This is an action of forcible entry and detainer brought by plaintiff against defendant involving the title to certain real estate situated on Matinicus Isle, plaintiff relying upon a sheriff's sale to establish his title to the property. Defendant pleaded the general issue and a brief statement claiming title. In March, 1905, Hattie E.

Young, for a consideration of $50.00, executed and delivered a mortgage of the property to Marian A. Young. In March, 1913, Marian A. Young brought suit against the mortgagor, attached the real estate described in the mortgage, recovered judgment, took out execution, placed the execution in the hands of the sheriff, who made a levy and sale of the property of which the plaintiff was a purchaser for the sum of $195.00. The execution was returned into court fully satisfied. After the evidence was taken out by agreement of the parties the case was reported to the Law Court. Plaintiff nonsuit.

The case is fully stated in the opinion.

Edward K. Gould, for plaintiff.

Adelbert L. Miles, for defendant.

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

SPEAR, J. This case originated upon an action of forcible entry and detainer brought by the plaintiff against the defendant in the Police Court for the city of Rockland. The defendant pleaded the general issue and in a brief statement claimed title in himself. After the evidence was taken out, in the Supreme Court, the case was reported to the Law Court. The only issue is that of title. The plaintiff undertakes to establish his title through a purchase of the property described, at a sheriff's sale. In March, 1905, Hattie E. Young, for a consideration of $50.00, executed and delivered a mortgage to Marian A. Young of land situated on Matinicus Isle. In March, 1913, Marian A. Young brought suit against the mortgagor, attached the real estate covered by the mortgage, recovered judgment, took out execution, placed the execution in the hands of the sheriff, who made a levy and sale of the property of which the plaintiff was purchaser for the sum of $195.00. The execution was returned into court as fully satisfied. Upon this feature of the case the first inquiry is, . . . Were all the proceedings leading up to and including the sale conducted in accordance with the provisions and requirements of the statute? It was encumbent upon the plaintiff to prove the various steps leading up to and including the sale, as the burden was upon him to prove title. Upon this point the plaintiff has obviously failed. The execution and the return thereon was not produced to show whether the sale was regular or not and the recitals in the

sheriff's deed were not sufficient to supply the possible omission. Consequently, there is a missing link in the plaintiff's chain of title.

In May, 1921, eight years after Marian A. Young, the mortgagee, had attached and conveyed, by sheriff's sale, the mortgaged property, as above set forth, she made an assignment of the mortgage on the premises sold as aforesaid to Wilmer L. Ames, the plaintiff in the present case and purchaser under the sheriff's sale. As assignee of this mortgage, the plaintiff began proceedings of foreclosure and the equity of redemption was permitted to expire. But the plaintiff does not claim title under the assignment and foreclosure. His contention is that the assignment was evidence of the redemption of the mortgage and that the foreclosure was merely a matter of extra precaution.

Whatever might be the effect of the assignment and foreclosure of the mortgage, the defendant claims that, at the time of the assignment, the mortgagee, Marian A. Young, had no interest in the mortgage which she could assign, inasmuch as her action upon the note, attachment and sale of the property, constituted a waiver of all her rights in the mortgage and that the sale of the property was a payment in full of the mortgage debt.

We are of the opinion that the defendant's contention must prevail.

Crooker v. *Frazier*, 52 Maine, 405, was a case in which the mortgagee brought suit upon his note secured by the mortgage and proceeded to a levy and sale of the premises, the same thing that was done in the case at bar. It was held in this case that the proceeding was a proper one for the creditor to pursue, giving the following reasons: "The debt is the principal thing. The mortgage is designed to secure the ultimate payment of it to the creditor. But if he pleases to waive that security and proceed to collect his debt in the ordinary process of law, it is not for the debtor to complain. He is subjected to no illegal burden. The accepting of a mortgage does not impose upon the creditor the necessity of giving the credit for the term of three years beyond that which is stipulated for in the principal contract. The relation of the parties is changed by the levy. The levying creditor can no longer be considered as entitled under his mortgage. He is to be considered as holding by virtue of his levy, and his title must depend upon the regularity of his proceedings. He can claim no priority over other attaching creditors, or intervening encumbrances, by reason of his mortgage." The foregoing quotation

seems to conclusively establish the principle that when a mortgagee brings suit upon his note, attaches the property and sells it upon a levy, he has then waived all the rights which he might otherwise have had by virtue of the mortgage. In other words, he waives the evidence of the security and takes the security itself. It is further held in the same case, that "If the debtor has taken no feasible steps to redeem his property from the levy which was made upon it, he has lost the right to redeem that portion which was covered by the levy. But the debt originally secured by the mortgage has been paid by the levy." This case is referred to in *Forsyth* v. *Rowell*, 59 Maine, 131, and approved in the following language: "He cannot waive his security by the mortgage and at the same time treat it as still subsisting and constituting the foundation of an equity which may be the subject of a sale."

Plaintiff nonsuit.

GEORGE STRICKLAND *vs.* ALLEN S. ROLLINS.

Waldo. Opinion March 15, 1923.

In a real action to gain possession of land, where plaintiff had foreclosed a mortgage given to him on same real estate, and the equity of redemption having expired, in which mortgage was incorporated, "Except a life lease held by Ida F. Rollins and Allen S. Rollins," (defendant), such language cannot be stricken from the mortgage, and so regarded in the action, even if it were so agreed, as such an agreement could not be enforced in an action at law, but if the insertion of such an exception was an error, it might upon proof, be removed by a procedure for reformation of the instrument.

This case is succinctly stated in the plaintiff's brief, as follows:

"On April 2, 1919 the plaintiff took a mortgage from Clyde R. Tilton for the sum of $975.00 on two parcels of real estate in Troy, Maine, with interest at 6 per cent. At the same time and by the same transaction Clyde R. Tilton had received a deed from Allen S. and Ida F. Rollins of the same two parcels of land and at the same time and transaction Clyde R. Tilton gave a mortgage

for support and maintenance to Allen S. Rollins and Ida F. Rollins, who had given him a deed of those two parcels of land at the same time and transaction."

The plaintiff foreclosed his mortgage and the equity of redemption was allowed to expire, whereupon he brought the present action to gain possession of the mortgaged premises. The defendant, however, interposes what is called a life lease contained in the mortgage of Clyde R. Tilton to the defendant and his wife for support, which was incorporated in the plaintiff's mortgage in the following language: "Except a life lease held by Ida F. Rollins and Allen S. Rollins." The plaintiff responds by saying that it was agreed that the exception should be stricken from his mortgage and that it should be so regarded in this case.

Held:

1. That even if so agreed, the agreement could not be enforced in an action at law.
2. That the defendant cannot be deprived of his possession of the mortgaged premises as long as the exception remains in the plaintiff's mortgage deed.

On report. A writ of entry to obtain possession of a farm in the town of Troy. Plaintiff had foreclosed a mortgage on the premises which was given to him to secure a loan of $975.00, and the equity of redemption had expired, in which mortgage it was stated that the land was free of all incumbrances "except the life lease held by Ida F. Rollins and Allen S. Rollins." At the time plaintiff's mortgage was given, another mortgage was given by the same party to the defendant and his wife securing to them the right to live on the farm the remainder of their lives, which grant is mentioned in plaintiff's mortgage. Plaintiff contended that the clause in his mortgage referring to a life lease he objected to and it was stricken out at the time of execution; this the defendant denies. By agreement of the parties the cause was reported to the Law Court. Plaintiff nonsuit.

The case is fully stated in the opinion.

Fremont J. C. Little, for plaintiff.

Dunton & Morse, for defendant.

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

SPEAR, J. This is a writ of entry to gain possession of land, by the plaintiff, after he had brought and matured a foreclosure on the premises demanded. The case is succinctly stated in plaintiff's brief, as follows:

"On April 2, 1919 the plaintiff took a mortgage from Clyde R. Tilton for the sum of $975.00 on two parcels of Real Estate in Troy, Maine, with interest at 6 per cent. At the same time and by the same transaction Clyde R. Tilton had received a deed from Allen S. and Ida F. Rollins of the same two parcels of land, and at the same time and transaction Clyde R. Tilton gave a mortgage for support and maintenance to Allen S. Rollins and Ida F. Rollins, who had given him a deed of those two parcels of land at the same time and transaction.

"On the 5th day of July, 1915, Ida F. Rollins had given a mortgage to one L. L. Rogers for $918.39 as appears by Defendant's Exhibit No. 2, and said Rogers had begun foreclosure on said parcels and the year of redemption had but three days to run to mature on this 2d day of April, 1919."

By examination of these mortgages as made April 2, 1919, it will be seen that each is made subject to the other.

The testimony as taken out and as testified to by the plaintiff shows that when Miss Williston had written the mortgage to the plaintiff and read it over to him, he objected to the phrase "except the life lease held by Ida F. Rollins and Allen S. Rollins," and supposed it had been stricken out, or erased, and had not again thought of it until he started foreclosure, when it was seen there with a line through it. He testifies that he asked her to cross it out and it appears crossed out in this way. The defendant seems to claim that it properly belonged in the mortgage but plaintiff ordering it erased and it so appearing erased in the original mortgage the plaintiff contends that it is so erased and of no consequence. But the facts, fairly considered, do not support the contention of the plaintiff that the exception of the life lease was erased from the original mortgage. The testimony of the scrivener is positive upon this point, and when asked whether those words were stricken out, or attempted to be stricken out, before the instrument was signed and acknowledged, emphatically said, "No sir, they weren't." The defendant also states, that it was understood, as he thought, among them all, when the writings were being made out, that the life lease, as it is called, was made an exception in the plaintiff's mortgage for the purpose of giving him and his wife a home upon the place, and also that Clair, the mortgagor to the plaintiff, should have a home with them. The exception of what is called the life lease, therefore, must be regarded

as written in and retained in the plaintiff's mortgage. The life lease, as it is called, was contained in the mortgage of Clair R. Tilton to the defendant and his wife and provided that "Ida F. Rollins and Allen S. Rollins are to live on the above described premises during the remainder of their life, have the full use of the premises and the privilege of supporting themselves on these premises as long as their physical health enables them to do so." This life lease, accordingly, by the exception in the plaintiff's mortgage, gives it the same force as if incorporated in the mortgage in the language in which it is expressed.

The plaintiff's able and ingenious argument seems to be based upon the last clause of the last paragraph quoted from his brief, ... that the exception of the life lease should have been erased and, therefore, upon the evidence, in law, must be regarded as erased and without effect upon the plaintiff's mortgage and his right of possession after the foreclosure. But the difficulty is, that, in a legal process, the exception cannot be expunged from the mortgage, even if the evidence was sufficient to prove that it was placed there by error. The exception is actually in the deed and an action at law cannot reach it. If the insertion of the exception was an error it may, of course, upon proof, be removed by a procedure for reformation of the deed. Although the legal title is obviously in the plaintiff, yet a writ of possession cannot be granted to oust the possession of Ida F. Rollins and Allen S. Rollins, so long as the exception remains in the deed and they choose to live upon the premises, as the exception clearly gives them a right to do.

Plaintiff nonsuit.

JOHN MORIN'S CASE.

Aroostook. Opinion March 15, 1923.

A defendant who under the Workmen's Compensation Act, disregarding the statute, goes to trial without filing an answer, and after an adverse decision, appeals, cannot then for the first time interpose the limitations of the statute. A petition, manifestly insufficient, upon which a hearing has been held and certain facts found by the chairman, where a new petition, based upon such findings of fact, would not be barred, that hardship may be avoided and litigation terminated, may be regarded as amended after the analogy of procedure in actions of law.

The petition in this case is manifestly insufficient on its face to support any award of compensation, for the following reasons:

(a) It is not a petition for review under Section 36, because it contains no reference to any "agreement, award, findings or decree" of which a review is asked upon the grounds stated in said Section.

(b) It does not set out a case for the award of compensation under Sections 15 and 16, for "partial incapacity for work resulting from the injury specified" continuing after total incapacity for a specified period.

(c) It does not set forth, either an agreement which has not received the approval of the commissioner, or a failure to reach an agreement in regard to compensation.

(d) It does not set forth "the matter in dispute and the claim of the petitioner in reference thereto."

The case proceeded to a full hearing before the Chairman who found the necessary facts to support an award of compensation under Sections 15 and 16, for "partial incapacity for work resulting from the injury specified," continuing after total incapacity for a specified period.

The limitations of the statute afford no defense. When a defendant disregards the statute requiring him to file an answer, files no answer, goes to trial, and after adverse decision carries his case to the Law Court on appeal, he cannot for the first time then interpose the limitations of the statute.

A new petition based upon the facts found by the Chairman will not be barred either by (1) the agreement under which compensation has been paid for presumed total disability for the period specified in Section 16; or (2) by Section 39 of the act; the filing of "an agreement or a petition, as provided by section thirty," takes the case out of the operation of the statute, and stops the running of the two-year period.

When an agreement for compensation for a compensable injury resulting in presumed total disability for a specified period, has been seasonably filed and

approved, the case is before the commission and there is no time limit for filing a petition for compensation for total or partial incapacity for work resulting from the injury specified, continuing after the period specified.

Section 36 is not applicable to approved agreements or decrees fixing compensation for periods of total disability or incapacity, the duration of which is absolutely fixed by statute.

A new petition framed according to the facts found by the Chairman, not being barred, to avoid the hardship in compelling the claimant to again present his case, which would result from a dismissal or recommittal of the present case and in the interest of a speedy termination of litigation, the court may regard the petition as amended, after the analogy of procedure in actions at law, and affirm the decree below.

Lemelin's Case, 121 Maine, 72, distinguished.

Graney's Case, 121 Maine, 500, distinguished.

On appeal. This is a petition under the Workmen's Compensation Act seeking compensation for partial incapacity, continuing after the expiration of the specified period for which compensation was awarded and paid for a total disability under an agreement. The claimant, a common laborer, while in the employ of Aroostook Pulp & Paper Company at Van Buren, received an injury to his left eye on October 22, 1918, by being hit by a stick or piece of wood, and the eye was subsequently removed. Under an agreement between employer and employee, duly approved by the commissioner of labor, a compensation of $10 a week for one hundred weeks, was awarded for total disability and paid. On July 26, 1921, a claimant filed the petition in these proceedings, no answer being filed by the respondents, on which petition a hearing was had and compensation for partial incapacity awarded, and respondents appealed from a decree of sitting Justice confirming the findings of the Chairman of the Commission. Appeal dismissed. Decree of sitting Justice affirmed.

The case is fully stated in the opinion.

Claimant was without counsel.

George E. Thompson, for defendants.

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

MORRILL, J. This case is under the Workmen's Compensation Act; the injury was received prior to the revision of that Act by the Legislature of 1919.

The petition is manifestly insufficient on its face to support any award of compensation, for the following reasons:

(a) The appeal filed by the employer and insurance carrier, upon which the case is before us, refers to the petition as a "petition for review." But an examination will show that it is not a petition for review under Section 36, because it contains no reference whatever to any "agreement, award, findings or decree," of which review is asked "upon the ground that the incapacity of the injured employee has subsequently ended, increased or diminished."

(b) Nor does the petition set out a case for the award of compensation, under Sections 15 and 16, for "partial incapacity for work resulting from the injury specified" continuing after total incapacity for a specified period, for which compensation has been fixed for such period either by agreement or award of the chairman, because it contains no reference to such antecedent agreement or award.

(c) Nor, does the petition set forth, either an agreement which has not received the approval of the commissioner (see *Gauthier's Case*, 120 Maine, 73, 75), or a failure to reach an agreement in regard to compensation, one of which is a prerequisite to filing an original petition under Section 30; nor does it set forth "the matter in dispute and the claim of the petitioner in reference thereto." See *Maxwell's Case*, 119 Maine, 507.

The petition therefore lacks the essential allegations of fact upon which an award may be based, and the most liberal construction with a view to carrying out the general purposes of the law cannot supply them. It is a bare request for compensation for personal injury by accident arising out of and in the course of the petitioner's employment, received, as shown on the face of the petition, more than two years before the date of filing. Upon motion or answer seasonably filed, petition should have been dismissed or opportunity to amend it given; an amendment adequately stating the claimant's case, if offered, was allowable, in accordance with the purpose of the act to reach speedy adjustments of such claims. The proper procedure under such circumstances was pointed out in *Maxwell's Case*, supra, announced before this petition was filed.

The case, however, proceeded to a full hearing before the Chairman, who found that the claimant on October 23, 1918 suffered a compensable injury resulting in the loss of his left eye; that an agreement was entered into between the parties for the payment of compensation

for a period of one hundred weeks during which period the disability is deemed to be total (Section 16); that compensation was paid according to the terms of the agreement; that the claimant is suffering from a partial incapacity for work resulting from the injury specified, continuing after the specified period; that he is entitled to compensation for such partial incapacity, and made an award accordingly, upon which a decree was entered; from this decree the appeal before us was taken, stating that, "the petition for review, on which the decree was made, from which this appeal is taken, being dated the twenty-fifth day of July, 1921, and being more than two years after the agreement for compensation was entered into, the findings of fact do not substantiate the decree as a matter of law." We have already seen that the petition is in no sense a petition for review, and evidently counsel came so to consider it, because in his brief he thus states his contention: "This is an original petition for compensation and hence is barred by the two year limitation period."

Is this contention now open to the employer and insurance carrier?

We think not. The defect was apparent upon the face of the petition. The respondents did not file an answer, and the record does not show that this contention was in any manner called to the Chairman's attention during the proceedings; it first appears on appeal. This laxity of practice in failing to file answers has become so common, at least three cases in which it occurs being before the Law Court, that it calls, we think, for the attention of the court.

The Workmen's Compenation Act unmistakably aims at a prompt adjustment of claims by a procedure as simple and direct as possible.

The first step (Section 30) is by agreement, if possible; if such agreement is made and not approved, or if the parties fail to reach an agreement, either employer or employee may file a petition, giving in detail certain required facts, stating the matter in dispute and the claims of the petitioner with reference thereto on which notice shall be given within four days after filing (Section 31).

Within ten days after the filing of such petition, answers are to be filed and copies thereof furnished to the petitioner, which answer should state the claims of the opponents with reference to the matter in dispute as disclosed by the petition. If any party opposing such petition does not file an answer within the time limited, the hearing shall proceed upon the petition (Section 32).

"The whole matter shall then be referred to the chairman of said commission" (Section 33). "If from the petition and answer there appear to be facts in dispute, the chairman of the commission shall then hear such witnesses as may be presented by each party, . . . From the evidence thus furnished the chairman shall, in a summary manner, decide the merits of the controversy."

Such was the simple procedure, clearly prescribed by the statute in force when the injury was received by the claimant; the same procedure now obtains except as modified by the creation of the office of Associate Legal Member.

If no answer is filed, no facts will appear to be actually in dispute, although the petitioner may apprehend, and so state in his petition, that a dispute exists; and the chairman in proceeding upon the petition may treat the allegations of fact, which are well pleaded in the petition, as admitted, and may make such award as the facts so stated in the petition will support, after the analogy of the procedure upon bills in equity taken pro confesso for want of appearance or answer.

If the opponents of the petition wish to interpose the bar of a statute limitation, they should so do by answer before hearing, that the issue may be apparent, or lose the benefit of such defense, as in procedure in actions at law, requiring that the statute of limitations shall be specially pleaded.

The respondents having failed to file an answer cannot avail themselves of a statute limitation first interposed as a defense upon appeal before the Law Court.

What disposition under the circumstances should be made of this case? Will the court reverse the decree, suo motu, and dismiss the petition, on account of its manifest insufficiency, or recommit it, for amendment, to the Industrial Accident Commission? If a new petition, framed according to the facts found by the Chairman, will not be barred, a dismissal or recommittal of the present case would work a hardship in compelling the claimant to again present his case. The case has been fully heard with the respondents represented, and the Chairman has found the facts and awarded compensation accordingly. We see no reason why we may not regard the petition as amended so as to present a claim under Section 16 for compensation for partial incapacity for work continuing after the period of presumed total disability for which he received compensation under the agree-

ment. The Chairman has awarded such compensation after a finding of facts supporting it. Why should not the petition be regarded as amended in the interest of a speedy termination of litigation? Such amendments are frequently considered as made in actions at law. *Wyman* v. *American Shoe Finding Company*, 106 Maine, 263. *Clapp* v. *C. C. P. & Lt. Company*, 121 Maine, 356. *Burner* v. *Jordan Family Laundry*, 122 Maine, 47, 52. We see no reason why the same principle may not be applied here. *Gauthier's Case*, 120 Maine, 73, 76. The reasons which prompted the court to recommit *Maxwell's Case*, 119 Maine, 504 do not exist here.

Will a new petition in the form above suggested be barred? Certainly not by the agreement under which compensation has been paid for presumed total disability for the period specified in Section 16. Such agreement, approved by the commissioner, although having the force of a judgment, is binding only to the extent of the facts agreed upon, (*Maxwell's Case*, supra,) which in this case were, that the claimant had received a compensable injury resulting in a presumed total disability, and the amount of compensation; the law establishes the basis upon which compensation shall be computed and the duration of the period of presumed total disability is fixed by law. Manifestly the parties could not understandingly agree upon compensation for partial incapacity continuing after the specified period, and did not attempt to do so.

Nor will such petition be barred by Section 39 of the Act, which reads: "An employee's claim for compensation under this act shall be barred unless an agreement or a petition, as provided in section thirty shall be filed within two years after the occurrence of the injury;" the remainder of the section is not material here.

The filing of "an agreement or a petition, as provided in section thirty" takes the case out of the operation of the statute, and stops the running of the two-year period. In *Gauthier's Case*, 120 Maine, 73 we held that when an agreement has been seasonably filed, although not approved, an original petition is the appropriate remedy and that no time is fixed for its filing. Why should we not, by the same course of reasoning hold that when, as in this case, an agreement for compensation for a compensable injury resulting in presumed total disability for a specified period, has been seasonably filed and approved, the case is before the commission, and that there is no time limit for filing a petition for compensation for total or partial

incapacity for work resulting from the injury specified, continuing after the period specified? We think that such must be the construction of the statute; the legislature apparently considered that a time limit is unnecessary in view of the interest of the claimant to promptly make application for compensation after the specified period of total disability had expired.

Section 36, relating to petitions for review, is not applicable. Whatever may be the full scope of that section, it cannot be applicable to approved agreements or decrees fixing compensation for periods of total disability or incapacity, the duration of which is absolutely fixed by statute, as by Sections 14 and 16 of the act, unless, perhaps, in cases of fraud affecting the entire award or agreement.

Therefore, a new petition, based upon the facts already found by the Chairman will not be barred.

The opinion in *Lemelin's Case*, 121 Maine, 72, is not opposed to the views here expressed. In that case, as here, an agreement was entered into, and approved by the commissioner, for the payment of compensation for a compensable injury, resulting in the loss of claimant's right hand at the wrist, for a period of presumed total disability of one hundred and twenty-five weeks. After the expiration of said period and more than two years after the occurrence of the injury the claimant filed a petition for award of compensation, to which the employer and insurance carrier filed an answer setting up the limitation of the Act and the executed agreement, as a bar. The Chairman found *total* incapacity since the expiration of the specified period resulting from the injury specified, and awarded compensation at the same rate as paid under the agreement; commencing at the end of the specified period, "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 five hundred weeks from the date of the injury," thus treating the petition as a petition for compensation for an injury resulting in total incapacity for work, to be awarded under Section 14. This was clearly erroneous; there was then no provision of law for an award of compensation for *total* incapacity, resulting from a specified injury, continuing after the specified period of presumed total disability, during which the claimant has received compensation under an agreement approved by the commissioner. The Legisla-

ture has since supplied such provision. Public Laws 1921, Chap. 222, Sec. 7. There was such provision for compensation for *partial* incapacity in Section 16 of the original Act, which we are considering in the instant case. The petition in Lemelin's Case, being a petition for compensation for *total* incapacity, and being filed more than two years after the date of the injury was properly dismissed. The question of recommitment for purpose of amendment was not considered. It may be, but upon that point we express no opinion without the record before us, that Lemelin may still maintain a petition for compensation for *partial* incapacity, continuing after the specified period, under Section 16; by his accident he was left in a most unfortunate condition.

So, if any language is used in the opinion in *Graney's Case,* 121 Maine, 500, apparently in conflict with the views here expressed, although not intentionally so, it should be disregarded. That case did not arise under Section 16; the opinion expressly so states on Page 503. "The case in hand is outside the schedule of section sixteen. Mr. Graney's injury was not of the kinds that that section names."

We are therefore of the opinion that the petition in this case may be considered as amended, and that the mandate should be,

Appeal dismissed.
Decree of sitting Justice affirmed.

WASHINGTON ANDERTON *vs.* GEORGE WATKINS.

York. Opinion March 16, 1923.

Prescriptive right for the public to use land as a highway does not permit the use of the locus as a landing or parking place for an aeroplane for one's own private gain. A plaintiff in trespass relying on title under a release deed, must show either title in his grantor, or actual possession. If, however, he or his grantor acquired title by warranty deed, he may maintain trespass against one showing no title, as he is then in constructive possession.

If any rights have been acquired by the public by prescription to make use of the locus in question as a highway, it would not give the defendant the right to use it as a landing or parking place for an aeroplane for his own private gain.

Where a plaintiff in an action of trepass relies in his proof of title upon a mere release deed, unless he shows title in his grantor he must furnish proof of actual possession.

Where, however, he acquires his title by a warranty deed, or if it appears his grantor acquired his title by a warranty deed, it is sufficient to maintain an action of trespass against one showing no title in the premises, as the plaintiff is then held to be in constructive possession.

The plaintiff in this case, having shown that he acquired title to that part of the locus where the alleged trespass was committed of one who acquired his title by a warranty deed, is entitled to judgment in this action without further proof of actual possession.

No special damages being claimed in the declaration, and it not appearing that the alleged acts of trespass were wilful in the sense that they were done without any claim of right or license, exemplary damages are not warranted.

On report. This is an action of trespass brought to recover damages which plaintiff alleges he suffered by reason of the defendant parking an aeroplane upon land claimed by plaintiff. The general issue was pleaded and also a brief statement under which defendant set up want of title in plaintiff, and also alleged that the public had acquired a prescriptive right to use the locus as a highway. At the conclusion of the evidence, by agreement of the parties, the case was reported to the Law Court for final determination, with a

stipulation that in the event the finding was for the plaintiff, damages were to be determined. Judgment for the plaintiff. Damages assessed at one hundred dollars.

The case is fully stated in the opinion.

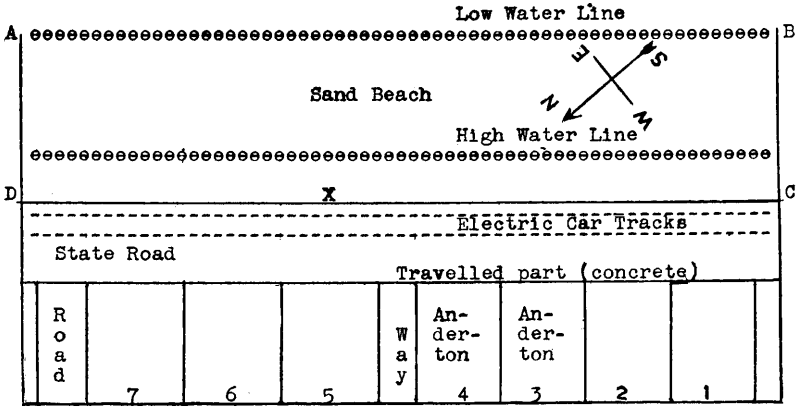
Stewart & Putnam, for plaintiff.

Sewall & Waldron, for defendant.

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

WILSON, J. An action of trespass *quare clausum* with a plea of general issue and a brief statement denying plaintiff's possession of the locus and claiming an easement in the public of free passage over the land described in the plaintiff's declaration. It comes before this court on report.

The locus described in the plaintiff's declaration lies between the lines joining the four points marked A, B, C, D on the accompanying sketch, that is, between the so-called "New" or "State" Road on the west and the Ocean on the east.



The plaintiff owns lots marked 3 and 4 on the above sketch, the easterly bounds of which in the deeds conveying them to the plaintiff are the State Road. No evidence is offered by the defendant that lot 5 or any other lot shown on the sketch extends farther east than the State Road. In 1890, the plaintiff took a conveyance by quit-

claim deed from Samuel G. Donnell of all his right, title and interest in the land between the State Road and the Ocean and included within the bounds connecting the points A, B, C, D, on the above sketch.

The alleged acts of trespass consisted in using for a time the space in front of lot 4 between the Electric Railroad track and high-water mark and afterward during the months of July and August, 1921, the corresponding space in front of lot 5, at the point marked "X" on the above sketch, for a parking place for the defendant's aeroplane, he being an aviator.

The defendant raises two questions by his pleadings: first, that the plaintiff has not shown title and possession in himself of the locus of the alleged acts of trespass; and second, that the public by adverse use had acquired a right to pass and repass over the premises described in the plaintiff's declaration.

To dispose of the last contention first. We think if the public ever acquired by prescription any right to use these premises as a highway, no evidence is offered by the defendant of any adverse use by the public of this land which could give the defendant the right to use it for a landing or parking place for his aeroplane for his own private gain.

With respect to the plaintiff's title and possession he must, it is true, not only show title but possession at the time of the alleged trespass. Where his claim of title rests upon a mere release deed or a quitclaim of all right, title and interest, the plaintiff, unless he shows title in his grantor, must not only produce his deed, but also furnish proof of actual possession of the premises described therein. *Butler* v. *Taylor*, 86 Maine, 19. But where he acquires his title by warranty deed, or if by deed of release and it appears that his grantor acquired title by a warranty deed, then the plaintiff is held to be in constructive possession, which is sufficient to maintain this form of action against one who shows no title. *Rand* v. *Skillin*, 63 Maine, 103; *Ripley* v. *Trask*, 106 Maine, 547; *Smith* v. *Sawyer*, 108 Maine, 485.

The deeds introduced in this case show that, while the plaintiff acquired his title to the locus by a quitclaim deed of all right, title and interest, the plaintiff's grantor acquired title by warranty deed from one Eastman Hutchins, at least, to all that part of the premises described in the plaintiff's declaration as lies between the State Road

and high-water mark, which is the real locus of the alleged acts of trespass. It is therefore, unnecessary to determine in this case whether land running to the "Sea Beach," which is the easterly boundary fixed in the Hutchins deed of the land conveyed to the plaintiff's grantor, extends to low-water mark; but see *Cutts* v. *Hussey*, 15 Maine, 241; *Littlefield* v. *Littlefield*, 28 Maine, 184; *Hodge* v. *Boothby*, 48 Maine, 71. The acts complained of were shown and admitted to be above high-water mark and therefore within the premises described in the warranty deed from Eastman Hutchins to Samuel G. Donnell, the plaintiff's grantor; hence possession to this much of the premises described in the declaration must, prima facie, at least, be held to be in the plaintiff which is sufficient to enable him to maintain this action, since the defendant justifies only by license from one not shown to have any title whatsoever. *Smith* v. *Sawyer*, supra.

The actual damages, however, resulting from the acts complained of were not large. No special damages are claimed in the declaration. Nor does it appear that the continued acts of trespass, though done against the protest of the plaintiff, were wilful in the sense that they were done without any claim of right or license, the defendant apparently in good faith obtained leave from the owner of lot 5, presumably upon the assumption that each owner of the upland owned as far as low-water mark, and at once moved his aeroplane from the land in front of the plaintiff's lots when he learned of his objections. Otherwise exemplary damages might be allowed. *Ames* v. *Hilton*, 70 Maine, 36. We think one hundred dollars sufficient to compensate the plaintiff for such damages as may be recovered under his declaration

Judgment for plaintiff.
Damages assessed at one hundred dollars.

FREDERICK L. RAY et al.

vs.

E. I. DUPONT DE NEMOURS COMPANY.

Oxford. Opinion March 16, 1923.

The rights of a littoral proprietor on Ponds over ten acres in extent are not effected by raising the water by means of a dam at the outlet, to the original height of the bed of the outlet channel, where such channel has been lowered.

Where Ponds over ten acres in extent are drained by lowering the outlet, the land exposed along the shores does not become the property of the adjoining littoral proprietors, and the flowing again of the land thus exposed by the erection of a dam at the outlet of the same height as the bed of the outlet channel before it was lowered in no way injures the littoral proprietor.

The evidence of the respondent in this case, corroborated as it is by the physical conditions now existing and by the results of well known natural laws indelibly written on the shores of and rocks in the Ponds described in the complainant's petition makes it manifest that the jury in arriving at its findings must have misinterpreted the evidence and disregarded the clear and comprehensive charge of the presiding Justice or were influenced by some bias or prejudice.

On motion for new trial. This is a complaint brought under Chap. 97 of R. S., alleging damage to land of complainant by flowage caused by raising the water in Kezar Lakes in the town of Waterford by increasing the height of the dam on Kezar River at the outlet of the lakes. The case was tried to a jury who found for the plaintiff on the question of liability, and defendant filed a general motion for a new trial. Motion sustained. New trial granted.

The case is fully stated in the opinion.

Frank A. Morey, for plaintiff.

Bradley, Linnell & Jones, for defendant.

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

WILSON, J. On a complaint filed under Chap. 97, R. S., alleging damages to complainants' land by flowage, two questions were

submitted to a jury: (1) Whether there had been any flowage of complainants' land and actual damages had resulted; (2) Whether the respondent Company, or its predecessor in title had gained by prescription any right to flow complainants' lands in the manner alleged in the complaint.

The jury answered the first question in the affirmative and the second in the negative, thus in effect finding that the respondent had without right flowed the complainants' lands as alleged and that damages had resulted, leaving the extent of the damages to be determined in accordance with Sec. 9 of Chap. 97, R. S.

The case comes before this court on a motion for a new trial on the grounds that these findings are against the law and the charge of the presiding Justice, and also are so manifestly against the weight of the evidence as to indicate that they were result of mistake, bias or prejudice.

If sustained by the evidence, we think no rule of law is necessarily violated by the findings. The real issue upon this motion is whether the dam constructed by the respondent Company in 1918 raised the waters of the Kezar Ponds, so called, in the towns of Lovell, Waterford and Stoneham in the County of Oxford above their natural levels.

The respondent Company strenuously contends that nearly fifty years ago the channel of the outlet of these Ponds was lowered by its predecessor in title, and that its dam as constructed during the period covered by this complaint raised the water in the Ponds no higher than it was accustomed to stand prior to the lowering of the outlet.

In 1874, the Nutter, Locke Co., of which Mr. Eben N. Fox appears to have been the chief owner operated a grist and saw mill in the town of Lovell on the outlet stream of these Ponds. Finding that they required more water to run their mill than the then natural flow of the stream provided, Mr. Fox conceived the idea that by deepening the channel of the stream at the outlet of the Ponds, the natural flow of the stream could thereby be augmented, and he could by this method avoid the payment of damages to the littoral proprietors which would follow if by a dam the waters of the Ponds were raised above their natural level. Whether he was right as a matter of law is immaterial now.

However, there can be no doubt from the evidence in this case that Mr. Fox did as a matter of fact in 1874 excavate and lower the bed of

the stream from the outlet of the lower Pond for a distance of several hundred feet. The channel of the stream shows it. Witnesses for the respondent testify to it and the water line along the shores of the Ponds corroborates them; and finally several of the complainants' own witnesses admit it, or that it was of common knowledge. As one of them, Mr. Kimball, states, it was done, "So as, as I understand, to lower these Ponds; so they could drain the Ponds lower."

The only possible question is the depth of the excavation. Mr. Fox testified that he excavated the bed of the stream at the outlet to a depth of at least five and one half feet, and then constructed a dam there five and one half feet high. Such a dam, if maintained throughout the year, would obviously hold back the water in the Ponds at practically the same levels as the natural barrier, formed by the bed of the stream, held it before any excavating was done. Any injury suffered by the littoral proprietors from such acts would not be from flowage, but rather from lowering the waters of the Ponds below their natural level, if any part of the dam was removed or opened for the purpose of increasing the natural flow of the stream below.

To meet this evidence and sustain the findings of the jury the complainants offered testimony of men who had used the outlet stream for log driving during the last forty years, the statements of some of whom tended to show that no dam was ever constructed there by Mr. Fox or used by him in connection with his grist and saw mill. All agreed, however, that the dam or obstruction, which was there, was maintained for only a part of the year. Two admitted that there had been some excavating of the channel, though not to a depth of more than two feet, and one or more testified that they understood the dam was constructed by Mr. Fox and used in connection with his mill below.

Reliance is also placed by the complainants upon the testimony of several witnesses as to picking cranberries over a period of years on a bog, which it is claimed was overflowed in 1918 and 1919 by respondent's dam; and that a meadow near one of the Ponds, which for several years prior to the erection of the respondent's dam had been mowed, but which in 1918-19 was entirely submerged; also that waters held back by the respondent's dam killed trees along the shores on complainants' land, one of which at least was estimated by one witness to be seventy-five or one hundred years old and two feet

or more in diameter; and further that the respondent's predecessor in title, Mr. Fox, had on one occasion since 1874 paid to the complainants damages for flowage of their lands resulting from the maintenance of his dam at the outlet.

In the first place, but little of the complainants' testimony can have any bearing on the real issue; as with the exception of two witnesses it relates to conditions existing since 1874, and the testimony is all in accord that the old dam at the outlet was maintained but a short period in each year from 1874 to 1900, and from 1900 to 1918 was not used in connection with the mill at Lovell at all. The lowering of the outlet being established, cranberries may well have been picked and grass mowed at any time within the past forty years on bogs and meadows submerged by the maintenance throughout the year of a dam at the same height as the old dam, and bed of the channel before excavating.

Two witnesses testify to picking cranberries on the complainants' bogs prior to 1874; but in a half century the vegetation and physical condition along the shores of these Ponds, especially in the low lands, must have materially changed under the conditions which the evidence shows have existed since 1874. Under such conditions the exact location and extent of cranberry bogs more than half a century ago must be uncertain when dependent upon the memory of man. The tendency, of necessity, of cranberry vines would be to follow the receding waters, if they continue to live at all. It is common knowledge that this vine does not thrive in dry soil or lands not watered and covered from time to time by natural or artificial flowage. The cranberry bog of the complainants' predecessor in title in 1860-70, when the witness Lebroke picked berries upon it, may have been substantially in the same relative position as to the waters of the Pond as the cranberry bog of 1910-18, yet have been beyond the reach of the waters held back by the respondent's dam in 1918-19.

The age of trees is only susceptible of approximate determination even after cutting, and while standing, any estimate by an ordinary witness is a mere guess. Tree growth in fifty years varies widely according to whether conditions are favorable or otherwise.

Against the evidence submitted by the respondent we think the evidence offered by the complainants clearly should not have prevailed. The testimony of Mr. Fox that the channel was excavated

to a depth of five and one half feet is corroborated by evidence to which human testimony founded upon recollection of conditions existing between twenty-five and fifty years ago must yield.

The channel itself according to the testimony of the engineers, and if not true, it was a matter easily refuted, shows that it had been excavated to the depth of more than five feet. For two feet in height its sides had been built up vertically with rocks, and then extended on in an incline faced with rocks to a total height in places of nearly six feet. Two witnesses, Messrs. Briggs and Seavey, testified that the wings of the old Fox dam are still there with the planks presumably fastened to the mudsill of the old dam.

But evidence even more irrefutable is presented by the shores of these Ponds and the rocks rising from their waters which show beyond peradventure that prior to 1874 the normal high water was approximately six feet above the bottom of the excavated channel at the outlet and the mudsill of the old Fox dam and ten inches above its top and the crest of the respondent's dam. A condition irreconcilable with the conclusions of the complainants deduced from their evidence: that the outlet was lowered but little, if any, and the lands now claimed by the complainants as injured had never, or at least but once before, been covered with water.

This water line or berm, as it has been termed, could have been made by no other agency than by the waters of these Ponds standing at this level for a considerable portion of the year and over a long period of years, and certainly by no conditions existing since 1874. This is substantiated by the complainants' own testimony, that their lands have not during that period been overflowed, except on one occasion. When waters reached this point, not only the lands of the complainants, but the meadow referred to must have all been submerged to a greater depth and extent even than in 1918-19 by the respondent's dam, which is ten inches lower than the berm along the shores.

It is true that this berm or water line does not represent the low-water level of the Ponds and that the complainants are entitled to have the use of their lands in the natural state as far as low-water mark. When the waters of these Ponds were drained, it exposed the bed of the Ponds below natural low-water mark, but that did not transfer title to the exposed bed to the littoral proprietor. The

Ponds being over ten acres in extent the title to the land so exposed still remained in the State. To reflow it again in no way injures the complainants.

No evidence is offered by complainants in the face of the conclusive evidence that the outlet was lowered in 1874, to show the natural low-water level of these Ponds prior to that date. This burden is upon them and also to show that their lands above the natural low-water mark have been overflowed by the respondent's dam. We think they have failed to sustain this burden by any evidence on which the verdict or findings of the jury should be allowed to rest.

One of the complainants testified that at some indefinite time since 1874, and which a letter from Mr. Fox shows to have been in 1890, he presented a claim against Mr. Fox for flowage of these same lands and was paid the sum of twenty-five dollars after submission of the question to two referees. This is denied by Mr. Fox so far as the submission to referees and any payment is concerned, and the letter shows that he took the same attitude then as he takes now, viz.: that he had not by his dam raised the waters of these Ponds above their natural level. But even if by mutual agreement the question then raised was finally referred to two or more arbitrators and a payment made, the evidence is not sufficient to show that it rendered the issue here *res adjudicata* as between these parties, nor can it control against the convincing evidence now before this court.

As against the testimony of Mr. Fox and the respondent's engineers, corroborated as they are by the beds and sides of the excavated channel and by the results of well known natural laws indelibly written on the rocks and shores of these Ponds, we are of the opinion that the jury must have misinterpreted the evidence and disregarded the clear and comprehensive charge of the presiding Justice, or were influenced in arriving at their verdict by some bias or prejudice; and that their finding that any lands of the complainants had been overflowed by the respondent's dam is so clearly without foundation on any facts fairly and properly deducible from the evidence in this case, as to require it to be set aside and a new trial granted.

Entry must be:

Motion sustained.
New trial granted.

INHABITANTS OF ELLSWORTH *vs.* INHABITANTS OF BAR HARBOR.

Hancock. Opinion March 16, 1923.

It is essential to the establishment of a home in a town that there should be personal presence, and also an intent to remain, continued for five years necessary to establish a settlement, without being absent during such five years with an intent not to return.

To establish a home in a town there must be personal presence with an intent to remain, or in other words to reside there. If absent from such town within the five years necessary to establish a settlement without a continued fixed intention to return, the continuity of the home is broken and the settlement is not acquired.

Testimony of the person whose settlement is being investigated as to his intent to return, while admissible, can have little weight when his acts during the period in question refute his declarations made at the time of the trial.

It is clearly apparent that the verdict of the jury was unwarranted upon the evidence and that the jury must have misunderstood or misapplied the law to the facts, they were warranted in finding from the evidence, or were influenced by some bias or prejudice.

On motion for a new trial. An action brought under R. S., Chap. 19, Secs. 70 and 71, to recover for supplies furnished by plaintiff to a family quarantined by the local board of health of plaintiff city on account of scarlet fever. A verdict for plaintiff was rendered by the jury, and defendant filed a general motion for a new trial. Motion sustained. New trial granted.

The case is fully stated in the opinion.

Daniel E. Hurley, for plaintiff.

Charles H. Wood, for defendant.

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

DEASY, J. did not participate.

WILSON, J. An action to recover under Sec. 71, Chap. 19, R. S., for supplies and medical attendance furnished to the family of one Chalres A. Emerson during a quarantine ordered by the Board of

Health of the city of Ellsworth. A jury found for the plaintiff and the case comes before this court on motion for a new trial on the usual grounds.

It is admitted that the quarantine was proper and in the interests of public health, and that the supplies and medical attendance were properly furnished, that the prices charged in the plaintiff's writ are reasonable, and that Charles A. Emerson is not able nor has he any parent able to pay for said supplies and medical attendance.

It does not appear, though no question was raised at the trial, nor before this court, that the Board of Health of the city of Ellsworth had also determined that the supplies and medical attendance so furnished were not legitimate expenditures for the protection of public health, which is essential to the recovery of the town of the settlement of the person whose family is quarantined.

The only question argued before this court or raised at the trial was the settlement of Charles A. Emerson.

It is admitted that his derivative settlement when he became of age, approximately thirty years ago, was in the town of Waltham in Hancock County. To recover of the defendant town, therefore, the plaintiff must prove that for at least five successive years between his becoming of age and the date of the writ Charles A. Emerson had a home in the defendant town without receiving pauper supplies either directly or indirectly, and in the same manner had not since acquired a settlement in any other town.

To establish a home in the first instance in any town there must be personal presence with an intent to remain, or in other words, to reside there. If absence from such town is later shown before five successive years have elapsed, it must be made to appear that such absence was only temporary, that there was a fixed purpose to return. The home must be continuous. If within the five years the person is absent from the town without an intention of returning to it the continuity of his home is broken, and the settlement is not acquired. To continue a home while absent there must be at all times an intention to return to it. The intent need not at all times be active in the mind, but as often as it is the subject of thought at all, the *animus revertendi* must be found to exist, or the home is lost. *North Yarmouth* v. *West Gardiner*, 58 Maine, 207; *Ripley* v. *Hebron*, 60 Maine, 379; *Detroit* v. *Palmyra*, 72 Maine, 256; *Thomaston* v. *Friendship*, 95 Maine, 201.

With these principles of law in mind, was the verdict of the jury upon the evidence presented manifestly wrong? Certain facts are not in dispute, or were clearly proven. Charles A. Emerson left the town in which he had a derivative settlement about 1906 and came to Ellsworth and obtained work and so far as the evidence discloses remained there until 1910. He voted there at least in 1908, was assessed for a poll tax there for the years 1909-10-11 and 1912, which taxes were paid. While an attempt was made to show that the taxes assessed in 1911 and 1912 were not paid by him, by showing that politicians in Ellsworth sometimes paid poll taxes of voters, no evidence was offered that anyone paid the taxes assessed to Charles Emerson except himself, unless it be inferred from his answer, that he never paid two taxes in one year, it appearing that the 1911 and 1912 taxes were both paid in August, 1912, which we think is not sufficient to overcome the presumption that every man pays his own taxes, or at least they are paid with his consent. In any event this witness when first inquired of as to his paying them for each of these years said: "I guess I did," though he later states he only paid one tax to the Collector of Ellsworth.

It is not contended that he was assessed and paid taxes in the defendant town during any of these years although he went to Bar Harbor to work in 1910 and it is claimed remained there at work, except during a brief period, until 1913.

In April, 1913, an event occurred which required him to indicate at that time with what intent he had left Ellsworth and remained in Bar Harbor since 1910. He was to be married. The law required the filing of a certificate of his intentions in the office of the clerk of the town or city where he resided. He applied at the clerk's office of the plaintiff city and his certificate was recorded there by the clerk. Notwithstanding his statements in reply to leading questions by the plaintiff's attorney that he went to Bar Harbor in 1910 intending to make his home there, in view of the purpose for which it appears he went, viz.: to obtain employment, and the evidence of continued payment of taxes in Ellsworth up to 1913, and his recognition of Ellsworth as his place of residence in April, 1913, we think that if the jury's verdict was based upon the establishment of a home in Bar Harbor prior to April, 1913, it was manifestly wrong.

It does not appear that he had any abiding place in the defendant town prior to his marriage except wherever he happened to be work-

ing. Proof of an intent to remain there is entirely lacking, except his own statements now, which can have little weight against his own positive acts during that period. Residence, it is true, is largely a question of intent, but pauper settlements should not be determined by the mere say so of the pauper ten years afterward unless his acts at the time square with his present declarations.

After his marriage, however, it cannot be said that there was not sufficient evidence for the jury to find that from the time he brought his family to the defendant town the last part of April, 1913, until at least November, 1916, he had not established and maintained a home in Bar Harbor even though from October, 1915, it was in a lumber camp. He had purchased it and moved his household goods into it and there set up his *Lares* and *Penates*, and it was their only sanctuary for more than two years.

In July, 1916, in order that he might be near his work on a lumber operation, his camp and household goods were moved into the adjoining town of Mt. Desert at Oak Hill, so called, where he remained until November, 1916, when the operation at Oak Hill being completed, his camp was again moved to the scene of another operation, but still in the town of Mt. Desert, where it remains to the present time. There he remained in the employ of the same person until January, 1918, when his wife about to be confined at childbirth left the camp, which had been their abiding place for nearly three years, and went, not to Bar Harbor, where they now insist it was always their intent to return, but to the plaintiff city of Ellsworth, where she was delivered of a child and remained until March of that year.

Emerson completed his work in Mt. Desert for Mr. Nutting, by whom he had been employed since 1915, and also went to Ellsworth where his family then was. When first inquired of as where he then went, he said: "I moved up here," meaning to Ellsworth. After a few days, however, he obtained employment in Bar Harbor. In March, 1918, his family came to Bar Harbor where they lived on a farm where he was employed until September, 1918, when they again returned to Ellsworth, where they have remained ever since.

Though both Emerson and his wife testified that when they moved to Oak Hill in 1916 they intended to return to Bar Harbor they never did except in connection with employment obtained by him during the summer of 1918, or from March to September. Such might have been their intent when they moved to Oak Hill; but there is

nothing to indicate that such intent continued after they moved their camp back to the Kittridge lot, so called, in November, 1916, which was also in the town of Mt. Desert, except the mere statement of Emerson himself again in reply to leading questions by plaintiff's attorney for whom he is apparently a very willing witness though offered by the defendant.

It is more significant as to whether his intent continued, that when his wife was to be confined, and although he was about to complete his work with the man for whom he had been employed nearly three years and was to leave his camp as it proved never to return again, he did not take his wife to Bar Harbor, but to Ellsworth, and the time spent in Bar Harbor after that was not in the nature of a return home but in consequence of an employment on a farm during the spring and summer of 1918.

Assuming that there is evidence of the establishment of a home in the defendant town after his marriage in April, 1913, there is an entire lack of evidence of a continuing fixed intent to return to the defendant town after November, 1916, when he moved from Oak Hill to the Kittridge lot in Mt. Desert, except his own declaration which is not supported by any acts of his or other evidence in the case. On the contrary, his acts refute his declarations.

It would be unfortunate if the burden of towns to maintain paupers could be shifted, or fixed, by such evidence. While the question of the continuity of his home and of his intent, when absent, is one of fact, the jury in this case must have misunderstood or misapplied the law to the facts which they were warranted in finding from the evidence, or were influenced by some bias or prejudice. We think their verdict is clearly unwarranted upon the evidence presented and should be set aside.

Entry will be:

Motion sustained.
New trial granted.

ALICE ELDRIDGE OAKES

vs.

FRANKLIN FIRE INSURANCE CO.
ATLAS ASSURANCE CO., Limited.
NATIONAL LIBERTY INSURANCE CO.
GRANITE STATE FIRE INSURANCE CO.

Hancock. Opinion March 16, 1923.

Under the Standard Policy of insurance in this State the award of referees goes to the amount of damage only, and does not furnish a basis for action. In the event of suit, it must be on the policy, and if liability established, the award, if valid, is conclusive as to damage. In absence of fraud, the amount actually due though less than the amount claimed in the account annexed may be recovered. An award to be conclusive must be made by disinterested and impartial referees, after a notice to the parties in interest and a full opportunity to be heard given. To establish a waiver it must be shown that the party knew and appreciated his rights.

Where loss or damage in case of fire is submitted to referees under the provisions of the Standard Policy of insurance in this State, the award of the referees does not furnish a basis for action.

In case suit is brought to recover the loss it must be on the policy. The award, if valid, may be offered as conclusive of the amount of the damage.

In an action under Sec. 38, Chap. 87, R. S., the statute does not require the insured to set forth in his "account annexed" anything more than the amount claimed as due both as principal sum and interest; and allege that he has complied with all the conditions of his policy. If the amount shown to be due is less than the amount claimed in the "account annexed" it will not prevent a recovery of the amount actually due, unless fraud is shown.

The provision in the Standard Policy for a reference to determine the amount of the loss contemplates more than a mere appraisement or view, and requires notice to both parties and an opportunity to be heard and present evidence.

While the referees may determine the nature and amount of evidence they will hear, they may not arbitrarily exclude either party from participating in the proceedings to determine the amount of the loss.

Even if either party has no other evidence other than his own to present, he is entitled to be present and present his own views of the loss he has suffered.

The arbitrary exclusion, therefore, of the plaintiff by the referees from the proceedings to determine her loss was unwarranted and as a result the award of the referees was not valid and binding.

To constitute a waiver the party alleged to have waived must be shown to have known and appreciated what his rights were. The plaintiff in this case did not understand that her rights were being finally determined.

The purpose of the statute authorizing such reference will not be served if the proceedings are permitted to relapse into a mere arbitrary appraisal on view or from personal knowledge of the referees. If it is to result in an award which shall be conclusive on both parties in a court of law, full opportunity to be heard after notice to the parties must be given and by referees who are disinterested and impartial.

The defendants having refused to enter into another agreement of reference and indicated that they would not grant a further hearing under the agreement already entered into, the nonsuit should not have been granted.

On exceptions. These are five actions by the same plaintiff against five insurance companies on account annexed to recover upon five policies of insurance of standard form for a loss by fire on August 19, 1921, on a three-story, wooden, frame building in the village of Seal Harbor, Mount Desert. The general issue was pleaded and also a brief statement alleging fraudulent statements of overvaluation, and that the action must be upon the award of the referees. At the close of the plaintiff's evidence, a motion for a nonsuit was granted and plaintiff excepted. Exceptions sustained.

The case is fully stated in the opinion.

Fellows & Fellows, for plaintiff.

Pattangall & Locke, for defendant.

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

WILSON, J. These several actions were tried together and involve with one exception the same questions. They were brought under Sec. 38, Chap. 87, R. S., to recover the amount due under certain policies of insurance issued by the several companies named as defendants.

The defendant in each suit pleaded the general issue and also in a brief statement set up the defenses that the plaintiff had made certain false and fraudulent statements of overvaluation in her written certificate of her loss following a fire, and that the amount of her loss had been submitted to a reference in accordance with

the provisions of her policy and of the statutes, and the amount of her loss having been determined by the referees, no action could be had against the defendant except upon the award of the referees.

At the close of the plaintiff's evidence, counsel for the defendant in each action moved for a nonsuit which was granted by the court, and the case comes to this court upon plaintiff's exception to this ruling.

At the trial of the cause at nisi prius the evidence offered related to the issue of whether any valid award had been made by the referees and the amount of the actual loss. In what respect the plaintiff had failed to make out her case the presiding Justice in ruling on the motion did not indicate, nor was he obliged to do so, but presumably it was upon this issue as to whether the evidence disclosed a valid, binding award.

The plaintiff, however, now contends that assuming there was an award by the referees that bound her as to the amount of her loss, she was at least entitled to recover the amount of the award or a proportionate amount of it in each case under her pleadings, and for that reason the nonsuit should not have been granted.

The defendants reply and say that not having raised this point when the motion for the nonsuit was being considered, she cannot now raise it before this court, that her pleadings will not permit a recovery for the amount of the award, nor can a suit be maintained when once a valid award has been made by referees selected in accordance with the provisions of the Standard Policy authorized by the statutes of this State, except upon the award.

It is unnecessary from this court's view of the case to determine whether the plaintiff by not raising the question of her right to recover at least the amount of the award in the court below has waived her rights to rely upon that ground here. It would obviously be unfair to the presiding Justice, though no intentional advantage was taken. The point was undoubtedly inadvertently overlooked by all parties at the time, the only issue apparently raised by the evidence being the validity of the award.

However, the court may say in passing, that these are not cases where an action will lie on the award of the referees. The rights of the insured to recover the loss is not submitted to the referees, only the amount of the damage. *Dunton* v. *Ins. Co.*, 104 Maine, 372. Even in the event of a valid award, the right of the insured to recover

any amount may have to be determined in court and, if so, it must be done by an action upon the policy, in which the plaintiff must show, having established his right to recover, the amount of the loss, which he may do by offering the award of the referees as conclusively determining it. *Fisher* v. *Ins. Co.*, 95 Maine, 486, 491. *Soars* v. *Home Ins. Co.*, 140 Mass., 343.

Under Sec. 38, Chap. 87, R. S., an action of *indebitatus assumpsit* on an account annexed is authorized in all actions on insurance policies, with the additional allegation that the plaintiff has complied with all the conditions of the policy.

The statute does not require him to set forth anything more in his account annexed than "the amount claimed as due both as principal sum and as interest if any." Clearly we think the amount claimed as due may be substantiated either by "proof" of actual loss or by a valid award of referees, and must be by the latter, unless arbitration is refused or waived by the insurer. The plaintiff is not required to prove the full sum claimed as due in his account annexed in order to recover. The statute expressly excuses him from this burden. "The fact that the amount claimed in the account annexed varies from the amount found to be due the plaintiff shall defeat the action, unless there be found to be a fraudulent claim of an excessive amount."

The words "principal sum" in the plaintiff's account annexed is not to be interpreted as an allegation that the face of the policy is claimed as due, but that such a sum is claimed to be due under the policy as principal in distinction from interest. Such is the language of the statute. Proof of a less sum due in accordance with a valid award of referees would entitle him to recover the amount of the award as the "principal sum" due.

However, upon the grounds that the defendants contend that the nonsuit was granted we think the exception must be sustained.

The Standard Policy of insurance against loss by fire as contained in Sec. 5, Chap. 53, R. S., provides that in case the parties cannot agree as to the amount of the damage, it shall be referred to three disinterested men chosen in the manner provided therein, whose award as to amount of the loss shall be conclusive and final.

This provision we construe to contemplate something more than a mere appraisement by the referees upon a view and such information as they see fit to obtain, and requires notice to the parties and an opportunity to present evidence and be heard. *Bradbury* v. *Ins. Co.*,

118 Maine, 191; *Second Soc.* v. *Royal Ins. Co.*, 221 Mass., 518. The Legislature, having made the result of such reference conclusive and binding on the parties, must have intended that the parties should have the right to be present at all hearings and also to be heard upon any matters pertaining to the amount of the loss. As the court said in the case last cited: "This has been the universal practice under general arbitrations." And such was clearly the understanding of the parties here. In their written Agreement of Reference it is provided that notice of every hearing is to be given to each of the parties. It would be a useless requirement that the parties shall be notified, if they have no right to be present and be heard.

While an agreement of reference was entered into it appears to have been signed only by the plaintiff and by one who describes himself as Agent for the Franklin Fire Ins. Co. It is objected that only one of the defendants entered into the reference, viz.: the Franklin Fire Ins. Co. It is not necessary to pass upon this question at the time. The defendants did not put in their case. Their evidence may show that, while he described himself as agent of the Franklin Fire Ins. Co., he was acting for all. This question may well be left for determination upon another trial.

No notice of any hearing was given to either of the parties by the referees. The defendants apparently waived theirs; and if the plaintiff had been permitted to be present during what the referees termed in their award a hearing, was going on, and been heard, we should consider this defect waived on her part.

Where rights are to be conclusively determined, those acting as referees should see to it that the rights of all parties are fully protected. As a rule the insured in this class of cases is not familiar with his rights or the effect of such proceedings.

The action in this case of the referees, representing, under the method of selection provided in the Standard Policy, the insurance company or companies, in arbitrarily refusing to proceed with the reference, unless the plaintiff left the building during their examinations must be condemned as unwarranted and constituted a violation of her right to be present and be heard upon such evidence as bore upon the nature and amount of her loss, and to offer such evidence as she might deem to be pertinent to that issue.

It may be admitted that the referees have the right to determine what kind of evidence they will receive and are not bound by the strict rules governing procedure in court, but that does not give them the right to arbitrarily exclude either party from participating in the proceedings to determine the loss. To exclude either of the parties and all testimony whatsoever may well be viewed as evidence of such bias and prejudice on the part of a referee insisting upon it, as to alone invalidate an award.

The plaintiff in this case testified without contradiction that she went with the referees to the third floor of the building to examine its condition, but soon it was apparent to her that she was not wanted. "If I went into one room they left and went into another." In response to this inquiry: "You tried to give them some information?" she replied: "I tried to give them some, but I found it wasn't wanted." She then went into what she termed her room. Her conclusion was soon confirmed. In a short time the referee, who may be said to have been selected by her, came in and said: 'Mrs. Oakes, you will have to leave the building. Mr. Hoxie (who was the referee selected by the insurance companies) says he cannot or will not do anything with you here." Whereupon she left and took no further part in the proceedings. This is all confirmed by the referee, Mr. Pettee, who conveyed to her the request or ultimatum of Mr. Hoxie.

It is suggested that by not protesting and insisting upon her right to be heard, she waived her rights. But to constitute a waiver of rights, the party alleged to have waived must know and appreciate what his rights are. *Hanscome* v. *Ins. Co.*, 90 Maine, 333; *Rosen* v. *Ins. Co.*, 106 Maine, 232. The plaintiff, as the evidence shows, did not understand that her rights were being finally determined. She says she understood only an estimate of the loss was being arrived at. She did seek to call the attention of the referees to certain elements of damage, while the view was going on, but was finally requested to leave the building, the reference proceeding to its close without her being permitted to be present. Of course, she might have insisted on remaining or requested to be heard later, but she was informed that the reference would not go on unless she left the building; and when the referees came out was informed of their award and that it was final. Any request on her part to remain or be heard later obviously would have been fruitless.

It is suggested that she admitted that she had no evidence to offer and therefore was not prejudiced by the action of the referees; but she was not even allowed to be present and present her own views as to her loss. One of the referees who rebuilt or repaired the building testified at the trial that there were many elements of damage which were not discovered upon their view or taken into consideration in their award, hence it cannot be said that the plaintiff could not have been prejudiced by her exclusion.

Clearly we think upon the evidence before this court there was not the arbitration of her loss by three disinterested referees which the statute contemplates. The proceedings described in the evidence was not arbitration at all, but an arbitrary determination of the loss suffered by the plaintiff without evidence of prior conditions,—a mere appraisement upon what appears to have been a somewhat superficial view and personal examination by the referees alone.

The purpose of this provision in the Standard Policy was to provide a speedy method of determining the loss by an impartial tribunal which might view the property, hear the parties, and without being hampered by the strict rules of court procedure, adjust the question most often in dispute between the parties, thus saving, perhaps, expensive litigation in the courts.

But the purpose of this statute will not be served if the proceedings on reference are permitted to relapse into a mere arbitrary appraisal on view or from personal knowledge of the referees. If it is to result in an award which shall be conclusive on the parties in a court of law, full opportunity to be heard after notice must be granted both parties by referees who are disinterested and impartial.

Such opportunity was not given to the plaintiff in the proceedings had under the agreement of reference in these cases; and the defendants having indicated that they would neither agree upon a new reference or further hearing under the existing agreement, the case now stands before this court as though arbitration had been refused by the defendants and the plaintiff was entitled to recover such damages as she proved before the jury.

Entry must be:

Exception sustained.

NEWTON S. STOWELL *vs.* JOHN F. BLANCHARD.

Franklin. Opinion March 16, 1923.

Where a tax deed is set up by the defendant in a real action under Sec. 62 Chap. 10, R. S., any alleged irregularities in the assess ment must be proved by the plaintiff but the defendant must show that the advertising and selling was in strict compliance with the statutes; recitals in deeds cannot be accepted as evidence, there being no presumption in favor of the regularity of the Treasurer's acts.

Under Sec. 62, Chap. 10, R. S., where a tax deed is set up by the defendant in a real action, any alleged irregularities in the assessment of the tax or the certification thereof to the County Treasurer must be proven by the plaintiff.

To complete a *prima facie* title under a tax deed when relied upon by defendant, he must submit proof that the County Treasurer in advertising and selling in all respects proceeded in strict compliance with the statutes.

Recitals in deeds cannot be accepted as evidence. There is no presumption in favor of the regularity of the Treasurer's acts. Each step must be strictly proved. Nothing can be left to intendment or inference.

A certificate by the County Treasurer that the "accompanying advertisement" was published in a local paper and a "similar advertisement" was published three successive weeks in the "State Paper" is not a sufficient compliance with the statute that notice of the time and place of sale and of the lists of unpaid taxes and date of assessment shall be published in both papers.

While the accompanying advertisement published in the local paper was sufficient, the "similar advertisement" published in the State Paper may or may not have been sufficient. A "similar advertisement" may nearly correspond, or resemble in many respects, but may not contain all the essentials required by the statute.

The burden is on the defendant to show that the "similar advertisement" published in the "State Paper" did comply with all the essential requirements. There are no presumptions in his favor. In this respect he has failed.

On report. A real action to recover an undivided half in certain real estate situated in Perkins Plantation in Franklin County. Defendant pleaded the general issue and set up a tax deed under which he relied, admitting that the title was in plaintiff except or unless he had acquired a title under the tax deed. At the conclusion of the evidence, by agreement of the parties, the case was

reported to the Law Court for final determination of all questions involved, excepting that of damages, which question, in the event plaintiff should prevail, was reserved for determination agreeably to a stipulation. Judgment for plaintiff. Case remanded to the court below for assessment of damages by the Clerk in accordance with the agreement of the parties.

The case is fully stated in the opinion.

Elmer E. Richards, for plaintiff.

Cyrus N. Blanchard, for defendant.

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

WILSON, J. A real action to recover an undivided one half part of a lot of land containing about one hundred and sixty acres situated in Perkins Plantation in Franklin County, and known as the Crocker Farm.

It is admitted that the plaintiff is the owner of the one half part of the land sought to be recovered, unless his title is affected by a certain tax deed, the grantee named therein having conveyed all the title he acquired thereby to the defendant.

In support of the tax deed the defendant offered the record of the assessment by the County Commissioners of Franklin County of a tax for the repair of County roads in unincorporated townships and tracts of land in said County during the year 1906, at least, in so far as it related to a certain road in Perkins Plantation, also a copy of the certificate of the clerk of the County Commissioners to the County Treasurer of certain road taxes in Perkins Plantation for the year 1906 for collection, which included among others a tax of six dollars assessed to C. F. Blanchard, the father of the defendant, and one McLaughlin whose interest it is admitted has been acquired by the plaintiff as joint owners of Crocker Farm, together with the deed of the County Treasurer of the land thus described, and a copy of his records in so far as it related to his proceedings in advertising and selling, and a deposition to the effect that the local paper in which the notice of the time and place of the sale was advertised was "printed" in Franklin County as required by the statutes.

Numerous alleged defects or irregularities in the proceedings leading up to the sale of this land are pointed out by the plaintiff's counsel.

But Sec. 62 of Chap. 10, R. S., provides that the County Treasurer's deed duly executed and recorded, together with the assessment signed by the County Commissioners and certified by them or their clerk to the County Treasurer and proof that the County Treasurer complied with the requirements of the statutes in advertising and selling shall be prima facie proof of title in any trial at law or in equity in which the validity of any sale or forfeiture of such lands is involved.

By reason of this legislative fiat any alleged irregularities relating to the assessment of the tax or the certification thereof to the County Treasurer must be proven by the plaintiff. The presumption is that the requirements of the statutes in these matters were fully complied with. The irregularities in the assessment by the County Commissioners or in their certificate to the County Treasurer pointed out by plaintiff's counsel in these proceedings have either already been determined by this court to be unavailing by reason of the section of the statutes above referred to, *Green* v. *Martin*, 101 Maine, 234, or are based upon extraneous facts requiring evidence to substantiate them, which the plaintiff has failed to furnish. It is, therefore, unnecessary to consider them here.

But to complete his prima facie title under the section of the statute referred to, the party relying upon such tax deeds must submit *proof* that the County Treasurer in advertising and selling in all respects proceeded in strict compliance with the statutes, and as to his acts, the recitals in his deeds, under the section above referred to, cannot be accepted as evidence otherwise proof that he has complied with the law would not have been expressly required. Sec. 62, Chap. 9, R. S.; *Ladd* v. *Dickey*, 84 Maine, 190; *Libby* v. *Mayberry*, 80 Maine, 137; *Bennett* v. *Davis*, 90 Maine, 102. There is no presumption in favor of the regularity of the Treasurer's acts, but each step must be strictly proved.

Sales of land for taxes are in general proceedings *ex parte* and *in invitum*. *French* v. *Patterson*, 61 Maine, 203, 210 As this court said in *Phillips* v *Phillips*, 40 Maine, 160: "It has therefore, been held with great propriety that to make out a valid title under such sales great strictness is to be required; and it must appear that the provisions of the law preparatory to and authorizing such sales have been punctiliously complied with."

Except, therefore, so far as certain records of official acts have been made prima facie evidence of title by legislative enactment,

proof of strict compliance with the law to sustain a sale or forfeiture under this statute requires that nothing shall be left to intendment, inference or presumption. Blackwell on Tax Titles, *72-74.

Nor is this rule unreasonable where, as in the instant case, the defendant seeks to enforce title to lands worth approximately fifteen hundred dollars for failure on the part of the plaintiff, a non-resident of the county, to pay taxes in the inconsequential amount of five dollars and eight cents, and as the evidence discloses without any personal notice to the plaintiff that the taxes were not paid and the plaintiff having made arrangements with his then cotenant, who was the father of the defendant, for their payment. *Copper Mining, etc., Co.* v. *Franks,* 85 Maine, 321.

Sec. 60, Chap. 9, R. S., 1903, provided that notice of the time and place of such sales together with a list of the unpaid taxes and date of assessment shall be published three weeks successively in the State paper and some paper, if any, printed in the county where the land lies, the last publication to be at least thirty days before the date of sale. This must be construed to mean that publication must be had for three successive weeks in each paper designated, and that the date of the last publication in each paper must be at least thirty days prior to the sale.

To prove compliance with this section the defendant introduced copies of the records kept by the County Treasurer showing the tenor of the notice published by him and his certificate of publication which in part was as follows: "I hereby certify that in pursuance of the accompanying advertisement which had been inserted and published in the Farmington Chronicle, a paper published in Franklin County, and a similar advertisement which had been inserted and published in the Kennebec Journal, a paper published in Kennebec County, and designated as the "State Paper," for three successive weeks, the last publication being more than thirty days before the date of sale, I did on the eleventh day of January, A. D. 1908, at the time and place therein set forth expose and offer for sale the several tracts of land therein described," etc.

This certificate, which is the only evidence in the case tending to show compliance with the statutes as to advertising and sale, except the deposition to the effect that the Farmington Chronicle was "printed" in Franklin County, since the recitals in the Treasurer's deed cannot be treated as evidence on this point, *Worthing* v. *Webster,*

45 Maine, 270, 278, *Hatch* v. *Hollingsworth & Whitney Co.*, 113 Maine, 255, 258, while it sets forth that the accompanying advertisement was published in the Farmington Chronicle, it does not state that the accompanying advertisement or one of the same tenor was published in the "State Paper," but only that "a similar" advertisement was published in the "State Paper," which may mean an advertisement substantially or nearly like it; but in what respects it may have differed, whether in some essential or non-essential point and still have been considered "similar" by the County Treasurer does not appear

The word, similar, has in use and according to the lexicographers two distinct meanings, one, "exactly corresponding," "precisely alike"; and the other, "nearly corresponding," "resembling in many respects." Webster's Dictionary. Its two meanings have also been recognized by the court. "The word similar is often used to denote a partial resemblance only. But it is also used to denote sameness in all essential particulars." *Com.* v. *Fontain*, 127 Mass., 452 In which sense was it used here? Must the court by intendment or presumption adopt the one sustaining a forfeiture of the plaintiff's land, or is the burden upon the party relying upon the forfeiture to show that the meaning which will sustain his claim was the one which was in fact intended? We think the burden is on the defendant. There being no presumption in his favor, exact proof is required; and he must show by clear and unambiguous evidence that the advertisement published in the State Paper was in fact exactly the same as that set forth *in haec verba* in his record as published in the Farmington Chronicle, or that it contained all the essential elements required by the statutes. This he has failed to do. Nor does it appear that the proof of these essential facts, if they exist, is not available to defendant.

As proof of strict compliance with the statutes that the notice of the time and place of the sale and the other essential elements of such a notice was published for three successive weeks in the two papers required by law, we think the records of the Treasurer are insufficient to base a forfeiture or a divestiture of title by tax sale upon. *Tolman* v. *Hobbs*, 68 Maine, 316. In other respects there are grave doubts as to the sufficiency of defendant's proof of strict compliance with the statutes in advertising and selling.

It is suggested by defendant's counsel that the same proof offered in this case was accepted as sufficient to validate a sale by a County Treasurer for taxes in *Green* v. *Martin*, supra, but it does not appear that the same proof of the steps taken by the County Treasurer was offered in the case at bar as in the case above refererd to. It was insisted in that case that the records of the Treasurer were not sufficient to comply with the statute, but, as the opinion states, other additional and competent evidence was produced. The only other evidence produced in this case is the deposition of the clerk of the County Commissioners that the Farmington Chronicle was a paper "printed" in Franklin County, but no other evidence is produced to show that the advertisement published in the State Paper contained the essential elements of the notice required by law.

The evidence reported in this case fails to prove that there was a strict compliance with the statutes by the County Treasurer in advertising and selling which must be shown by the defendant before he has made out a prima facie title to this land.

Entry must be:

Judgment for plaintiff.
Case to be remanded to court below for assessment of damages by the clerk in accordance with agreement of parties.

KENNEBEC HOUSING COMPANY *vs.* CHARLES H. BARTON.

Kennebec. Opinion March 17, 1923.

When a party consents to a reference of his case he waives his rights to trial, and agrees to be bound by the judgment of the referee both as to law and facts, and the report of a disinterested referee when accepted by the court at nisi prius must stand. If, however, material matters in issue were not passed upon by the referee, the aggrieved party may seek a remedy by exceptions.

This case by consent of the parties and order of court was submitted to a referee. At the hearing before the referee sundry defenses were presented. The report was in favor of the plaintiff and was accepted by the court at nisi prius. The referee said in his report, "My findings are based upon the issues of fact involved in a question of fraud and deceit although the defendant's counsel in a lengthy elaborate and learned argument presented legal defenses upon which I do not pass in making this findings".

Held:

That when a suitor consents to the reference of his case he waives his rights to trial according to legal forms and rules, submits it to a tribunal of his own choosing and in effect agrees to be bound by the judgment of that tribunal both as to law and facts. When a disinterested refereee has heard the parties and rendered a decision according to his own judgment and his report has been accepted by the court at nisi prius the award must stand even though it is contrary to law.

The failure of a referee to find facts or law specifically does not take away the discretion of the court at nisi prius to accept the report.

But when it appears that there were material matters in issue not passed upon, the losing party has a legitimate grievance that may be remedied by a bill of exceptions. That a case is decided erroneously affords no ground of exceptions. When the litigant waives his right to trial in court he impliedly agrees to take this chance. But he does not agree that the referee may decide his case without passing upon material issues of fact or law involved in it.

On exceptions. This action of assumpsit on an express contract, with four other similar actions, at the January term, 1921, of the Superior Court of Kennebec County, was referred under rule of court. The defendant pleaded the general issue and a brief statement, and upon a hearing the referee found for the plaintiff, and filed in court his report, to the acceptance of which, defendant seasonably filed objec-

tions, alleging that the referee did not pass upon some material issues, which objections were overruled and the report of the referee accepted, and defendant excepted. Exceptions sustained.

The case is fully stated in the opinion.

Harvey D. Eaton, for plaintiffs.

Bradley, Linnell & Jones, for defendants.

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

DEASY, J. This case arises on exceptions to the acceptance of a referee's report.

When a suitor consents to the reference of his case he waives his rights to trial according to legal forms and rules, submits it to a tribunal of his own choosing and in effect agrees to be bound by the judgment of that tribunal both as to law and facts.

While the contrary is true in some jurisdictions, in this State it is held that when a disinterested referee has heard the parties and rendered a decision according to his own judgment, "The award must stand even though it is contrary to law." *Perry* v. *Ames*, 112 Maine, 203. "An award made within the scope of the submission is not made invalid by a mistake of the arbitrator as to law or fact," *Phaneuf* v. *Corey*, 190 Mass., 237. The referee determines finally all questions of law unless in his discretion he reports any such question to the court for its decision. Kennebec Sup. Court Rule 46; S. J. Court Rule 45.

He determines the facts finally and has no discretion to refer any such question to the court. *Preston* v. *Knight*, 120 Mass., 8.

True when the referee's report is presented for acceptance. (Sup. Ct. Rule 25; S. J. C. Rule 21) the court at nisi prius may for any reason that it deems sufficient recommit the case or may accept the report. In either case whether a recommittal is ordered (*Cutler* v. *Grover*, 15 Maine, 159) or report accepted (*Chasse* v. *Soucier*, 118 Maine, 63), it is by virtue of a discretionary power which, if not abused, is not subject to exceptions, save in cases hereinafter referred to.

But certain objections to the acceptance of a referee's report if presented when the report is offered survive acceptance of report and may be brought to this court on exceptions.

This is true of objections grounded on fraud on the part of the referee (*Bank* v. *Herrick*, 100 Maine, 494) or that he is interested (*Pierce* v. *Bangor*, 105 Maine, 418) or grossly prejudiced (*Harris* v. *Seal*, 23 Maine, 439) or has made unintentional mistakes, of course not including errors of judgment or opinion (*Perry* v. *Ames*, 112 *Maine*, 202) or fails to have a hearing or give notice of hearing (*Auburn* v. *Paul*, 113 Maine, 209) or undertakes to decide questions not submitted (*Porter* v. *Railroad*, 32 Maine, 539) or fails to pass upon questions which are submitted to him. (*Jonah* v. *Clark*, 111 Maine, 142).

In the instant case the exceptions are based upon the alleged failure of the referee to pass upon submitted questions.

The pending action is assumpsit to recover damages for breach of a stock subscription contract. The referee found for the plaintiff. The report was accepted. The defendant reserved exceptions.

The bill of exceptions shows that the defendant by brief statement set up the following defenses:—(1) no contract, (2) fraud, (3) offer to subscribe withdrawn before acceptance, (4) violation of condition, (5) fundamental change in corporate enterprise, (6) no consideration.

In his report the referee says:—"My findings are based upon the issues of fact involved in a question of fraud and deceit, although the defendant's counsel, in a lengthy, elaborate and learned argument presented legal defenses upon which I do not pass in making this finding." Because the referee as appears by his report did not pass upon legal defenses presented, other than fraud, the defendant says the report should not have been accepted, and that the acceptance is error, to correct which exceptions lie.

The defendant relies upon *Jonah* v. *Clark*, 111 Maine, 142. This case involved inter alia the title of certain boats. The referees failed to decide this question. Exceptions to the acceptance of their report were sustained. The court says:—"It was the duty of the referees to decide all material matters in issue between the parties." Some of the other authorities to the same general effect are *McNear* v. *Bailey*, 18 Maine, 254; *Coffin* v. *Hall*, 106 Maine, 126; *Clark* v. *Hewitt*, (Cal.), 68 Pac., 303; *Grout* v. *Bank*, (Colo.), 111 Pac., 556. *Danaher* v. *Ward*, 40 Mich., 300; *Cable Flax Mills* v. *Early*, 76 N. Y. S., 191; *La Grange* v. *Merritt*, 84 N. Y. S., 1092; *Sutton* v. *Clark*, 40 Or., 508; *Johnson* v. *Mantz*, (Iowa), 27 N. W., 467.

We do not adopt the doctrine prevailing in some jurisdictions that the mere failure of a referee to find facts or law specifically takes away the discretion of the court at nisi prius to accept the report. Nothing appearing to the contrary it is presumed that the referee passed upon all issues submitted to him and no others. *Vannah* v. *Carney*, 69 Maine, 223; *Sohier* v. *Esterbrook*, 5 Allen, 311.

But when as in *Jonah* v. *Clark*, supra, it is shown, or when as in the case at bar it appears upon the face of the report that there were material matters in issue not passed upon, the losing party has a legitimate grievance that may be remedied by bill of exceptions. That a case is decided erroneously affords no ground of exceptions. When the litigant waives his right to trial in court he impliedly agrees to take this chance. But he does not agree that the referee may decide his case without passing upon material issues of fact or law involved in it.

The learned counsel for the plaintiff says that the referee found no evidence to support the various defenses. But to find that there is no evidence to support certain defenses and to so determine is to "pass upon" such defenses. And the referee says that he did not pass upon them.

If the referee in fact considered the other defenses presented and determined that at the hearing before him there was no evidence to sustain them it is his right upon recommittal of the case to amend the report accordingly. *Fales* v. *Hemenway*, 64 Maine, 376; *Runnels* v. *Moffat*, (Mich.), 41 N. W., 224; *Bank* v. *McMullen*, 85 Mo. App., 142; *Church* v. *Krelsovitch*, 131 N. Y. S., 846; *Bossi's Estate* v. *Baehr*, (Wis.), 113 N. W., 433.

This case has once been fully heard before a tribunal selected by the parties. It is unnecessary and would be unfortunate to require a new trial on account of an inadvertent omission in a referee's report.

Exceptions sustained.

HENRY M. MITCHELL, In Equity *vs.* FRED C. HILL et al.

Penobscot. Opinion March 19, 1923.

A bill in equity for specific performance of written agreement to convey. The finding that the plaintiff had not paid in full the amount due was warranted by the evidence. Master to be appointed inasmuch as plaintiff offers to pay whatever balance may be found due, and defendants' offer to convey on payment of such balance.

Bill in equity asking for the specific performance of a written agreement to convey real estate, given by George F. Hill, and dated August 5, 1918. The defendants are grantees of the premises from George F. Hill, without consideration as claimed by the plaintiff. The bill alleges payment in full. The answers deny such payment, set up a second agreement dated December 9, 1918, superseding the first, and offer to convey on payment of the balance due thereunder. At the close of the plaintiff's evidence the sitting Justice dismissed the bill with costs. On appeal by plaintiff it is

Held:

1. The finding that the plaintiff had not paid in full the amount due was warranted by the inherent unreliability of the evidence offered.
2. However, as the plaintiff offers to pay any balance that may be found due and the defendants offer to convey on the payment of such balance, the equitable rights of the parties require that a master be appointed to ascertain and report the facts as more fully stated in the opinion.

On appeal. A bill in equity asking for specific performance of a written agreement to convey certain real estate, given to plaintiff on August 5, 1918, by one George F. Hill, who subsequently conveyed the same real estate to defendants without consideration as plaintiff claims. On April 21, 1922, a hearing was had upon the bill and the sitting Justice dismissed the bill with costs, and plaintiff appealed. Appeal sustained. Cause remanded. Master to be appointed in accordance with the opinion. So ordered.

The case is stated in the opinion.

D. I. Gould and Clinton C. Stevens, for plaintiff.

Terence B. Towle, for defendants.

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

CORNISH, C. J. Bill in equity asking for the specific performance of a written agreement to convey certain real estate, given by one George F. Hill, and dated August 5, 1918. The defendants are grantees of the premises from George F. Hill, without consideration as claimed by the plaintiff. The bill alleges that the amount to be paid by the plaintiff under this agreement was $1,489.00 and that this amount was subsequently paid to said George F. Hill who acknowledged full satisfaction, promised to make the conveyance, but never did, and instead conveyed to the defendants.

The answers, while admitting the agreement of August 5, 1918, and certain payments thereunder, deny a substantial performance thereof, and further allege that a second agreement was entered into by Mitchell and Hill on December 9, 1918, which cancelled the previous agreement of August 5, 1918; that under the second agreement the amount to be paid was $951.00 together with other indebtedness in the forms of notes and accounts, upon the payment of all which sums the defendants are ready and willing to convey the premises. The genuineness of this agreement seems to have been somewhat doubted by the plaintiff's witnesses, but the plaintiff himself did not testify. The defendants further ask that a master in chancery be appointed to ascertain the amount due.

At the close of the evidence introduced by the plaintiff, the sitting Justice entered a decree dismissing the bill with costs. An appeal was entered by the plaintiff.

This finding that the plaintiff had not paid in full the amount due and therefore was not entitled to a conveyance was warranted by the utter unreliability of the evidence offered and must stand.

However, the plaintiff in his bill offers to pay any balance that may be found due. The defendants in their answer offer to convey upon the payment of such balance. Therefore the equitable rights of the parties require that a master be appointed to ascertain and report:

1. Whether the agreement of December 9, 1918, did supersede that of August 5, 1918.

2. If it did not, what balance, if any, is due from the plaintiff under the agreement of August 5, 1918.

3. If it did, what balance, if any, is due from the plaintiff under the agreement of December 9, 1918.

4. Also to ascertain and report such other material facts as to the sitting Justice who issues the order appointing the master, may seem pertinent and proper.

Appeal sustained.
Cause remanded.
Master to be appointed in accordance with this opinion.
So ordered.

EDGAR W. RUSS AND CARL C. KING (George W. P. Jerrard Co.)

vs.

EASTMAN CAR COMPANY.

Aroostook. Opinion March 23, 1923

Where there is no direct evidence of negligence it may be proved and established by legal inferences and presumptions drawn from undisputed facts and circumstances, under the doctrine of "res ipsa loquitur."

The defendant's brief states the issue as follows: "The burden of proof is on the plaintiffs to show that the defendant was negligent."

Upon the issue, as thus framed, the burden of proof is upon the plaintiffs to show that the defendant's negligence in its care of the heating apparatus in the car was the proximate cause of the burning of the car and consequently, of communicating the fire to the potato house.

The evidence unequivocally proves that the fire was communicated to the potato house from the burning car.

Although the evidence is conclusive that the fire originated from the stove in the heater car, there is no direct evidence whatever as to what happened to the heating apparatus that caused it to communicate the fire to the body of the car.

The negligence of the defendant must, therefore, be proved from the inferences and presumptions based upon the facts and circumstances found in the case.

This brings us to the question as to whether from the undisputed facts can be drawn a legal inference of the negligence of the defendant. To establish such inference, the plaintiff invokes the doctrine of res ipsa loquitur.

From the fact that the stove in a heater car is intended to burn continuously for quite a length of time and from the fact that there is no evidence that it does, as a matter of fact, or as a custom, communicate fire to the car, we are of the opinion that the present case clearly falls within the doctrine of res ipsa loquitur; that the communication of fire by the stove in the car was such an accident "as in the ordinary course of affairs does not happen if those who have the management use proper care."

On report. An action to recover damages for the destruction of the plaintiffs' potato house and contents which occurred December 16, 1916, the plaintiffs alleging that the fire communicated to the building from a burning heater car of defendant standing on a siding of the Bangor & Aroostook Railroad Company at the California Road, so called, in the town of Limestone. At the close of the testimony, by agreement of the parties, the cause was reported to the Law Court, under a stipulation that in the event the plaintiffs were entitled to recover the amount of damages was to be $20,197.00. Judgment for plaintiffs for $20,197.00.

The case is fully stated in the opinion.

L. C. Stearns and A. S. Crawford, for plaintiffs.

Taber D. Bailey and O. L. Keyes, for defendant.

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

SPEAR, J. This is an action on report against Eastman Car Company to recover damages for destruction of plaintiffs' potato house and contents in December 1916, by a fire communicated from a burning heater car standing on the California Siding, at the California Road, in Limestone. The plaintiffs claim that the fire was caused solely by the defendant's negligent operation of the heating apparatus in the car, for which it is liable; and it is agreed that if this action can be maintained the plaintiffs' damages shall be assessed at $20,197.00.

The defendant's brief states the issue as follows: "The burden of proof is on the plaintiffs to show that the defendant was negligent.

"The plaintiffs ordered this car set at their storehouse. They had used these heater cars right along. They must have known that there was some risk in having them brought to their storehouse. No doubt plaintiffs knew the manner in which the heater cars were

looked after. Defendant claims that when plaintiffs ordered a heater car set at their storehouse, they assumed some risk. Any agency or implement containing fire is an agency of more or less danger.

"The defendant Company has certain employees to look after the heating apparatus on the cars, and also to keep a proper supply of oil. The particular car in question came to Caribou, which is a railroad centre for the Bangor & Aroostook Railroad. At that centre was stationed Mr. Frank Caulkins to look after cars that came into Caribou to be used there, or on branches of the railroad starting from there. He had other men under him. The car was inspected there and allowed to go on to Limestone. If the heating apparatus on the car was not working all right, Mr. Caulkins would not have allowed it to proceed, but would have held it at Caribou to be repaired or adjusted. After receiving the report of the men who examined it, he allowed it to go along. That is prima facie evidence that the car was in good order."

In view of the foregoing statement of facts, the defendant claims that the following principles of law apply:

1. It is presumed that men have acted in good faith and in conformity with their duty.

Several cases are cited in support of this principle.

2. When a fact, relation, or state of things continuous in its nature is shown to exist, it is presumed to continue until the contrary is shown.

Several cases are also cited in support of this principle.

From these principles he draws the following conclusion: "The heating apparatus on the car was in good condition when it left Caribou. Defendant claims that it is presumed to continue so until it is proved to the contrary."

Upon the issue, as thus framed, the burden of proof is upon the plaintiffs to show that the defendant's negligence in its care of the heating apparatus in the car was the proximate cause of the burning of the car and, consequently, of communicating the fire to the potato house. The evidence unequivocally proves that the fire was communicated to the potato house from the burning car. The heater was burning in the car when the car left Caribou and was calculated to burn continuously to the siding where it was to be loaded, and, as a matter of necessity, to its place of destination where the potatoes

were to be delivered. The car was set upon the siding in front of the potato house about nine o'clock in the morning. It was not warm enough in the forenoon for the reception of potatoes. A little after noon, the employees at the potato house commenced to load and at about four o'clock had put four hundred bushels of potatoes into the car. The car was then closed in the usual way. At the same time the potato house was closed and locked. The heater, a small, kerosene stove, was located in an asbestos lined box underneath the middle of the car. When the cover was shut down over the heater, the box was automatically locked. No person connected with the potato house had a key to that box. The only key to it, so far as the evidence shows, was in the possession of the defendant or its agents. About a quarter past twelve in the morning, the first person who arrived at the fire, testified that the bottom of the car was burned through so that potatoes were dropping out and that the clapboards on the outside of the potato house were just beginning to burn. When other people arrived they attempted to move the car along the track, but were unable to do so. And on account of the heavy wind that was blowing directly from the burning car to the potato house, they were unable—because of the heat and flame—to do anything to save the house.

Although the evidence is conclusive that the fire originated from the stove in the heater car, there is no direct evidence whatever as to what happened to the heating apparatus that caused it to communicate the fire to the body of the car. Edgar W. Russ, being requested to give a description of how the cars are heated and what fuel is used, testified substantially as follows: That the fuel is kerosene oil, and it is something on the principle of any kerosene oil stove, only the fuel comes down to it from a pipe; that is, it is piped down from a tank; it is right in the centre of the car—right underneath; it is boxed by itself; asbestos lined box; the burner was very much like the burner of any oil stove; it is larger over, that's all; it might be four inches across it and perhaps a little more; there is a vent for the smoke to go out through; in order to light the burner you have to open the door of the box. The apparatus appears to have been of the kind approved and in general use.

The negligence of the defendant must, therefore, be proved from the inferences and presumptions based upon the facts and circumstances found in the case.

The defendant invokes the inference as a presumption of fact that, inasmuch as the heating apparatus was inspected at Caribou and found all right, the presumption is that it continued to be all right to the time of the fire, so far as the defendant could be made responsible for the exercise of reasonable care. The only testimony presented by the defense as a basis for the presumption above invoked was the evidence of the inspection of the heating apparatus at Caribou, but that evidence does not seem sufficient to support the presumption. The agent of the company, whose duty it was to inspect the heating apparatus, delegated the duty of inspection to two of his men, who made a report to him, but what that report was does not appear; neither of the men was called. While the inference may be reasonable that the men to whom was delegated the duty inspected the car and reported their inspection to the agent, we are, nevertheless of the opinion that the court, acting as a jury, is not authorized, upon the testimony, to hold such inference equivalent to evidence of that fact. What the men said was properly excluded, which left the testimony as follows: Q. "They reported the car to you, did they?" A. "Yes, sir." Q. "And you authorized the cars to go along?" A. "The car was supposed to go through anyhow; the hot car."

This brings us back to the question as to whether from the undisputed facts can be drawn a legal inference of the negligence of the defendant. To establish such inference, the plaintiff invokes the doctrine of res ipsa loquitur, that, since the heating apparatus which caused the injury had been shown to have been under the management of the defendant, and since the fire was such as in the ordinary course of affairs does not happen, if those who have the management use proper care, the accident, itself, affords reasonable evidence, in the absence of an explanation by the defendant, that it was caused by lack of proper care by the defendant. It may be said here, that no explanation was offered by the defendant. In support of the doctrine of res ipsa loquitur, the plaintiffs cite the following cases: Volume 1, Shearman and Redfield on the law of negligence (5th Edition) Section 59, in which it is said: "In many cases, the maxim res ipsa loquitur applies. The affair speaks for itself. The accident, the injury, and the circumstances under which they occurred, are in some cases sufficient to raise a presumption of negligence, and thus cast upon the defendant the burden of establishing his freedom from fault. Proof of an injury, occurring as the proximate result of an

act of the defendant, which would not usually, if done with due care, have injured anyone, is enough to make out a presumption of negligence. When a thing which causes injury is shown to be under the management of the defendant, and the accident is such as in the ordinary course of things does not happen, if those who have the management use proper care, it affords reasonable evidence, in the absence of explanation by the defendant, that the accident arose from a want of due care."

In *Leighton* v. *Dean*, 117 Maine, 40, our court say: "When a thing which has caused the injury is shown to be under the management of the party charged with negligence, and the action is such as in the ordinary course of affairs does not happen if those who have the management use proper care, the accident itself affords reasonable evidence, in the absence of an explanation by the party charged, that it was caused by the lack of proper care by the party charged with negligence." That was a case in which the injuries were caused by a falling awning. In *Stevens* v. *European and North American Railway*, 66 Maine, 74, it was said, "Cars can ordinarily be run with safety, and when they are not, that fact itself is evidence of fault or defect somewhere, requiring explanation. The maxim res ipsa loquitur applies in such a case." The foregoing quotation was approved and applied in *Herbert* v. *Portland Railway Company*, 103 Maine, 315. Those were cases of railway accidents.

In *Berry* v. *Atlantic Railway*, 109 Maine, 330, a railway accident, it was said: "The burden of explanation then falls upon the defendant operating the railway." And here it is further said, "In this case no explanation is attempted. We must regard the defendant's liability as established." This doctrine has also been applied in the following cases: *St. Louis* v. *Bay State Railway*, 216 Mass., 255; *Draper* v. *Cotting*, 231 Mass., 51; *Melvin* v. *Pennsylvania Steel Company*, 180 Mass., 196. The last was a case in which a chisel fell from a platform upon which workmen were engaged, striking upon the head of the plaintiff, without any evidence whatever as to why, or how, the chisel fell. The court said, "In the absence of any evidence from the defendant to explain the facts relied on, the jury might well find for the plaintiff."

Kearner v. *Tanner Co.*, 31 R. I., 203, was a case in which there was an explosion of dust in a starch factory, and the court said, "As the business is entirely within the control of the defendant, and its method

of manufacturing starch may be good, bad, or indifferent, it is called upon to explain when a fatal explosion occurs within its premises."

In *Jordan* v. *Giant Powder Company*, 107 Cal., 549, involving an explosion of nitroglycerine in a dynamite factory, the court say, "The real cause of the explosion being unexplained, it is probable that it was occasioned by a lack of proper care."

From the fact that the stove in a heater car is intended to burn continuously for quite a length of time, and from the fact that there is no evidence that it does, as a matter of fact, or as a custom, communicate fire to the car, we are of the opinion that the present case clearly falls within the doctrine of the foregoing cases; that the communication of fire by the stove in the car was such an accident "as in the ordinary course of affairs does not happen if those who have the management use proper care." The case is almost in equilibrium, yet in the absence of explanation, under the well-settled rules of law, we are of the opinion that the plaintiffs have sustained the burden of proof.

Judgment for the plaintiffs for $20,197.00.

CEPHAS WALKER'S CASE.

Somerset. Opinion March 24, 1923.

Under the Workmen's Compensation Act the making of a decree awarding specific compensation for presumed total disability does not bar an award, upon further hearing, of compensation for subsequent actual disability.

A reservation in a decree by the Industrial Accident Commission of a right which the statute gives is unnecessary and redundant, but for mere redundance the decree should not be reversed.

On appeal. The claimant on January 16, 1922, while in the employ of defendant, James H. Kerr, at North New Portland, tending a concrete mixer, received an injury to his left arm by contact with the gears. Under an approved agreement "specific compensation" for fifteen weeks was awarded, and it was further decreed that compensation should be paid according to the provisions of Sections 14 and 15, in the event of a recurring period of either total or partial incapacity, from which decree respondents appealed. Appeal dismissed. Decree affirmed.

The case is stated in the opinion.

Claimant was without counsel.

Hinckley & Hinckley, for respondents.

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

DEASY, J. Upon a petition alleging permanent impairment of his arm the petitioner was awarded "specific compensation" for fifteen weeks. The term "specific compensation" is obviously used as meaning compensation for a disability "deemed to be total" for a limited period. (Section 16).

The employer and insurance carrier make no objection to this award. By their appeal they contend that the commission made a reversible error of law in that it included in its decree the following:

"It is further ordered and decreed that in the event of a recurring period of either total or partial incapacity to work due to the injuries received by Mr. Walker while in the employ of James H. Kerr on

January 16th, 1922, compensation according to the provisions of Sections 14 and 15 shall be paid Mr. Walker by James H. Kerr on his insurance carrier, the Federal Mutual Liability Insurance Company."

An approved agreement providing specific compensation for a period of presumed total disability does not bar or interfere with a petition for compensation for actual disability "after such specified period."

What is true of an agreement having the effect of a judgment (Section 35) is also true of a decree which is a judgment.

The making of a decree awarding specific compensation for presumed total disability does not bar an award of compensation for subsequent actual disability. "Recurring" or continuing disability following a period of presumed total disability are adequately provided for by Section 16.

The paragraph objected to is superfluous. The privilege which the decree seeks to reserve to the employee, is given him by the statute subject to limitation which the commission cannot and does not intend to disregard.

The defendants apprehend that the paragraph objected to threatens to charge them with payment of additional compensation without hearing or petition.

Not so. The present petition has performed its office. It has secured for the petitioner the compensation specifically provided by Section 16 which is awarded without reference to existing earning capacity. If the petitioner claims further compensation for actual incapacity under Sections 14 or 15 he must petition for it.

What the defendants object to in the decree is not illegality but redundancy. Except in an extreme case a decree should not for this reason be reversed or modified.

Appeal dismissed.
Decree affirmed.

LYNDON FAY CLIFFORD *vs.* WALTER D. HINES.

Aroostook. Opinion March 26, 1923.

On the question of negligence in driving an automobile the real test is the application of the familiar rule as to what an ordinarily prudent man would, or would not do, under like circumstances. The sounding of the horn under some circumstances might be necessary in the fulfillment of one's duty, while under other circumstances it might of itself be evidence of negligence.

In this case the verdict for the defendant was rightly directed at the close of the testimony, as the record disclosed that the collision between the plaintiff, who was going on foot from one garage to another, and an automobile making its way from a service station to a public street, occurred in the congestion of a city yard with no one legally responsible.

On exceptions. An action to recover damages for personal injuries sustained by plaintiff by being struck by defendant's automobile operated by his son in the yard of the Whitman-Sawyer Stable Company in Portland on August 3, 1921. Plea, the general issue. At the conclusion of the testimony on motion by counsel a verdict for defendant was directed, and plaintiff excepted. Exceptions overruled.

The case is fully stated in the opinion.

Shaw & Cowan and Charles P. Barnes, for plaintiff.

William H. Gulliver, William B. Mahoney and James C. Madigan, for defendant.

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

DUNN, J. Not far from a principal public street in Portland and connecting with it by a lane or driveway is an area or yard on which several buildings open, including an automobile service station.

One August forenoon, in 1921, the defendant's automobile was driven for him from the street into that yard. On the driver's left, as he neared the end of the lane, and extending to the lane's end, was

a garage, which, in convenience of verbal expression, will be called the first garage. Behind this garage and in the yard, apparently less than eight feet away, a large automobile was parked. At the driver's right, close by a projection of the lane's line, three mail trucks stood each near its immediate neighbor, the backs of all within a little of the yard's inclosing fence. Beyond the mail trucks, eighty feet or thereabouts, was a second garage. In front of the driver as he entered, about forty feet on the opposite side of the yard, was a building the left part of which, as the driver would look at it, was called a stable and the other part of which was the automobile service station. The space between the trucks and the front of the service station was from twenty to twenty-five feet. The outside or yard end of the station and the furthest side of the second mail truck were approximately in line.

On entering the yard the defendant's car bore to the right and went, between the mail trucks and the service station, to a wider part of the yard where it was turned and brought back until it was stopped adjacent to the service station and heading diagonally in the direction of the lane, that mechanical attention might be done to the car.

Another automobile came into the yard. It stopped virtually midway between the mail trucks and the service station and in front of the defendant's car. In consequence of its stopping the defendant's driver could not see across to the lane.

The defendant's car started in low gear and went ahead at eight to ten miles an hour, passing the front of the service station on the right and the car which most recently had come into the yard on the left, until it had gone by that car. Then it turned in course for the lane. While proceeding, and despite the application of the brakes in an attempt to stop it, the car struck and injured the plaintiff, who, on foot, was making his way from the first to the second garage. Neither the driver nor the plaintiff was in the view of the other as they started out.

The gist of the plaintiff's contention on the trial was, that the reciprocal rights and duties of the parties were fulfilled, except that the defendant's driver was negligent in not sounding his horn. Plaintiff's attitude may be thus summarized: (a) I myself was free from contributing fault; (b) the fault from which my injuries were immediately resultant and for which I am insisting the defend-

ant liable to me in damages arose from the failure of the driver to blow the car's horn as he drove from the service station to the lane; (c) had he blown his horn, and had I heard the blowing, and hearing it had removed myself from the scene of the accident, there would have been no injury. Or, perhaps best put it thus, had the horn been sounded it would have banished liability on the defendant's part regardless of my conduct.

Relieving the plaintiff from blame, if for argument's sake alone, it by no means follows that the defendant's responsible blame is shown.

A hard and fast practical rule in reference to the blowing of an automobile's horn is not definable. Failure to blow a horn may be evidence of negligence in one set of circumstances, as where an automobile silently and suddenly comes up behind one on a public way, or a rapidly moving automobile approaches without a warning signal, for the automobile must reasonably give notice of its coming, and pedestrians and others on the roads and streets are not held to the standard of continuous vigilance. On the other hand, the very blowing might be evidence of negligence, as where its sounding would naturally tend to distract the attention of one making for safety, already advised by actual knowledge that an automobile was only too nearby. Which after all is but saying that what the ordinarily prudent person would do or would not do is the test.

This plaintiff, twenty year old youth though he was, began to work in and about the yard long before the accident. He must have known full well on the fateful day, and before that day, that automobiles came with frequency into the yard, not only to the first garage where he on that day was in regular employment, but to the second garage, to the service station, for parking, and likely for other purposes, and thence went to the street again; the lane alone being the means of entrance and of exit. The coming and the going of automobiles was essentially the business of the yard. Knowing these things he was fairly warned beforehand. It might be that had the horn been blown disaster to him would not have been recorded. So might it be that if every horn on every automobile in that yard had been sounded simultaneously his confusion would have been brought about.

The plaintiff certainly had as great reason to expect the coming of an automobile into the space that he was crossing as had the driver

to expect to find him there. And when, after making the other car's rear, the driver for the first time could see the plaintiff, the plaintiff, owing some duty in the situation, albeit less than that of unremitted lookout, could see the driver just as plainly.

The plaintiff when he was seen by the driver was but a few feet away. The driver reached for and put on the emergency, vainly hoping to avoid a collision. It is not to be said in the peculiar situation presented here that the fact that the horn was not blown showed negligence. Rather may it be said that the record disclosed that the unfortunate accident occurred in the congestion of a city yard with no one legally chargeable. This being so a verdict for the defendant was rightly directed at the close of the testimony.

Exceptions overruled.

EDWARD B. MEARS et al. *vs.* JULIA BIDDLE.

Hancock. Opinion March 30, 1923.

A real estate broker who procures for the owner a customer, willing, ready and able to purchase and pay for the property the stipulated price on the terms defined by the owner, is entitled to his commission. A cash sale whether expressly stated or implied requires payment in cash on delivery of deed, but terms may be waived by the owner, and such waiver is a question of fact. A refusal to give a requested instruction is not exceptional error where the subject matter of the requested instruction has already been given though in different language, as the interest of the excepting party was not thereby prejudiced.

A broker having real estate for sale who is the procuring cause of bringing a customer upon the scene not only willing but prepared to purchase and pay for the property at the price and on the terms defined by the owner, and who otherwise has fully and properly done his part, is entitled to his commission.

A cash sale is a sale conditioned on payment concurrent with the delivery of the deed as distinguished from sale where by agreement payment is deferred. A cash sale, whether expressly defined or necessarily imported, may be waived by the seller; waiver being a question of fact.

A requested instruction had already been defined in other words of like meaning. Therefore refusal to give it was not hurtful.

On defendant's exceptions and motion for a new trial. An action by plaintiffs, real estate brokers, to recover of defendant commission for procuring for defendant a customer to purchase of defendant certain real estate in Bar Harbor, the property having been placed by the defendant in the hands of plaintiffs for that purpose. The contention of the defendant was that the plaintiffs had not complied with all the terms and stipulations defined by her in placing the property in their hands for sale. The case was tried to a jury and a verdict for plaintiff for $1314 was rendered. Defendant excepted to a refusal to give a requested instruction and also filed a general motion for a new trial. Exception overruled. Motion overruled.

The case is fully stated in the opinion.

Charles H. Wood, for plaintiffs.

Harry L. Crabtree, for defendant.

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

DUNN, J. Owning real estate in Bar Harbor which she was wishing to sell, the defendant listed it with the plaintiffs, brokers and agents doing business there, in the hope that they would find a purchaser on prescribed terms, their pay to be in the form of a commission contingent on success. This was previous to the year of 1917.

Toward the end of August, in 1917, as the defendant was leaving Bar Harbor, she and one of the plaintiffs talked over the situation in reference to the property, the other plaintiff averring a knowledge of that fact. At the trial there was a sharp conflict in the testimonies of the parties regarding the tenor of this conversation, the plaintiffs saying that the defendant orally authorized them to offer the property for thirty thousand dollars, and the defendant as positively insisting that, notwithstanding the plaintiffs' importuning, she adhered to the higher selling price before then named, only modifying her attitude by assenting that she might be notified if the brokers received a thirty thousand dollar bid.

Three years passed by. The property still was on the plaintiffs' listings. One August day, a prospective purchaser of the name of Baker, of unquestionable readiness, ability, and willingness to buy

the estate, appeared at the plaintiffs' office and proposed that he would buy for thirty thousand dollars. Evidently the proposal was otherwise unqualified. Plaintiffs telegraphed the defendant:

"Mr. Baker will pay your price, thirty thousand,—one thousand on signing contract nine thousand thirty days thereafter twenty thousand January two."

A reply telegram told that a letter was following. The first sentence of the letter was in these words:

"The price which Mr. Baker offers is I think too low for the present time."

Beyond this, and the asking of what would be a fair rental for the house and land through the next year, the letter argues its initial statement.

The plaintiffs wrote:

"You will recall that when you were here in 1917, you told us that you would sell your property for $30 000. . . . ."

The defendant rejoined:

"An offer of $30,000 in 1917 is not what it is in 1920 & I think it would be a mistake to accept such a price now."

Said the plaintiffs:

"We have your letter . . . and assume it is a definite refusal of Mr. Baker's offer, and we are so notifying him. He will not pay more. . . . ."

And the defendant answered that she felt that thirty-five thousand dollars was the lowest sum that she could take for the property "now."

Mrs Biddle accepted the offer of Mr. Baker, or a renewal of that offer, after a little while, and made a conveyance of the realty to him, the plaintiffs not participating in the transaction. On learning what Mrs. Biddle had done, the plaintiffs brought this action against her asserting that, having produced a customer who was not only willing but prepared to purchase and pay for the property at the price and on the terms which had been given to them as brokers, they were reasonably entitled to their commission. *Smith* v. *Lawrence*, 98 Maine, 92; *Grant* v. *Dalton*, 120 Maine, 350; *Jutras* v. *Boisvert*, 121 Maine, 32.

The presenting questions on review are, whether the verdict which the plaintiffs have for their full demand ought to be avoided on a usual form motion, and whether the trial judge erred in declining an instruction reading: "If the defendant agreed to sell her property

through the offices of the plaintiffs for cash, but the offer as submitted to defendant by plaintiffs provided for payment in terms other than cash, the plaintiffs cannot recover." Responding in inverse order. As plain and as difficult of demonstration as a self-evident proposition is it, that the requested instruction but embodied an abstract principle of law applicable to a fact assumed as true. Were nothing more appearing, it would be clear that the reserved exception had merit, but the essential difficulty with the defendant's position is, that the refusal to give the instruction was not hurtful, and this for the reason that the governing rule had been defined in other words of like meaning, as these excerpts from the charge show:

"Now there is an arrangement, . . . between the brokers . . . and the party who owns the property . . . , as to the terms upon which it shall be sold, whether for cash or on time, ... Now you understand that I have already stated that the agents or brokers who have property in their hands for sale, must sell that property precisely according to the contract between them and the seller of the property, that is, if it is cash, that sale must be cash.

"They must meet the exact terms upon which the property is put in their hands for sale."

Of course, if tautology may have the indulgence of pardon, harmless refusal works no injury. Sufficient instructions upon the point involved were laid down. More need not be said. *Hearn* v. *Shaw*, 72 Maine, 187; *Young* v. *Insurance Company*, 80 Maine, 244; *Bunker* v. *Gouldsboro*, 81 Maine, 188.

The motion too must be decided adversely, though for a reason unlike that ascribed for overruling the exception, and the ground is, that the facts which were in controversy have been decided in the only mode provided by our constitution and laws for deciding questions of fact, namely, by the verdict of a jury, a method which is the best yet devised by man's wit for the purpose. Courts may set aside verdicts, but the power is restricted in exercise to instances, not where intelligent, fair-minded and conscientious men might reasonably differ (*Pollard* v. *Maine Central Railroad*, 87 Maine, 51), but when palpable and gross error, produced by prejudice, bias, or mistake of law or fact, is shown on the record. *Sawyer* v. *Hopkins*, 22 Maine, 268; *Hatch* v. *Dutch*, 113 Maine, 405; *Lemieux* v. *Heath*, 116 Maine, 55. And, be it remembered, that the credibility of every witness and the weight of his testimony is for the jury. *Hatch* v. *Dutch*, supra.

A listing of the property at a stipulated price, nothing being said as to terms, contemplated that the consideration for the transfer should be paid in circulating cash or money. *Grant* v. *Dalton*, supra; *Jutras* v. *Boisvert*, supra. A cash sale is a sale conditioned on payment concurrent with delivery of the deed as distinguished from a sale where by agreement payment is deferred. Now, a cash sale, whether expressly defined or necessarily imported, may be waived by the seller; waiver being a question of fact.

These litigants differed, in the first place, respecting the listing of 1917. Plaintiffs declared the price was fixed at that time at thirty thousand dollars. The defendant witnessed that thirty-five thousand dollars continued to be the value which she set, though she consented to take thought of a thirty thousand dollar offer, if made. On this issue the plaintiffs' version was accepted.

A thirty thousand dollar offer was made. It was a cash offer. The maker bore witness that it was. The plaintiffs likewise attested. For some purpose, not seen in the text, they did not so submit it to their principal. In what manner, it is pertinent to inquire, did the receipt of the plaintiffs' telegram, telling the defendant that Mr. Baker would pay her price and stating its amount and the terms, cause her to react? Observe again the succinct replying expression, and notice its clarity and internal evidence: "The price which Mr. Baker offers is I think too low for the present time."

Any mention of an authority previously revoked? Any suggestion that thirty thousand dollars never had been the established price? Any complaint or rejection because of postponement in payment? No. On the contrary, the letter supports the plaintiffs' insistence. Tacitly admitting that thirty thousand dollars was named as the amount for which they might sell, the writer indicated the variation in the worth of that sum then and at "the present time," implying that a dollar's buying power had diminished in the three years which lay between.

The defendant first advanced on the trial that the prospective purchaser was not solicited as she had directed, or, to put it in another way, that, within her privilege, she elected not to accept and ratify any modified terms. The question was for the jury. Respecting it, and the other matters which were in dispute, the members of the panel that tried this case saw the witnesses, they heard them testify, and they observed them while they were testifying. They considered

all the evidence, weighed its value, and based their verdict, not upon certainty, but upon that part of the evidence which they in their sphere found to be of the greater weight. They decided, without needlessly seeking how slight or how great the plaintiffs' services and exertions had been, that the plaintiffs were the procuring cause of bringing a customer upon the scene, and that they had fully and properly done their part. So the jury deemed the brokers worthy their commission. And, in the circumstances, the commission was computed rightly at the fixed customary rate in the community. *Potts* v. *Aechternacht*, 93 Pa. St., 138. A verdict arrived at in a fair manner, with propriety, and sensibly is final.

Exception overruled.
Motion overruled.

LOU M. DAUGHRATY, Admx. *vs.* LEILLA TEBBETS.

Oxford. Opinion April 6, 1923.

The evidence of negligence of defendant sufficient to warrant the finding of the jury for plaintiff, and the evidence authorizing the jury to find the plaintiff exercised reasonable care, cannot be declared, as a matter of law, as being not sufficiently substantial.

In the instant case wherever there was any controversy in the testimony, in determining the issue the Law Court must proceed upon the theory that the jury had a right to accept all the testimony of the plaintiff's side as true, and to reject all the testimony of the defendant's side as untrue, mistaken or unsatisfactory, unless the testimony, including the circumstances and probabilities, reveals a situation that proves the testimony on the plaintiff's side to be inherently wrong.

Upon the practically undisputed facts two questions arise: First, was the defendant negligent; Second, if so, was the plaintiff guilty of contributory negligence.

There was sufficient evidence to warrant the affirmative finding of the jury upon the first question. It cannot be declared as a matter of law that there was no substantial evidence upon which the jury was authorized to find the exercise of reasonable care on the part of the plaintiff. The general motion should be overruled. The special motion for setting aside the verdict is merely stated but not discussed in the defendant's brief. We think he discovered that it was without merit.

On motion. This action was brought by plaintiff as the administratrix of the estate of Lyman H. Daughraty against defendant to recover damages for personal injuries sustained by her intestate by being run over by the defendant's automobile on October 29, 1921, on a highway in the town of Oxford and so seriously injured that death ensued on November 4, following. Defendant filed the general issue and under a brief statement alleged no negligence on the part of defendant, and contributory negligence on the part of the intestate. The case was tried to a jury and a verdict for $5000 was rendered for plaintiff. Defendant filed a general motion for a new trial, and also filed a special motion for a new trial on the ground that the jury was sent out to dinner by the presiding Justice, accompanied besides the regular officer, by the court messenger who was not a sworn officer. Both motions overruled.

The case is fully stated in the opinion.

Alton C. Wheeler and Frederick R. Dyer, for plaintiff.

Frank A. Morey and Walter L. Gray, for defendant.

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

DUNN, MORRILL, WILSON, JJ. did not concur.

SPEAR, J. This case comes up on a general motion and a special motion based upon the alleged interference with the jury by a court officer. The case involves an automobile action in which the plaintiff's intestate, who will hereafter be called the plaintiff, received injuries on October 29, 1921, from which he died on November 4th following. A verdict was found in favor of the plaintiff, and the general motion is to set aside that verdict. No exceptions were taken and the charge of the jury must be regarded as a proper and adequate statement of the law. The burden which the proponent of a motion to overturn a verdict assumes has been too long and too often declared to require citation. There is very little controversy in the present testimony. However, wherever a controversy did arise, in determining the issue the Law Court must proceed upon the theory that the jury had a right to accept all the testimony of the plaintiff's side as true, and to reject all the testimony of the defendant's side as untrue, mistaken, or unsatisfactory, unless the testimony,

including the circumstances and probabilities, reveals a situation that proves the testimony on the plaintiff's side to be inherently wrong.

The facts determined from the testimony are substantially as follows: On October 29, 1921, Mr. Lyman H. Daughraty, the plaintiff, was proceeding in a northerly direction on the cement highway leading from Lewiston toward South Paris. He stopped his Studebaker automobile on the right hand side of the cement strip and presumably obtained a pail of water for the radiator of his car by crossing to the Charles house on the left hand side of the road and recrossing the road to his automobile, the cement part at this point being eighteen feet in width and having a strip of gravel road several feet wide on each side of the cement. When Mr. Daughraty started toward the house, presumably to return the empty pail, he was struck by the defendant's car, also proceeding northerly. His body was carried fifty feet before it fell from the car. He was left in the dooryard of the Charles place, while the defendant's automobile continued eighteen feet further before it was brought to a stop, after turning nearly a right angle into the Charles dooryard and plowing the turf out of the ground to a depth of six or eight inches and covering an area of two feet and one half in circumference. Upon the practically undisputed facts two questions arise: First, was the defendant negligent? Second, if so, was the plaintiff guilty of contributory negligence? In view of the numerous fatalities that are daily occurring, due to the mania for overspeeding automobiles, and the lack of control, due thereto, whenever an automobile or team appears to be stationary upon the road or roadside, the standard of due care on the part of an operator in approaching a car or team thus standing should be made commensurate with the danger involved. We are, therefore, of the opinion that it is wise to enunciate a rule that will save life rather than one that will jeopardize it; and that it should be held, in order to meet the proper standard of due care, in approaching a stationary car or team, that the operator of the moving car should be charged with the duty of observing, whether any person or persons are connected with such car or team, and should have his car under such control, in passing such car or team, as to avoid an accident with any person or persons, who may be around or about such car or team, or who attempts to cross the road in front of the oncoming car, provided such person or persons

are themselves in the exercise of due care. The force of this rule applies with emphasis when the moving car is approaching the standing car or team from the rear. With the top up, as is now well nigh the universal custom, the standing car is more likely than not to conceal some person or persons who may be about the front of the car for various reasons, and may even hide little children from view, who may at any moment dart into the road in the pursuit of childish play.

Under the above standard, upon the first question we are of the opinion that the jury had before them sufficient evidence to warrant them in coming to the conclusion, that the defendant was negligent in driving at a rate of speed which they might well have regarded as unreasonable, based upon the fact that she saw the plaintiff car sitting beside the road; upon the evidence that by the driver's own testimony she did not put on her brakes; and upon the further undisputed fact that the car turned a right angle, tore up the turf of the area of a bushel basket and went sixty-eight feet before it was stopped. These unquestioned facts point to a rate of speed which the jury may have regarded as reckless. And we think if that was their judgment they had evidence upon which to base it.

The second question, whether the plaintiff was in the exercise of due care, was a pure question of fact, under all the circumstances of the case, for the jury. The jury was as able to determine that question as the Law Court even if the Law Court had jury powers. It was the opinion of the jury that he was not negligent. It might be our opinion that he was. But that does not confer upon us a right to negative their judgment. If there was evidence upon which reasonable men might disagree the verdict should not be disturbed. The jury were the only tribunal that could try the case. They heard the evidence, and the parties were before them. Just what reasonable care required, under the circumstances in which the plaintiff found himself when he started to cross the road, when confronted by the oncoming car at an unreasonable rate of speed, as the jury had a right to find, is a question, that, probably, cannot be decided by any definite standard of action. As a matter of common knowledge and experience, the situation before the plaintiff, was sudden and confusing, and created an emergency in which the concept of hesitation and action arose together, like a flash. He had evidently started to cross the road for the purpose of returning the

pail to the Charles house. His mind was on doing that thing. He had to make up his mind in an instant. His judgment was that he could make the crossing with safety. He may have misjudged the speed of the approaching car. If he did make the crossing, however, his judgment proved to be right even in the circumstances of confusion. If he did not make it in view of the circumstances and the psychology of the situation must he be charged with negligence? We think whether he must was a question of fact for the judgment of twelve level-headed men sitting under the sanction of law and guided by the conceded correct instructions of the presiding Justice.

In the case at bar, however, the plaintiff did make the crossing and was hit on the extreme opposite side of the road where the concrete and the gravel come together. His judgment was not in error. There was ample space between the place where the accident occurred and the place where the plaintiff's car was standing to enable the defendant car to have passed entirely free from contact with the plaintiff, if her car had been under such control as would have enabled her to manage and guide it. The speed that carried the body of the plaintiff fifty feet after the car struck him, and the car eighteen feet further before it stopped, after turning a right angle and tearing up the turf over an area as large as a bushel basket and six or eight inches deep, was evidence from which the jury had the right to, and undoubtedly did, come to the conclusion that the car was coming at a furious pace. We think the plaintiff had a right to assume, in the exercise of his judgment, when he actually had time to cross the road, that the defendant car would not be so far beyond control as to attack him in the very place of safety which his judgment told him he could make, and which, as an undisputed fact, he did make. We are of the opinion, that it cannot be declared, as a matter of law, that there was no substantial evidence upon which the jury was authorized to find the exercise of reasonable care on the part of the plaintiff.

The general motion should be overruled.

The special motion for setting aside the verdict is merely stated but not discussed in the defendant's brief. We think he discovered that it was without merit. The case shows that the messenger, not a sworn officer of the court, accompanied the jury to their lunch and sat with them a few minutes at the table. During the time he was present no conversation whatever took place regarding any phase of

the case. In a few minutes it was discovered by an officer that an error had been made and a sworn deputy then relieved the messenger and took a place with the jury himself. While the courts are jealous of guarding the sanctity of the deliberations of juries, yet they never have gone so far as to set aside a verdict on account of irregularity when it affirmatively appears that the jury in no way could have been, or were, influenced by such irregularity. Even in a murder case in the Federal Court, where the jury was in charge of a deputy sheriff who had not been sworn as a bailiff, the court held after conviction of respondent and upon a motion to set aside the verdict, that "There was nothing tending to show that the jury was exposed to any influence that might interfere with impartial performance of their duties or in any way prejudice the decision, and overruled the motion." 163 U. S., 662. There are numerous cases to the same effect.

The special motion should also be denied. The mandate, therefore, must be,

Both motions overruled.

ISABELLE LABBE *vs.* MAINE CENTRAL RAILROAD COMPANY.

Franklin. Opinion April 10, 1923.

A railroad company having maintained at a crossing an "automatic signal of the silent type" in obedience to an order by the Public Utilities Commission, is not liable merely by reason of failure to maintain other or different safeguards. A lookout on a shifting train may assume that a driver of a team or car approaching a crossing will recognize the right of way of the railroad and stop for the train to pass.

When the Public Utilities Commission after a hearing have ordered maintained at a railroad crossing an "automatic signal of the silent type" and such signal so ordered is maintained and in operation the defendant cannot, under the circumstances of this case, be held liable merely by reason of failure to maintain other or different safeguards.

Until the contrary becomes reasonably apparent a lookout on a shifting train, backing across a highway, may assume that the driver of a team or car slowly approaching the crossing will respect the railroads right of way and consult his own safety by stopping short of the track and waiting for the train to pass.

The last car (the first to reach the crossing in backing) was a low tank car upon which no lookout was stationed. Signals from a lookout if any, so stationed could not ordinarily have been seen by the engineer. There was a lookout on the second car from the rear, a box car. A majority of the court are of opinion that the defendant was not in this particular wanting in due care.

On exceptions. An action to recover damages for personal injuries sustained by plaintiff, a minor, on October 28, 1921, while riding in a team, by being hit by a shifting train of defendant at a grade crossing in Livermore Falls. At the conclusion of the testimony, counsel for defendant moved for a directed verdict for defendant on the ground that the plaintiff had failed to prove negligence on the part of the defendant, and further that plaintiff was guilty of contributory negligence, which motion was granted, and plaintiff excepted. Exceptions overruled.

The case is stated in the opinion.

Carroll & Callahan and Ralph W. Crockett, for plaintiff.

Charles B. Carter, of White, Skelton & Carter, for defendant.

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

HANSON, J. did not concur.

DEASY, J. Verdict directed for defendant. Plaintiff excepts. This is the story:—

On October 28th, 1921, the plaintiff, eleven years old, was riding at Livermore Falls in a single-seated wagon drawn by one horse. Her sister Cora, seventeen years old was driving. Cordelia Labbe, mother of the girls was on the driver's left. The plaintiff was sitting on the knees of her mother and sister. The carriage turned in to Bridge Street and slowly approached the railroad crossing.

At this time the defendant's servants were making up a freight train and had occasion to back a shifting train over the crossing. This was done at a speed of seven or eight miles an hour.

The last car, i. e., the first to reach the crossing in backing, was a tank car. Next was a box car upon which a trainman was stationed.

The plaintiff says that as the carriage approached the crossing she looked to the right, the direction from which the shifting train came and saw no train. She then looked to the left. The team was driven on to the track. The train was stopped but not in time to avoid the collision. The plaintiff's sister was instantly killed. The plaintiff and her mother were injured.

The plaintiff alleges:—

(1) That the crossing was "inadequately protected." Her counsel contends that gates or a flagman should have been maintained. At the time of the accident there was in operation at the crossing an "automatic signal of the silent type." This signal was ordered by the Public Utilities Commission after a hearing.

Having conformed to the order of the Public Utilities Commission the defendant under the circumstances of this case cannot be held liable merely by reason of failure to maintain at this crossing other or different safeguards. *Dyer* v. *R. R. Co.*, 120 Maine, 154.

(2) That the shifting train backed on to the crossing "without giving proper warning." This point is not stressed in the brief of counsel. We assume that warning by bell is intended. The only evidence pro or con on this subject is that of a witness for the plaintiff

who testified that the engine "made the same noise they always do when backing up, ringing a bell I suppose." There is no evidence to sustain the allegation of want of proper warning.

(3) "That the defendant's servants made no reasonable and proper effort to stop said engine and cars for the purpose of avoiding a collision." This allegation is not proved. It fairly appears that as soon as the lookout saw that a collision was imminent he signaled the engineer, who at once applied both brakes. But it was then too late.

There is nothing to show that the trainman on lookout should have earlier foreseen the coming collision. He had a right to presume that a team slowly approaching the track would stop before reaching it and not drive on in the path of the coming train. Until the contrary became apparent he could properly assume that the driver would respect the railroad's right of way, and consult her own safety by stopping short of the track and waiting for the train to pass. *Stull's Admx.* v. *Traction Co.*, (Ky.), 189 S. W., 724; *Garland* v. *Railroad Co.*, 85 Maine, 522.

(4) That the defendant's servants failed to keep a proper lookout in that there was no trainman on the last car. The last car was a low tank car. It is evidently impracticable to station a lookout on such a car. Signals from a lookout so stationed could not ordinarily be seen by the engineer. There was a lookout on the second car from the rear, a box car. A majority of the court are of the opinion that a jury would not have been justified in finding the defendant in this respect wanting in due care.

No negligence having been shown on the part of the defendant, it becomes unnecessary to consider the further contention that the plaintiff was guilty of contributory negligence.

Exceptions overruled.

THOMAS MARKS *vs.* OUTLET CLOTHING COMPANY et als.

Cumberland. Opinion April 11, 1923.

The liability of the sureties on a bond given by the principal to dissolve an attachment of personal property under R. S., Chap. 86, Sec. 79, is not affected by an adjudication in bankruptcy of the principal within four months after the date of the bond.

In an action of debt against the principal and sureties on a bond to release attachment of personal property under R. S., Chap. 86, Sec. 79, in which the bankruptcy of the principal within four months after the bond was given is pleaded,

Held:

1. That the unqualified obligation under the bond was to pay the amount of judgment and costs within thirty days after rendition of judgment.
2. That the lien acquired by the attachment was gone when a bond to dissolve the attachment was delivered.
3. That this bond was a new obligation and was unaffected by the bankruptcy proceedings.

On report on an agreed statement. An action of debt on a bond given under R. S., Chap. 86, Sec. 79, to dissolve an attachment of personal property. On December 2, 1921 the plaintiff in this action brought an action against the Outlet Clothing Company, one of the defendants in this action, and attached personal property and on the same day the defendant in the original action gave a bond as principal with sureties to vacate the attachment. The plaintiff in the original action obtained judgment and then brought this action on the bond against the principal and sureties. Within four months after such bond was given the principal was adjudicated a bankrupt. The general issue was pleaded and also a brief statement under which was set up as a defense the adjudication in bankruptcy of the principal in the bond within four months after its date. On an agreed statement of facts the case was reported to the Law Court, and by agreement of the parties it was certified to the Chief Justice under R. S., Chap. 82, Sec. 47. Judgment for the plaintiff.

The case is fully stated in the opinion.

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

Maurice E. Rosen, for defendants.

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

CORNISH, C. J. Action of debt against principal and sureties on a bond to release attachment of personal property given under R. S., Chap. 86, Sec. 79. The condition of the bond is in these words: "Now therefore, if we the said obligors or either of us shall within thirty days after the rendition of judgment or after the adjournment of the court in which it is rendered or after the certificate of decision of the Law Court shall be received in the County where the cause is pending, pay to the plaintiff or his attorney of record the amount of any judgment including costs, recovered in said suit against said defendant or defendants or either of them this deed shall be void." This condition follows the provisions of the statute.

The original writ on which the attachment was made was entered at the February Term, 1922, of the Cumberland County Superior Court, and on March 8, 1922, judgment was entered in favor of the plaintiff, and on April 17, 1922, an execution in the sum of $217.35 debt and damage and $15.51 costs was duly issued.

On March 29, 1922, an involuntary petition in bankruptcy was filed against the Outlet Clothing Company and on April 26, 1922, that company was duly adjudged a bankrupt. Neither the defendant, the principal obligor, nor the sureties having paid this judgment, this suit was brought. The defense is that the bond "was given to take the place of an attachment and said attachment was vacated and made null and void by reason of the bankruptcy of the defendant within four months of the date of said attachment; and that by reason thereof the said writing obligatory is null and void." This defense is specious. The bankruptcy proceedings had no effect whatever upon the attachment because that had already been vacated by the giving of the bond. There was no attachment upon which bankruptcy proceedings could operate. Had no bond been given the attachment would have been dissolved by the bankruptcy, but another state of facts existed. The defendant in the suit instead of availing himself of bankruptcy proceedings at the time saw fit to

vacate the attachment in another way and executed the bond to supersede it. His sureties signed with him and their legal obligations were thereby fixed by the terms of the bond itself. They bound themselves absolutely and unqualifiedly to pay the judgment within thirty days after rendition. "So says the bond." There is no exception in case of bankruptcy. None is implied and the court can insert none. It can only enforce the contract made by the parties. The condition has not been complied with and the penalty follows:

This precise question has been before the Massachusetts Court in a very recent case, and after full consideration judgment was rendered for the obligee in the bond. *Guaranty Security Corporation* v. *Oppenheimer*, 137 N. E., 644, (decided January 4, 1923). Reason and authority unite in requiring the same result in the pending cause.

Judgment for the plaintiff. The amount to be determined by the Justice at nisi prius.
So ordered.

EMMA F. CAMPBELL *vs.* ELLA V. WHITEHOUSE.

Piscataquis. Opinion April 11, 1923.

The continuity of holding by recorded deeds not broken by a reasonable time intervening between the execution and the recording of a deed. The rule for the interpretation of deeds is the expressed intention of the parties gathered from the whole instrument, but the intention must be effectively expressed, not merely surmised. Privity, such as will authorize the tacking of possessions, exists between two successive holders where the latter takes under the earlier by descent. Payment of taxes may be shown either by the collector's receipt, or by entries in his books and official records. A tax receipt is original evidence of payment, but not conclusive, sufficient till invalidated by proof.

The continuity of holding by recorded deeds is not broken by reason of the fact that a period of twenty-eight days elapsed between the date of the execution of a deed and the date of its record. A reasonable time must ordinarily intervene between the date of the deed and its record. This necessary and reasonable interval will not deprive parties of the protection of a Statute.

The cardinal rule for the interpretation of deeds is the expressed intention of the parties, gathered from all parts of the instrument, giving each word its due force, and read in the light of existing conditions and circumstances. It is the intention effectually expressed, not merely surmised. Description in a deed which conveys "one half right, title and interest in and to a one undivided half of a certain piece or parcel of land" can be held to convey only one fourth of the land.

Privity, such as will authorize the tacking of possessions, exists between two successive holders where the latter takes under the earlier by descent.

While payment of taxes may be shown by the receipt of the collector of taxes, or other officer authorized to receive them, yet this is not the only method of proof, for the fact may be shown by the entries in the books and official records of the tax office.

The giving of a receipt for taxes by the collector is an official act which the statute requires him to perform. The manifest purpose of the statute is to furnish the taxpayer with written evidence of payment. The receipt is therefore original evidence; not conclusive, but sufficient till invalidated by proof.

On report. This is a writ of entry to recover a lot of wild land numbered one hundred and eleven, containing one hundred and sixty acres, situate in the town of Wellington. The general issue was pleaded with a brief statement claiming title under the provisions of R. S., Chap. 110, Sec. 18, while the plaintiff claimed title by virtue of certain conveyances, beginning with a warranty deed, dated February 18, 1860, given by Abbott R. Davis to Granville S. Seaverns, and recorded February 22, 1860. At the conclusion of the testimony by agreement of the parties the cause was reported to the Law Court. Judgment for the plaintiff for an undivided five twelfths of the premises.

The case is fully stated in the opinion.

Harry R. Coolidge, for plaintiff.

Hudson & Hudson, for defendant.

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

PHILBROOK, J. This is a writ of entry to recover a wild land lot lying in the incorporated town of Wellington. The tract is known and referred to in the declaration and testimony as lot number one hundred eleven, according to the plan and survey of said town of Wellington, containing and one hundred sixty acres.

The plaintiff claims title by virtue of certain conveyances, beginning with a warranty deed, dated February 18, 1860, given by Abbott R. Davis to Granville S. Seaverns, and recorded February 22, 1860. In that deed Davis recites that his title was obtained by warranty deed from Charles Wyman dated November 11, 1859, and duly recorded. The Wyman deed was not offered in evidence. It appears that Granville S. Seaverns possessed the lot until his death, which occurred on February 25, 1892. He died intestate, survived by a widow, and, as his only heirs, the following named children: Adelaide S. Seaverns, Martha E. Seaverns, Granville F. Seaverns, Marion J. Glover and Gertrude L. Bowen. The widow died January 18, 1910. Marion J. Glover died September 13, 1906, leaving no children and no surviving husband. Adelaide died June 7, 1913, testate; her interest in the real estate in question passing by devise to her sister, Martha E. Seaverns. Granville F. Seaverns

died October 2, 1915. Under date of November 1, 1913, Martha E. Seaverns, a single woman, in her individual capacity, and as sole executrix of the will of Adelaide S. Seaverns, together with Granville F. Seaverns and his wife, and Gertrude L. Bowen and her husband, describing themselves as being the sole surviving heirs of Granville S. Seaverns, and being all the heirs and devisees of the deceased heirs and widow of the said Granville S. Seaverns, gave a quitclaim deed of the land in dispute to Roscoe G. Jones. This deed was recorded June 20, 1914. On June 17, 1914, Jones, by warranty deed, conveyed the premises to Joseph Stewart and Murl Jones, this deed also being recorded June 20, 1914. On the same June 17, 1914, by mortgage deed recorded on the same June 20, 1914, Stewart and Jones conveyed the premises to Harry R. Coolidge. The latter foreclosed his mortgage by publication, the first publication being July 17, 1919, the affidavit of foreclosure being dated September 13, 1920 and recorded September 16, 1920. By quitclaim deed dated February 5, 1921, recorded February 7, 1921, Coolidge conveyed the premises to Emma F. Campbell, the plaintiff. The plaintiff's title down to and including the deed from Roscoe G. Jones to Joseph Stewart and Murl Jones is proved by the same deeds and by the deposition of Martha E. Seaverns as was plaintiff's title in *Joseph Stewart and Murl Jones*, vs. *James S. Small*, et als., 119 Maine, 269, relating to lot ninety in Wellington, another lot in the same Seaverns title, in which case this court declared that the plaintiffs, Stewart and Jones, had a "true record title." The plaintiff in the case at bar, therefore claims "a true record title" to the land in controversy by reason of those deeds and deposition plus the mortgage to Coolidge, its foreclosure, and the conveyance from Coolidge to her.

The defendant relies upon the provisions of R. S., Chap. 110, Sec. 18. It is therefore incumbent upon her to prove; (1) that for twenty years next prior to the commencement of the action she, and those under whom she claims, have continuously claimed the premises under recorded deeds; (2) and have, during said twenty years, paid all taxes assessed on said lands; (3) and have, during said twenty years, held such exclusive, peaceable, continuous and adverse possession thereof as comports with the ordinary management of such lands in this state.

TWENTY YEARS CLAIM UNDER RECORDED DEEDS.

The defendant produced deeds as follows: (1) Quitclaim deed of "the whole of lot numbered (111) one hundred and eleven, containing one hundred and sixty acres, more or less," from Reuben Whitehouse, land agent for the town of Wellington, to John Huff. This deed is dated March 11, 1875, and recorded April 3, 1882. (2) Quitclaim deed of the same premises from John Huff to Green G. Roberson, dated October 18, 1881, recorded April 3, 1882; (3) Quitclaim deed of the same premises from Green G. Roberson to Benjamin D. Libby; dated November 16, 1882, recorded April 14, 1883. (4) Quitclaim deed of "one undivided half of lot numbered one hundred and eleven" from Benjamin D. Libby to Brice H. Libby, dated May 5, 1883, recorded June 2, 1883. (5) Quitclaim deed of this undivided half from Brice H. Libby to Ella V. Whitehouse, the defendant, dated January 17, 1908, recorded February 14, 1908. (6) Quitclaim deed of one undivided half of the premises from Benjamin D. Libby to Isaiah H. Whitehouse, dated December 4, 1882, recorded June 2, 1883. (7) Quitclaim deed of "one half right, title and interest in and to a one undivided half of a certain piece or parcel of land situated in said Wellington and described as follows; to wit; it being one undivided part of lot numbered one hundred and eleven (111) containing one hundred and sixty acres more or less," from Isaiah Whitehouse to Leonard Whitehouse, dated November 29, 1883, recorded February 26, 1884. (8) Warranty deed of "one undivided half of a lot of land situated in said Wellington, said lot being numbered one hundred and eleven (111) and containing one hundred and sixty acres more or less," from Leonard Whitehouse to Ivory L. Whitehouse, dated March 11, 1902, recorded March 14, 1902. It appears that Ivory L. Whitehouse is the deceased former husband of the defendant, and that he died January 7, 1904, intestate, leaving the defendant as his widow and also leaving one child, Gladys E. Whitehouse, who is still living.

It is contended by the plaintiff that the deeds, and record thereof, offered by the defendant, do not prove continuous claim under recorded deeds for the statutory period. As to the deed of the undivided half to the defendant, which may be referred to as the Brice H. Libby half, the plaintiff calls attention to the fact that a

period of twenty-eight days elapsed between its date and the date of its record. It is claimed that this delay broke the continuity from Brice H. Libby. Attempt is made to substantiate this claim by citing *Daugherty* vs. *Manning*, Tex. Civil App., 221 S. W., 983, where the court said, "It is our opinion that such instruments must be as promptly filed for record as is possible and the delay must be a reasonable one and free from any gross negligence in order to comply with and secure the benefits of the Statute." But the plaintiff does not cite *De La Vega* vs. *Butler et al*, 47 Texas, 529, where the court said, "A reasonable time must ordinarily intervene between the date of the deed and its record. . . . This necessary and reasonable interval certainly will not deprive parties of the protection of the statute." Nor does the plaintiff cite *Jack et al.* vs. *Dillon*, Tex. Civil App., 23 S. W., 645, where there was a period of thirty-eight days between date and record of the deed, and in which case the court said that instantaneous record of the deed is neither practicable nor required. "A reasonable time is allowed for such purpose," said the court. We hold that the break in continuity claimed by the plaintiff, as to the Brice H. Libby half of the premises is without foundation or merit.

As to the remaining undivided half of the premises other questions arise. Going back to the deed from Isaiah H. Whitehouse to Leonard Whitehouse, we have already seen that the language of description is "one half right, title and interest in and to a one undivided half of a certain piece or parcel of land situated in said Wellington and described as follows, to wit; it being one undivided part of lot numbered one hundred and eleven (111) containing one hundred and sixty acres more or less." The defendant claims that from other testimony introduced as to the intention and conduct of the parties in interest, as well as from the deed, we should decide that an undivided half of the whole tract was the portion intended. The plaintiff claims that one half of one half, or a quarter of the premises was quitclaimed. We hold in favor of the plaintiff upon this contention. "The cardinal rule for the interpretation of deeds is the expressed intention of the parties, gathered from all parts of the instrument, giving each word its due force, and read in the light of existing conditions and circumstances. It is the intention effectually expressed, not merely surmised. This rule controls all others." *Penley* vs. *Emmons*, 117 Maine, 108; *Perry* vs. *Buswell*, 113 Maine,

399. It is true that Ivory L. Whitehouse also received from Leonard Whitehouse a warranty deed of an undivided half of the whole premises, but this deed was dated March 11, 1902, recorded March 14, 1902, a date less than twenty years prior to the date of the writ, which is February 8, 1921. Clearly, therefore, Ivory L. Whitehouse had not claimed for twenty years under the recorded warranty deed of Leonard Whitehouse. Since the twenty-year period prior to the date of the writ began February 8, 1901, we find Ivory L. Whitehouse then alive and holding, by himself and those under whom he claimed, for a period in excess of twenty years, an undivided fourth of the land. Upon his death, by the provisions of our statute, one third of his interest in fee descended to his wife, the defendant, and two thirds to his living daughter. *Whiting* vs. *Whiting,* 114 Maine, 382. Privity such as will authorize the tacking of possessions exists between two successive holders where the latter takes under the earlier by descent. 2 C. J. 87, and cases there cited. Hence the defendant can tack her possession of one third of the one fourth which her husband held under recorded deeds for the statutory period. We are unable to discover by rule of law, or from the testimony in the record, how the defendant can successfully claim possession for twenty years under recorded deeds, or by tacking, to the two thirds of one fourth which descended at the death of Ivory L. Whitehouse to his daughter.

PAYMENT OF TAXES.

While payment of taxes may be shown by the receipt of the collector of taxes, or other officer authorized to receive them, yet this is not the only method of proof, for the fact may be shown by the entries in the books and official records of the tax office. *Taylor* vs. *Lawrence,* 148 Ill., 388; 36 N. E., 74; *Webb* vs. *Ritter,* 60 W. Va., 193; 54 S. E., 484. In *McIntosh* vs. *Marathon Land Co.,* 110 Wisconsin, 296, 85 N. W., 976, an entry upon the tax roll "Paid Apr. 15, '64" was held to be competent and sufficient evidence of payment of the tax.

Plaintiff says there is no proof of payment of the tax of 1902 upon the Brice H. Libby half of the property. The assessment was $1.40. As tending to prove such payment the tax collector's book for that year was produced. The collector, Marcellus Ward, was dead. His

son testified that it was his father's custom, when any one paid his tax, to mark a cross upon the book, "He crossed it right out when they paid their tax" said the witness. Upon this collector's book for that year, 1902, the Brice H. Libby tax was thus crossed. Precisely the same testimony was offered to prove payment of the tax for 1903, the amount being $1.65. The tax for 1905 was $1.56. As to payment of this tax no collector's book was offered. To prove such payment the defendant produced the town treasurer's book showing settlement in full with I. M. Huff who succeeded Mr. Ward as tax collector. This testimony is given by John F. Frye who produced the treasurer's book and Millard F. Whitehouse, chairman of the board of selectmen for 1905. If the payment of the tax for 1905 were an isolated transaction with no evidence of payment of preceding or succeeding taxes, we might properly doubt the sufficiency of the evidence offered. But the case is before us upon report and as to decision of facts we act with jury powers. That the tax was paid on the Brice Libby half in years before and after 1905, that nothing in the record shows any necessity of action to enforce payment of the 1905 tax because of deliquency, that the amount was so small, and the length of time since payment was due, together with other testimony in the case, justify us in finding, from all legitimate inferences to be drawn from the testimony in this particular case, that the tax for 1905 was paid. "The mere duty of the owner of property to pay the taxes thereon raises no presumption that he has paid them, although the fact that he has paid the taxes on particular property for a series of years may warrant a presumption of payment as to the taxes of one particular year for which he cannot show a receipt, and it may be presumed that the tax of a particular year was paid from the fact that it was not included in the tax bills of succeeding years. It is also held that a presumption of payment may arise from mere lapse of time if sufficiently long continued. It will be presumed that payments made on tax assessments were made by the party rendering the land for taxation," 37 Cyc. 1167, and cases there cited. Concerning the payment of taxes on the Brice H. Libby half for the other years in the twenty-year period the plaintiff does not appear to contend and we hold that such payment is sufficiently proved.

But the plaintiff claims that as to the Leonard Whitehouse portion, taxed to him from 1895 to 1901, there is no legitimate evidence

of payment of taxes as required by the statute. In proof of such payment the defendant offered receipts for payment of the taxes for 1895 and 1896 signed by A. C. Curtis, Collector; for 1897 signed by E. W. King, Collector; for 1898 signed by W. H. Pease, Collector; for 1899 signed by Albert Ward, Collector; for 1900 signed by I. M. Huff, Collector; and for 1901 signed by Alphonso Davis, Collector. These receipts were found among the Leonard Whitehouse deeds and other papers. The plaintiff objects to the introduction of these receipts on the ground that their execution was not proved. The defendant testified, as of her own knowledge, that Leonard paid the taxes on lot 111 a number of times but could not remember the years in which he so paid. That the various persons purporting to sign these receipts were the collectors for those years was admitted and the receipt of payment in each case is upon the official notice to the taxpayer as to the amount due. "While receipts given by parties to the suit are admissions, and are admissible in evidence as such, it is doubtless true that receipts given by third parties are merely unsworn declarations and heresay, and hence inadmissible." *Littlefield* vs. *Cook*, 112 Maine, 551; *Silverstein* vs. *O'Brien*, 165 Mass., 512. "But there are cases," said the court in *Ferris* vs. *Boxell et als.*, 34 Minn., 262, 25 N. W., 592, "where a receipt by a third party, in connection with other facts, may be competent evidence; for example, when the person to whom the payment is made is pointed out by law, as in the case of payment of taxes to public officer." In *Johnston* vs. *Scott*, 11 Mich., 231, it was held that a collector's receipt for taxes is an official paper which the law requires him to give, and is therefore evidence of the payment of the tax in suits between third persons. "The court was correct," it was said in that case, "in holding the receipt prima facie evidence of payment. It does not fall within the rule which excludes hearsay evidence nor does it rest upon the principle which admits entries made by third persons against their interest, or in the ordinary course of business. The giving a receipt for taxes by the township treasurer is an official act which the statute requires him to perform. The manifest purpose of the statute, we think, was to furnish the tax payer with written evidence of payment. . . . The receipt is therefore *original* evidence; not, it is true, conclusive, but sufficient till invalidated by proof." In our own State, R. S., Chap. 11, Sec. 17, provision is made which compels a tax collector or constable to give a

receipt when a tax is paid. We hold that the tax receipts given to Leonard Whitehouse were admissible, and since no proof was offered to invalidate the fact of payment, that such fact was properly and sufficiently proved.

POSSESSION FOR TWENTY YEARS.

It should here be observed that adverse possession under common law principles do not govern in this case, but statutory provisions obtain, whereby the defendant claims by color of title. This fact affects both the extent and nature of the possession necessary to be shown. The law is too well settled to need citation of authorities that when one enters upon a tract of land under color of title, and is in possession of part thereof, he is presumed to be in possession of the whole. *Farrar* vs. *Eastman*, 10 Maine, 195; *Gardner* vs. *Gooch*, 48 Maine, 487; *Roberson* vs. *The Downing Co.*, 120 Georgia, 883; 48 S. E. 429; Am. State Reports 128, and cases there cited. Thus the extent of possession is fixed. The statute declares that the possession shall be "such exclusive, peaceable, continuous, and adverse possession thereof as comports with the ordinary management of such lands . . . in this state."

Rehearsal of and comment upon the testimony would be of little value or interest except to the parties, and we content ourselves by stating that careful examination of the record shows that, as to the character of the occupancy, the defendant prevails. But by reason of what we have already pointed out the defendant can hold only the Brice Libby half plus one third of one fourth of the other half. The judgment must therefore be;

Judgment for plaintiff for an undivided five twelfths of the premises.

E. A. CLARK & COMPANY *vs.* D. & C. E. SCRIBNER COMPANY.

Cumberland. Opinion April 13, 1923.

In contracts for the sale of goods, wares or merchandise, to meet the requirement of the Statute of Frauds, R. S., Chap. 114, Sec. 5, there must be some confirmatory act by the buyer only. The seller must do something, concurrent with or subsequent to the contract, indicating clearly a delivery, with an intention of vesting the right of possession in the vendee as owner. There must be an acceptance and receipt by the vendee with an intent to become owner.

In contracts for the sale of goods, wares or merchandise, to which the Statute of Frauds (R. S., Chap. 114, Sec. 5) is applicable, the confirmatory and binding act proceeds from one party only, the buyer.

There cannot be such an acceptance and receipt as shall conclude the purchase until there has been a delivery by the seller.

Something must be done with respect to the subject matter of the contract, either concurrent with or subsequent to it, which unequivocally indicates that there was a delivery by the vendor, with an intention of vesting the right of possession of the subject matter of the sale in the vendee as owner, and an acceptance and receipt of the same by the latter, with an intent thereby to become the owner thereof.

Where the subject matter of such a contract is a car of cottonseed meal which the purchaser persistently refused to accept, and the seller at all times retained in his possession the railroad bill of lading and at no time made delivery of the merchandise with an intention of vesting the right of possession in the purchaser, the mere request of the purchaser, if proved, that the vendor sell the merchandise for the former's account is not such a constructive receipt and acceptance as will satisfy the Statute of Frauds.

The rule must be considered as established that so long as the seller's lien on goods for their price remains and the buyer cannot maintain trover for their detention, there can be no delivery of the goods which must precede their acceptance and no acceptance and receipt within the statute.

On report. An action to recover damages for an alleged breach of a contract claimed by plaintiff to have been made with the defendant by telephone for the sale of a carload of cottonseed meal. Plaintiff alleges that immediately after the telephone conversation a written confirmation of the sale was mailed to defendant, which is denied as

having been received. A few days before the carload of cottonseed meal arrived in Brunswick, where defendant corporation was doing business, defendant received from plaintiff an invoice of the meal, and thereupon at once called the plaintiff by telephone and announced his refusal to accept the shipment and the defendant contends that it never did accept it. The plaintiff alleges that defendant requested it to sell the shipment for defendant which it refused to do. Finally the plaintiff, the defendant continuing to refuse acceptance, took the car and sold it, and brought this action to recover a balance due it as it alleged. The general issue was pleaded and under a brief statement the defense set up the statute of frauds. At the conclusion of the evidence by agreement of the parties the case was reported to the Law Court. Judgment for the defendant.

The case is fully stated in the opinion.

Thaxter & Holt, for plaintiff.

Wheeler & Howe, for defendant.

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

MORRILL, J. In July, 1920, the plaintiff by oral contract, sold to the defendant a carload of cottonseed meal, for shipment from point of origin in the following November. The original bill of lading was received by the plaintiff early in December, and thereupon under date of December 9, 1920, an invoice of the meal was mailed to the defendant at Brunswick, and plaintiff forwarded the bill of lading with sight draft attached for collection through bank. The car arrived in Brunswick on December 15, 1920. The defendant refused to honor the draft or to accept the contents of the car. The car remained on the track in Brunswick until January 11, 1921, when it was forwarded by order of plaintiff to Lewiston, Maine, and there the contents were resold by the plaintiff. To recover the loss occasioned by the refusal of defendant to accept the goods, this action is brought.

Appreciative of the application of the Statute of Frauds to oral contracts for the sale of goods, wares and merchandise, counsel for plaintiff allege in the amended declaration that the defendant "did receive and accept the same (the cottonseed meal) by requesting the said plaintiff to sell the same for the account of the said defend-

ant," and that upon arrival of the car in Brunswick plaintiff was "compelled to then and there take possession of said car and sell the contents for the account of the said defendant." In a third count plaintiff avers "that in accordance with said request it did sell the same for the account of the said defendant." Evidence was introduced on both sides as to such request.

Assuming that the plaintiff has sustained the burden of proving the request which it alleges, the question is presented whether upon the facts of the case the Statute of Frauds (R. S., Chap. 114, Sec. 5) affords a defense to the action.

We think that unquestionably it does. Attention is directed to the undisputed fact that the bill of lading never came into defendant's possession, but was retained by plaintiff to protect its lien for the purchase price. The defendant could not exercise any control over the contents of the car until it paid the draft and thus obtained possession of the bill of lading; this it did not do, and persistently refused to do.

These facts are decisive of the case, and distinguish the instant case from the cases of constructive acceptance relied upon by plaintiff's counsel.

Under the statute the confirmatory and binding act proceeds from one party only, the buyer. That there cannot be such an acceptance and receipt as shall conclude the purchase until there has been a delivery by the seller, is manifest from the meaning of the former words, and has often been judicially affirmed. Browne on Statute of Frauds, 3d Ed., Secs. 316, 317.

It must be regarded as definitely and finally settled that these terms, "accept" and "actually receive," have distinct meanings, and that both acceptance and actual receipt, which implies delivery, are essential to take the case out of the statute. The cases, including our own cases of *Maxwell* v. *Brown*, 39 Maine, 98, and *Young* v. *Blaisdell*, 60 Maine, 272, are collected in a note to the case of *Shindler* v. *Houston*, 1 N. Y., 261, printed in 49 Am. Dec., 327. In the revision of the statutes of Maine in 1857, the word "actually" which had been in the statute since 1821 was omitted, and the clause was made to read, "unless the purchaser accepts and receives part of the goods"; this reading has been since continued; we apprehend, however, that the meaning remains the same as under the readings of the Statutes of 1821 and 1841. *Martin* v. *Bryant*, 108 Maine, 253, 256.

The rule must be considered as established that so long as the seller's lien on goods for their price remains, and the buyer cannot maintain trover for their detention, there can be no delivery of the goods which must precede their acceptance, and no acceptance and receipt within the statute. There must be some act of the parties amounting to a transfer of possession, and an acceptance thereof by the buyer. Browne, St. of Frauds, 3d Ed., Sec. 317. *Edwards* v. *Grand Trunk Ry.*, 54 Maine, 105, 111. *Maxwell* v. *Brown*, 39 Maine, 98, 103. In a frequently cited opinion by Judge Lowell in the U. S. District Court, it is said: "It has often been decided that there can be no sufficient receipt by the vendee, so long as the vendor holds as vendor, and insists on his lien for the price." *Ex parte Safford*, 2 Lowell, 563, 21 Fed. Cas., No. 12212.

In the note above referred to, in 49 Am., Dec., 331, the rule is stated thus: "The vendor's lien must be divested by the receipt and acceptance, or the oral contract will not be valid, for this is necessary to the vesting of the absolute control and dominion of the goods in the buyer, which is implied in the words 'actually receive';" and the authorities are collected.

From a recent case before this court the rule may be thus formulated: Something must be done with respect to the subject matter of the contract, either concurrent with or subsequent to it, which unequivocally indicates that there was a delivery by the vendor, with an intention of vesting the right of possession of the subject matter of the sale in the vendee as owner, and an acceptance and receipt of the same by the latter, with an intent thereby to become the owner thereof. *Ford* v. *Howgate*, 106 Maine, 517, 522.

In the instant case, the plaintiff at no time made delivery of the merchandise in question with an intention of vesting the right of possession in the defendant, and the latter has at all times persistently refused to accept the same. The mere request of the defendant, if proved, that the plaintiff sell the meal for its account is not such a constructive receipt and acceptance as will satisfy the statute of frauds. "Acceptance cannot legally take place, in the absence of a special agreement, so long as the seller preserves his dominion over the goods so as to retain his lien for the price, for he thereby prevents the purchaser from accepting and receiving them as his own within the meaning of the statute. Consequently, if there is nothing indicating a surrender of the seller's lien, any acts of control

by the buyer will not be an acceptance, for although there may be cases in which the goods remain in the possession of the vendor, and yet have been received and accepted by the vendee, in such cases the vendor holds possession not by virtue of his lien as vendor, but under some new contract by which the relations of the parties are changed." *Clark* v. *Labreche*, 63 N. H., 397, 399.

Judgment for defendant.

JAMES H. MAYBURY, In Equity *vs.* SPINNEY-MAYBURY COMPANY.

Knox. Opinion April 13, 1923.

In proceedings for the sequestration and equitable distribution of the assets of a corporation, generally speaking, where there is no statute otherwise controlling, creditors, whose rights accrue while the fund is in the control of the court, may share in the distribution. Claims presented in time and are capable of being made certain within the time fixed by the court should be allowed. Claims which are not then certain should be disallowed. Under "Lease and License Agreement" contracts where it is provided lessee is to pay for repairs necessary to put the machinery in suitable condition to lease, such claims are allowable, but claims for deterioration not allowable in addition. Where contracts provide royalties and rentals to be paid on fixed days, and a less sum if paid earlier, the intent of the parties governs in determining which sum was the actual debt.

In proceedings for the sequestration and equitable distribution of the assets of a corporation under R. S., 1916, Chap. 81, Secs. 82–86, the statute does not state what claims shall be provable; it does not prescribe procedure further than to fix a minimum period within which claims shall be presented.

It may be stated in a general way that in equity proceedings for winding up the affairs of a corporation and distributing its assets among its creditors, where there is no statute otherwise controlling, those creditors may share in the distribution of the fund, whose rights accrue while the fund is in the control of the court and within a time consistent with an expeditious settlement of the estate.

In such proceedings, claims which when presented within the time limited by the court for their presentation are certain or capable of being made certain

by recognized methods of computation, should be allowed. Claims which are not then certain should be disallowed because they afford no basis for making dividends.

There is no equitable reason why claims which are certain when presented and which are presented in time, should have been certain at some arbitrary anterior period.

Where contracts, known as "Lease and License Agreements" contain agreements to pay for repairs "necessary to put the leased machinery in suitable order and condition to lease to another lessee," and creditor claims and is allowed to prove for the amount of such repairs, additional claims for so-called return charges, described "as partial reimbursement to the lessor for deterioration of the leased machinery, expenses in connection with the installation thereof and instruction of operators," will not be allowed, no claim being made of expense actually incurred by creditor in the installation of the machines or instruction of operators.

The claimant, having proved the actual cost of restoring the machines to their original condition, cannot also prove for the sum estimated to cover deterioration.

Where contracts for use of machinery provide for the payment of certain sums on fixed days, as royalties and rentals, and for the payment of a less sum if payment is made before an earlier day, and denominate the difference between the larger and the smaller sums as a discount, and have been phrased in terms appropriate to that denomination, the court is not precluded from seeking the intent of the parties to ascertain whether the smaller sum was in fact the actual debt, and the larger sum considered as a penalty.

The question is one of construction of the contract, and courts endeavor to learn the real intent of the parties to the contract, and, if that can be ascertained, will be governed by it.

The court is of the opinion that in the contracts in question, the actual rental to be paid by the lessee and collected by the lessor is the smaller amount; that it was not the actual agreement that the lessee should pay the larger sum, and that the latter must be regarded as a penalty.

On report. A bill in equity under which a receiver was appointed for the defendant company, and, in the proceedings, a Special Master was appointed to pass upon claims against the company. Among the claims so presented was that of the United Shoe Machinery Company which was contested at a hearing before the Master, and when the report of the Master came up for acceptance, no objection was made except to his finding upon said claim of the United Shoe Machinery Company, and the matter of that claim was reported to the Law Court upon an agreed statement of facts. Master's report modified by deducting from the amount allowed on the claim of

United Shoe Machinery Company the sums of $1,994.99, and $383.10, fixing said claim at $3,990.89. Decree to be entered accepting the Master's report as modified by the opinion; final decree to be entered upon report of receiver, and final distribution ordered.

The case is very fully stated in the opinion.

Arthur S. Littlefield, for Alan L. Bird, Receiver.

Walter Bates Farr, for United Shoe Machinery Company.

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

MORRILL, J. The issues here presented to us relate solely to the amount for which United Shoe Machinery Company, hereinafter sometimes called the claimant, may prove its claim against the defendant and share in the distribution of its assets.

Upon a bill filed May 12, 1917, a Receiver of the defendant corporation was appointed on May 19, 1917. The United Shoe Machinery Company had delivered to the defendant, for the equipment of its factory, some fifty-eight machines designed for use in the manufacture of boots and shoes; said machines were in the factory of defendant at Warren when the Receiver was appointed. The contracts under which the defendant used these machines vary in their terms, but all of them contain a clause in substantially the following words: "If the lessee becomes insolvent or bankrupt, or has a receiving order made against him, or makes or executes any bill of sale, deed of trust or assignment for the benefit of his creditors . . . . then and each such case any and all leases or licenses to use machinery then existing between the lessor and the lessee, whether as the result of assignment to the lessor or otherwise, shall at the option of the lessor cease and determine, and the possession of and full right to and control of all machinery the leases or licenses of which are so terminated, shall thereupon revest in the lessor free from all claims and demands whatsoever."

Each contract also contains a clause in some form reserving to the United Shoe Machinery Company the right to terminate the contract upon default by lessee or licensee in the observance of its terms, and that upon termination of the contracts, the lessee or licensee shall forthwith deliver the machinery to the lessor or licensor at its factory, sometimes stated to be in Beverly, Massachusetts, in good order and condition, reasonable wear and tear alone excepted.

On May 22d, 1917, the United Shoe Machinery Company sent to Spinney-Maybury Company a notice reading:—"You are hereby notified that in the exercise of our rights in the premises, we have elected and hereby declare our option to terminate all leases and licenses which have heretofore been granted to you, covering machines belonging to us. You are hereby notified that the said leases and licenses and all said rights and privileges are hereby terminated, revoked, canceled and annulled," enumerating the various machines covered by the several leases, and demanding that they forthwith be returned to the Machinery Company at Beverly, Massachusetts. It also gave a like notice to the Receiver.

The machinery was afterwards returned to the factory of the claimant at an expense of $81.60 for freight.

On March 9, 1918, a Special Master was appointed to pass upon claims against the defendant company; he allowed claims of the United Shoe Machinery Company as follows:

Actual repairs charges,	$1,012 71	
Return charges,	4,192 49	
Royalties and Rentals,	766 20	
Mdse. account,	322 82	
Actual freight, etc.,	81 60	
		$6,375 82
Less credits,		6 84
		$6,368 98

The agreed statement of facts under which the case is submitted states:

"All the account except the merchandise and freight paid on return of machinery is disputed.

"The repairs cost of which are given, were not simply those which were required by the machines that they might be in working order, nor those which were necessary, wear and tear excepted, but were such repairs as restored the machines to their original condition, by the replacing of all worn parts and restoring the machine and to all intents and purposes putting the respective machines in the same condition as they were when new.

"The return charges are in addition to these freight and repair items, and are claimed to be justified by the specific provision of the various leases, few of which contracts are precisely alike, in the clauses affecting the repairs and return charges."

REPAIR CHARGES.

This item is claimed under a certain clause contained in seven of the contracts in question, substantially in the following terms in each contract:

"Upon the expiration or termination of this agreement or any extension thereof or of the lease and license herein contained, the lessee shall forthwith deliver the leased machinery to the lessor at Beverly, Massachusetts, in good order, reasonable wear and tear alone excepted, and shall thereupon pay to the lessor without prejudice to any other rights or remedies of the lessor such sum as may be necessary to put the leased machinery in suitable order and condition to lease to another lessee."

Upon this item the master allowed actual repair charges of $1,012.71. We think that this amount was properly allowed. Counsel for the receiver contends that these items arose after the receivership and cannot be a claim against the funds in the hands of the receiver. The adoption of such a doctrine would limit altogether too narrowly the rights of creditors and the procedure in this class of cases. It is true that upon a strict construction of the language of the contracts, if a receiving order is made against the lessee, all leases terminate at the option of the lessor, and upon default by the lessee the lessor shall have the right by notice in writing to the lessee to terminate the contracts; yet the lack of any specific requirement of notice in the one case, or the termination by notice in writing in the other case, affords no ground for distinction in the provability of the repair charges. Some evidence of an election to exercise the option was required and that election the claimant made known by the notice of May 22, 1917, ten days after the bill was filed and three days after the appointment of the receiver. The notice speaks in the present, "said leases and licenses and all said rights and privileges *are* hereby terminated," but the liability to pay, upon termination of the leases, the sum necessary to put the machinery in condition to lease to another lessee, existed at the date the bill was filed. To

exclude from sharing in the assets this debt or liability, the amount of which was determined within the time fixed by the court for presentation of claims, is in our opinion inconsistent with the equitable principles upon which these proceedings should be conducted. It does not matter that the claim was perfected by the act of the claimant, if such must be considered to be the effect of the notice of May 22, 1917; some notice of the election of the lessor to exercise its option was required and was contemplated by the terms of the leases. *William Filene's Sons Company* v. *Weed et als., Receivers,* 245 U. S., 597, 602; 62 L. Ed., 497, 504. The form of the notice was appropriate to evidence an election. In re *Desnoyers Shoe Co.,* 227 Fed., 401, 405.

This bill is filed by a stockholder and officer, who is also a creditor of the defendant corporation, praying for its dissolution and for the equitable distribution of its assets. Jurisdiction in equity for that purpose is given by R. S., 1916, Chap. 81, Secs. 82-88. The statute does not state what claims shall be provable; it does not prescribe procedure further than to fix a minimum period within which claims shall be presented. The corporation may be dissolved; the receiver is to collect and receive all property and assets of the corporation, convert the same into cash, and from time to time distribute them. "The debts of the corporation shall be paid in full, when the funds are sufficient; when not, ratably to those creditors who prove their debts, as the law provides, or as the court directs," any balance is to be distributed among stockholders. (Section 88). The court has jurisdiction in equity of all proceedings, and may make such orders and decrees as equity may require. (Section 87).

It may be stated in a general way that in equity proceedings for winding up the affairs of a corporation and distributing its assets among its creditors, where there is no statute otherwise controlling, those creditors may share in the distribution of the fund, whose rights accrue while the fund is in the control of the court and within a time consistent with an expeditious settlement of the estate. *Pennsylvania Steel Co.* v. *New York City Ry. Co.,* 198 Fed., 721, 738-741. *N. Y. Security & Trust Co.* v. *Lombard Inv. Co.,* 73 Fed., 537. *Woodward Admr.* v. *Wise,* 112 Md., 35, in which it was held that the appointment of receivers for an insolvent corporation does not work its dissolution, in the absence of a judicial declaration to that effect;

nor does it determine the rights of any of the parties concerned. *People* v. *St. Nicholas Bank*, 101 N. Y., 592, distinguishing between a chancery receivership and an assignment for the benefit of creditors whose powers and duties are prescribed by that instrument, as in *Matter of Havener*, 144 N. Y., 271, cited by counsel for the receiver in the instant case. *Karkhoff* v. *Nelson*, 60 Minn., 284, which arose under a statute very similar to the one before us, holding that the procedure as to proof of claims is with the court, which may direct the manner in which claims may be proved, and that "all discussions of what claims may or may not be proved against the estate of an insolvent under bankrupt and insolvency laws, and decisions of courts in cases arising under such laws, are not relevant to the case." *Minneapolis Baseball Co.* v. *City Bank*, 74 Minn., 98. *Spader* v. *Mural Decoration Mfg. Co.*, 47 N. J., Eq., 18; in which it is said: "The receiver is bound in duty and clothed with power to reach out and take in every conceivable asset due or thereafter to accrue to the corporation. A complete collection of assets is contemplated, and a full and final distribution of them is made possible. Such being the situation, natural justice demands that those who suffer from breaches of contract should be included in the distribution, even though the breaches and consequent damages follow the insolvency." *Bolles* v. *Crescent Drug & Chemical Co.*, 53 N. J., Eq., 614. *McGraw* v. *Union Trust Co.*, 135 Mich., 609. *Smith* v. *Goodman*, 149 Ill., 75. *Wilder* v. *McDonald*, 63 Ohio St., 383. In re *Reading Iron Works*, 150 Pa. St., 369.

In the first two cases above cited the question of the provability of claims against the funds of a corporation in the hands of receivers, upon proceedings in equity not controlled by any statute, was exhaustively considered. In *Pennsylvania Steel Co.* v. *New York City Ry. Co.*, 198 Fed., 721, 739, the court says: "The real inquiry in getting at a basis for the distribution of an insolvent estate is whether the claims are reduced to dollars and cents. If they are so reduced or can be so reduced by the application of recognized principles they are entitled to share. If they are not, they cannot share. And this not at all for any reason affecting their merits nor strictly speaking because they are contingent, but because they are uncertain. So, without laying stress upon the question whether claims are (1) past due, (2) immature, or (3) contingent, the real way we should

divide them with respect to the question of provability is into these two classes: (1) Claims of which the worth or amount can be determined by recognized methods of computation at a time consistent with the expeditious settlement of estates.

"(2) Claims which are so uncertain that their worth cannot be so ascertained.

"The second class of claims cannot be proved. They may be highly meritorious, but they cannot share in the estate because their amounts cannot be ascertained.

"The first class of claims ought to be proved and share in the estate and this whether they are overdue accounts, immature notes, or claims for damages for breach of contract coinciding with or following the receivership. It is impossible to point to any equitable ground which would justify a court of equity in excluding the holders of any such claims from sharing in the estate of their debtor."

In the *Lombard Investment Co. Case,* (73 Fed., 537, 544) the court approved the report of a Special Master which formulated a similar rule, but which permitted creditors to prove claims which, although not matured and certain at the time of the appointment of the receivers, became such before *any order of distribution.* In the *New York City Ry. Case,* (198 Fed., 721, 741) the court pointed out that such procedure might give opportunity for uncertainty, delay and expense in reopening and recasting the orders of distribution. We quote again: "A narrower rule can be adopted which would obviate any difficulty in this regard and which would be simple, equitable and workable. It is this: Claims which when presented within the time limited by the court for their presentation, are certain or capable of being made certain by recognized methods of computation, should be allowed. Claims which are not then certain should be disallowed because they afford no basis for making dividends. But there is no equitable reason why claims which are certain when presented, and which are presented in time, should have been certain at some arbitrary anterior period."

These principles and rules of procedure commend themselves to our judgment, and sustain the ruling of the Master. They seem to have received the approval of the Supreme Court of the United States. *Filene's Sons Co.* v. *Weed et als., Receivers,* 245 U. S., 597, 62 L. Ed., 497, 504.

RETURN CHARGES.

These items are claimed to be a debt of Spinney-Maybury Company under the provisions of twelve contracts here under consideration. The master allowed on this claim $4,192.49. The provisions of these contracts relating to return charges vary somewhat, but they may be classified as follows:

(a) Five of these contracts are each entitled "Order and Temporary Loan Agreement" and each contains the following clause:

"Upon the termination of the lease of and license to use said machinery the licensee shall forthwith deliver the said machinery to the United Company at Beverly, Massachusetts, complete and in good order and condition (reasonable wear and tear alone excepted), and shall pay to the United Company the amount set opposite the name of each machine in said column "II," together with the cost at the regular prices established by the United Company therefor of replacing all broken or missing parts. Such payments shall in each case be made by the licensee to the United Company immediately upon such termination, excepting . . . ." (exception not material).

Under these contracts the Master allowed, according to the varying amounts fixed in the five contracts, the sum of $1,155. This must be regarded as properly provable under the rules and principles before set forth in relation to "Repair charges." These contracts do not provide for payment of the sums "necessary to put the leased machinery in suitable order and condition to lease to another lessee," and claim is not made therefor.

(b) The other seven contracts are each entitled "Lease and License Agreement," but vary somewhat in their terms.

Three contain the following clause which is made the basis for the claim for return charges:

"Upon the expiration or termination of this agreement, or any extension thereof, or of the lease and license hereby granted, the lessee, in addition to all other payments in this agreement provided for and without prejudice to any other rights or remedies of the lessor, shall pay to the lessor in respect to each welting or stitching or sewing machine hereby leased the sum of One Hundred and Fifty (150) Dollars as partial reimbursement to the lessor for deterioration of the leased machinery, expenses in connection with the installation thereof and instruction of operators."

The amount of the stipulated payment varies in each contract, the leased machines being of great variety; under these contracts and in accordance with the sums therein fixed the Master allowed the sum of $1,994.99. But these contracts all contain the "repair clause" and under that clause the claimant has made claim for and been allowed the sum of $841.32, as the sum "necessary to put the leased machinery in suitable order and condition to lease to another lessee." No claim is made that there has been any expense actually incurred by claimant in the installation of the machines or instruction of operators. The sums for which claim is made are expressed to be in "partial reimbursement to the lessor for deterioration of the leased machinery"; the agreed statement, however, shows that the repair charges allowed were for "such repairs as restored the machines to their original condition." We are, therefore, impelled to the conclusion that the sums now claimed under the three contracts in question were lump sums fixed large enough to cover any possible cost of repairs necessary to restore the machinery to its original condition, and must be regarded as penalties. The claimant, having proved the actual cost of restoring the machines to their original condition, cannot also prove for the sum estimated to cover deterioration.

(c) Upon the four remaining contracts the Master allowed return charges of $1,042.50. None of these contracts provide for payment of the sums "necessary to put the leased machinery in suitable order and condition to lease to another lessee," and claim is not made therefor.

They all contain clauses providing for the payment to the lessor of certain fixed sums upon the expiration or termination of the contracts, either, as stated, "without prejudice to any other rights or remedies of the lessor," or "independently of and in addition to all other payments herein provided for."

These contracts must be regarded as creating liabilities of the same class considered in paragraph (a), and properly provable for the same reason. The debtor corporation undertook to pay these fixed sums, and we see no reason for refusing to recognize the obligation.

ROYALTIES AND RENTALS.

All the contracts provide for the payment on the last day of each calendar month, of the rent or royalties accruing from the use of the

machines during the next preceding calendar month, in whatever way the royalty was determined, and likewise in case of a fixed rental; affecting the above provision in all contracts was a clause, substantially as follows: "provided, however, that in all cases when the lessee shall pay to the lessor on or before the fifteenth day of the calendar month the rent or royalty due for the use of the leased machinery for the next preceding calendar month the lessor will in consideration of such prompt payment grant a discount of fifty per cent. from such rent or royalty due for such preceding calendar month."

The creditor presented a claim for the full amount of the stipulated royalties and rentals, $766.20, and the Master allowed the same.

Counsel for the receiver contends that the liability for the royalty and rental items is only one half of the several amounts which the Master has allowed. His proposition is that the one hundred per cent. increase in the amount to be paid, if the rental is not paid by the middle of the month after it is earned, is a penalty and illegal.

The claimant insists that by clear and explicit language the contracts provide for a discount of fifty per cent. from the stipulated royalties and rentals for prompt payment anticipating the due date by not less than fifteen days, and that this case is no different, except perhaps in the amount of discount, from the usual discounts allowed in trade.

In support of this position reliance is placed upon two cases in the United States Circuit Court of Appeals, *United Shoe Machinery Co.* v. *Abbott*, 158 Fed., 762, and In re *Desnoyers Shoe Company*, 227 Fed., 16. In both cases cited the claimant here had proved its claims in the District Courts in Bankruptcy for the full amount, which in each case was reduced one half on the ground that the other fifty per cent. was an unlawful penalty. Upon appeal the judgments were reversed and the claims were allowed for the full amount, in the Abbott case by a divided court.

Goodyear Shoe Mach. Co. v. *Selz, Schwab & Co.*, 157 Ill., 186, is authority against the claimant's contention; if, as argued in Desnoyers's Case, there is any difference in the wording of the contracts under consideration in the two cases, that difference seems to us immaterial. The order in which the sums are stated does not change their character, or the legal effect of the instrument; for whether the amount to be paid is to be reduced upon compliance

with the terms of payment, or to be increased on a default, is only a different mode of expressing the same thing. *Longworth's Exrs.* v. *Askren et als.*, 15 Ohio St., 370, 375; *Seton* v. *Slade*, 7 Ves. Jr., 265, 273. Nor are the words "penalty," "forfeiture," "liquidated damages" or whatever other denomination may be given by the instrument, conclusive. *Dwinal* v. *Brown*, 54 Maine, 468. This rule seems to be generally recognized. See cases collected in 17 C. J., 938, Note 72. "All the cases on the subject agree that the mere language parties have used is to be legally molded into the form which their intent reveals." *May* v. *Crawford*, 142 Mo., 390; 44 S. W., 260. Thus although the contracts denominate the difference between the larger and the smaller sums as a discount, and have been phrased in terms appropriate to that denomination, the court is not precluded from seeking the intent of the parties to ascertain whether the smaller sum was in fact the actual debt, and the larger sum considered as a penalty. The question is one of construction of the contracts, and courts endeavor to learn the real intent of the parties to the contract, and if that can be ascertained, will be governed by it. *Burrill* v. *Daggett*, 77 Maine, 545. *Dwinal* v. *Brown*, 54 Maine, 468. *Jones* v. *Binford*, 74 Maine, 439. The language of the Massachusetts court in *Perkins* v. *Lyman*, 11 Mass., 76, 81 (1814) has been quoted and adopted by this court: "The question whether a sum of money mentioned in an agreement shall be considered as a penalty, and so subject to the chancery powers of this court or as damages liquidated by the parties, is always a question of construction, on which, as in other cases where a question of the meaning of the parties in a contract provable by a written instrument arises, the court may take some aid to themselves from circumstances extraneous to the writing. In order to determine upon the words used, there may be an inquiry into the subject matter of the contract, the situation of the parties, the usages to which they may be understood to refer, as well as other facts and circumstances of their conduct; although their words are to be taken as proved by the writing exclusively." *Burrill* v. *Daggett*, supra.

The opinion in *Desnoyers's Case*, supra, states: "While the intent of the parties determines what the actual debt is, and whether the larger amount includes a penalty, or the smaller amount is the result of a discount, that intent is to be found primarily from the language of the contract itself." And the court was very careful to say: "No

evidence of any kind has been introduced tending to show that the parties had in fact agreed upon the smaller amount as the actual rental, and that they, or the lessor, through some monopolistic power or otherwise, caused the real agreement to assume its present form for the purpose of concealing instead of expressing the mutual intent. In the absence of any such proof, the court would be substituting the contract that it thought the parties ought to have made for the one in fact made by them, if it held that to be a penalty which the parties, free to contract on any mutually agreeable terms, decided should be a true discount."

The question whether a stipulated sum is to be regarded as a penalty or not, usually arises where the written contract is for the doing of certain acts other than the payment of money, where the actual damages may, or may not be readily ascertainable, or wherein it is doubtful whether or not the parties intended to fix the amount of damages, in case of a breach, they being at liberty to do so.

But we think that the instant case more nearly falls within another class of cases, wherein the contracts are for the payment of money only, and the damages for failure to pay are fixed by law at legal interest. "If the instrument provides for the payment of a larger sum, on failure to pay a less one, the larger sum will be regarded as a penalty in respect to the excess over the legal interest, whatever be the language used. *Dwinal* v. *Brown*, supra; (an obvious typographical error occurs in this opinion; on Page 472, twenty-first line, "in future" should read "on failure"; the cases cited so show). *Mead* v. *Wheeler*, 13 N. H., 351. *Orr* v. *Churchill*, 1 H. Bl., 227. *Astley* v. *Weldon*, 2 Bos. & Pul., 346. *Longworth's Exrs.* v. *Askren et als.*, 15 Ohio St., 370. *Loudon* v. *Shelby Taxing Dist.*, 104 U. S., 771; 26 L. Ed., 923.

The older cases seem based upon the proposition that "the law, having by positive rules fixed the rate of interest, has bounded the measure of damages; otherwise the law might be eluded by the parties." Lord Loughborough in *Orr* v. *Churchill*, supra. But the rate of interest on a contract to pay money, other than loans secured by personal property, is a matter of contract in this State. R. S., Chap. 40, Sec. 41. We have, therefore, examined the facts of the case within the principles stated in *Burrill* v. *Daggett*, supra, with a view to ascertaining the actual intent of the parties, and are convinced that the actual rental to be paid by the lessee and collected

by the lessor is the smaller amount; that it was not the actual agreement that the lessee should pay the larger sum, and that the latter must be regarded as a penalty.

Upon examination of these seventeen contracts relating to fifty-eight machines, controlled by claimant, necessary for the equipment of a shoe factory, it is apparent that they have been drafted with much care and are designed to cover every possible contingency that could be foreseen, or that experience has disclosed. It is not too much to say that primarily they have obviously been drafted in the interest of the lessor; and to such an extent has this interest been paramount in the purpose of the draftsman that certain provisions, not, however, here material, have been found to violate the Clayton Act of October 15, 1914. *United Shoe Mach. Co.* v. *U. S.* , U. S., . Obviously the parties did not meet on equal terms; the parties were not "free to contract on any mutually agreeable terms." In these complicated contracts if any doubt exists, it must be solved against the lessor, construing the larger sum as a penalty. *Dwinal* v. *Brown*, 54 Maine, 468, 472. The form of the contracts was obviously dictated by the lessor and the lessee could only acquiesce if he desired to make use of these highly developed machines in operating a shoe factory.

The stated case shows clearly enough the nature of the actual contract in the minds of the lessor's officers and managers. The greater part of these contracts were made in June, 1914, a few in December, 1915. We quote from the agreed statement:

"By the books of the defendant company it was shown that the rentals and royalties had not been paid by the defendant company while in operation until after the 15th day of the month, the date on which payment, by the language of the lease, should be made to entitle them to settle for 50 per cent. of the royalty specified, and in many instances not paid until long after that date. On the books was uniformly credited the net amount. Payments of 50 per cent. of the stipulated royalty had always been received by the Machinery Company in full settlement for the royalty."

We are not prepared to believe that this course of dealing, whereby the claimant collected during a period of nearly three years only one half of the amount which its counsel now says was collectible under the contract, was due to generosity or a spirit of forbearance.

The stated case discloses further information as to the practice of the claimant in collecting its royalties and rentals. We again quote:

"Counsel for the claimant stated before the Master that it had not been generally the practice of the United Shoe Machinery Company to collect the full royalty charges if the lease went along in the ordinary course, even though payments were not made until after the time when, by the terms of the lease, the lessee would be entitled to the discount of 50 per cent., nor did the Company invariably exact the full amount of the so-called return charges on the expiration of the lease from a lessee whose dealings had been satisfactory, but adjustment was not infrequently made at a less amount."

This frank statement disclosed the exact attitude of the claimant; the words, "if the lease went along in its usual course," are significant; they unmistakably indicate that the smaller sum was the actual royalties and rentals to be paid. The purpose of framing this plan of an alleged fifty per cent. discount to be obtained by anticipating the due date fifteen days is made clear as an attempt to place the lessor, in case of liquidation proceedings against the lessee, in a position to double the amount of the rentals and royalties which the lessee was to pay and the lessor to accept, but which were unpaid.

In view of the equitable principles which govern the proof of claims in proceedings of this kind, and the manifest unjust advantage which the claimant would otherwise obtain over other creditors, we think that the larger sums stated in the contracts must be regarded as penalties, and the claim for royalties and rentals as allowed by the Master reduced one half.

The Master's report will therefore be modified by deducting from the amount allowed on the claim of United Shoe Machinery Company the sums of $1,994.99 and $383.10, fixing said claim at $3,990.89.

It appears from the record before us that there are no other questions to be determined prior to distribution of the assets and a final decree; the mandate will therefore be,

Decree to be entered accepting the Master's report as modified by this opinion; final decree to be entered upon report of receiver, and final distribution ordered.

LEWIS E. MILTON'S CASE.

Sagadahoc. Opinion April 13, 1923.

Both the date of beginning and end of the period of compensation must be definitely fixed by agreement or decree, under the Workmen's Compensation Act, to make effective the limitation, in section thirty-six, for filing petitions for review. When an agreement for compensation has been filed and approved within two years after the injury, the case is before the commission and there is no time limit for later filing a petition for determination of degree of present disability. The lack of opportunity to work included in the phrase "incapacity for work" is such as is due neither to claimant's own fault subsequent to the accident, nor to illness not connected with the accident, nor to general business depression.

Section thirty-six of The Workmen's Compensation Act, relating to review of decrees and agreements for compensation does not apply to petitions based upon agreements in which the period of compensation is not determined.

In fixing the time within which petitions for review shall be filed, section thirty-six contemplates that the period of compensation shall be definitely fixed by the agreement or by decree. Both the date of the beginning and the date of the end of the period of compensation must be definitely fixed.

Where an agreement for compensation does not fix the duration of the period of compensation and the Commissioner in approving the agreement adds to his approval the words "subject to review as provided by the Workmen's Compensation Act," the rights of the parties are not changed thereby.

When such an agreement for compensation has been filed and approved within two years after the occurrence of the injury, the limitation fixed in section thirty-nine is met; the case is before the commission and there is no time limit for later filing a petition for determination of the degree of present disability.

The matter being before the commission, a motion or petition may be filed at any time by any party in interest, upon failure of employer and employee to reach an agreement as to the degree of present disability and the compensation to be awarded therefor.

The petition in the instant case praying for a reduction of compensation is, therefore, properly before the court, although signed by the insurance carrier, who was not a party to the agreement for compensation.

The element of remunerative employment reasonably available to the claimant in his present condition is properly to be considered in determining the degree of present incapacity to labor.

The lack of opportunity to work included in the phrase "incapacity for work" is such as is due neither to claimant's own fault subsequent to the accident, nor to illness not connected with the accident, nor to general business depression.

If the lack of opportunity to work is due to general disinclination on the part of persons requiring help, to employ maimed or crippled men when sound men are available, after diligent effort of claimant to obtain employment, it is an element of claimant's loss of capacity to earn; but if the lack of opportunity to work is due to the fault of the claimant or to general business depression, it is not such an element.

The decision of the Chairman states that no evidence was offered of remunerative employment reasonably available to the claimant, which he can perform in his present crippled condition. The qualifications that such lack of remunerative employment was caused neither by unwillingness to labor on the part of the claimant, nor by general business depression, were apparently overlooked or disregarded; the case lacks such finding.

Compensation under the Maine Statute is awarded for loss of capacity to earn; not for incapacity to do the same kind of work as before the injury, but for incapacity to earn in the claimant's crippled physical condition, and this incapacity includes lack of opportunity to work not due to his own fault, or to general business depression.

On appeal. This is an appeal from a decree entered in accordance with the findings of the Chairman of the Industrial Accident Commission in ordering the respondent to continue payments of $15.00 per week to claimant under the Workmen's Compensation Act. The claimant was injured on October 16, 1920, while in the employ of Watson, Frye Company, Ltd. of Bath, resulting in a fracture of the right forearm above the wrist. By agreement duly approved, he had been paid compensation for total disability. On May 5, 1922, the employer and insurance company, filed a petition for a review, alleging that the incapacity had diminished, and asked that the compensation be diminished, which petition was denied and an appeal taken. Appeal sustained. Case recommitted to the Industrial Accident Commission to determine in accordance therewith, the compensation to which claimant is entitled.

The case is fully stated in the opinion.

Arthur J. Dunton, for claimant.

Robert Payson, for respondents.

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

MORRILL, J. This appeal under the Workmen's Compensation Act raises an important question of procedure which has not heretofore been presented for consideration.

On October 16, 1920, the claimant suffered a fracture of the right arm which resulted in the impairment of the usefulness of the arm and right hand; on October 22, 1920, the employer and employee made an agreement for compensation, approved by the Commissioner on October 26, 1920, by which the claimant was to receive fifteen dollars per week "during disability beginning October 26, 1920," being the amount of compensation for total disability under Section 14, as the statute then read; the insurer was not a party to the agreement. On May 3, 1922, the insurer filed a petition alleging that the injury for which the employee was compensated had diminished since the agreement was made, and praying "that compensation of the agreement as above set forth may be diminished, (and) for such further relief as may be properly granted the petitioner." The Chairman heard the case, denied the petition, and ordered compensation continued according to the terms of the agreement; from a decree entered in accordance with such decision this appeal is taken.

Throughout the proceedings the petition has been treated by parties and Chairman as a petition for review under Section 36, with the burden of proof on the insurer to show that claimant's incapacity had diminished.

If the petition is properly a petition for review under Section 36, the question is presented whether the petitioner has standing in court, not being a party to the compensation agreement. But we do not find it necessary to decide that question.

This petition cannot be properly regarded as a petition for review under Section 36. True, the commissioner approved the agreement for compensation with the qualification, "subject to review as provided by the Workmen's Compensation Act." This qualification, however, cannot change the rights of the parties; if the agreement is reviewable, it is because the law makes it so; if not made reviewable by the act, the endorsement of the Commissioner cannot make it so.

We think that the petition in this case must be considered as a petition for determination of extent of present incapacity, rather

than a petition for review within the meaning of Section 36, and that that section does not apply to petitions based upon decrees and agreements for compensation, like the agreement before us, where the period of compensation is not determined.

In fixing a time within which petitions for review shall be filed, Section 36 contemplates two indispensable prerequisites, viz.: that the agreement for compensation shall be approved, and that the period of compensation shall be definitely fixed by the agreement or by decree. Both the date of the beginning, and the date of the end of the period of compensation must be definitely fixed. The language of the section fairly so implies. In the present case the parties apparently could not know the duration of the disability. The agreement reads:

"Period of disability: From October 16, 1920 to"—The agreement was for compensation "at the rate of 15 dollars per week during disability beginning, Oct. 26, 1920," which, as we have seen was the rate for total disability.

The parties agreed as far as it was possible for them to do so; they could not know the duration of total or partial incapacity; they necessarily left the period of compensation open, limited only by the duration of disability and by the provisions of Sections 14 and 15. The total disability might continue for three years or more after the approval of the agreement. If the employer's remedy in such a case is by petition for review under Section 36, his petition may be barred by the limitation of that section before the period of disability has expired and before its duration can be known; such cannot be the intent of the law.

The parties commendably agreed as far as it was possible for them to do so, and filed their agreement for approval. Now they disagree as to the degree of present disability, and the insurer files a petition asking in effect to have that determined. The agreement having been filed, and in this case approved, within two years after the occurrence of the injury the limitation fixed in Section 39 is met; the case is before the commission, and there is no time limit for later filing a petition for determination of the degree of present disability, whether filed by claimant or employer. *Morin's Case,* 122 Maine, 338.

The result is, the matter being before the commission and under its control, a motion or petition may be filed at any time by any party

in interest, upon a failure of employer and employee to reach an agreement as to the degree of present disability, and the compensation to be awarded therefor.

It must be understood that we are not in any way discountenancing the use of agreements for compensation for undetermined periods. They avoid delay and operate beneficially for the injured employee, and their use should be encouraged. We are only concerned with the proper precedure to preserve the rights of the parties when the case has reached a stage where the parties can no longer agree.

The case must, however, be recommitted to the Industrial Accident Commission. The Chairman finds that "Mr. Milton is still entitled to compensation for total incapacity to work." He adds:

"As a result of the accident to Mr. Milton, Oct. 16, 1920, he has suffered an impairment to his right forearm and hand which prevents him from resuming his former occupation and seriously handicaps him in the performance of any other remunerative employment except such as can be performed by a man with one hand.

"No evidence was offered to show that there was reasonably available to Mr. Milton any remunerative employment which he can perform in his injured condition. Because of the crippled condition of Mr. Milton's right hand as a result of the accident, and because there was no evidence offered showing that there was reasonably available to Mr. Milton either with Watson, Frye Company, Ltd., his employer when injured, or with anyone else, remunerative employment which Mr. Milton can perform in his present crippled condition and because as a result of the accident to him, October 16, 1920, Mr. Milton is totally incapacitated to perform the kind of work being done by him when injured, the petition to order compensation diminished is denied."

The appellant argues that the Chairman has here erred as a matter of law in that his ruling is equivalent to holding that the burden is upon the employer to provide the claimant with remunerative employment. The element of remunerative employment, reasonably available to the claimant in his present condition, is properly to be considered. In *Ray's Case*, 122 Maine, 108, it is said, "The phrase 'incapacity for work,' appears in practically all Workmen's Compensation Statutes and has come to have a well settled meaning. It includes according to nearly all authorities not merely want of physical ability to work but lack of opportunity to work," due neither

to claimant's own fault subsequent to the accident, nor to illness not connected with the accident, nor to general business depression.

This statement is not equivalent to holding that in a case like the present, the employer has the burden of providing the claimant with remunerative employment; but it recognizes as proper for consideration evidence or lack of evidence of a condition by which the employee's incapacity, "his loss of capacity to earn" (*Thibeault's Case*, 119 Maine, 336) may be affected. In considering the element of lack of remunerative employment, the qualification that such lack of opportunity to work is not due to general business depression, is important; if the qualification is disregarded, the employer will be held to guarantee employment regardless of the condition of industry in a given locality.

We are not disposed to scan too closely the language of the Chairman in stating the reasons for his decision, and ought not to do so, only to attach the ordinary meaning to his words; upon examining this record, however, we are led to think that this qualification may not have been regarded by the Chairman in making his decision. He states that no evidence was offered of remunerative employment reasonably available to the claimant, which he can perform in his present crippled condition. The claimant was called as a witness and examined by counsel for the insurer. If the lack of opportunity to work is due to general disinclination on the part of persons requiring help, to employ maimed or crippled men when sound men are available, after diligent effort by claimant to obtain employment, it is an element of claimant's loss of capacity to earn; but if the lack of opportunity to work is due to the fault of the claimant or to general business depression, it is not such an element, *Ray's Case*, supra. That is a question of fact to be decided by the Chairman, not by the court on appeal.

The evidence was such as to require a finding that neither unwillingness to labor on the part of the claimant, nor general business depression, caused the lack of remunerative employment for the claimant in his present condition, before it could be said that no evidence was presented of reasonably available remunerative employment. The case lacks such finding; those qualifications were apparently overlooked or disregarded, and the statements of the Chairman are susceptible of the construction placed upon them by the counsel for appellants.

The Chairman also includes, among his reasons for denying the petition, the following: "Because as a result of the accident to him, October 16, 1920, Mr. Milton is totally incapacitated to perform the kind of work being done by him when injured."

The reason here stated is based upon a wrong standard for determining total or partial incapacity to work. Compensation under the Maine Statute is awarded for "loss of capacity to earn," *Thibeault's Case,* supra; not for incapacity to do the same kind of work as before the injury, but for incapacity to earn in his crippled physical condition; (*Connelly's Case,* 122 Maine, 289), and this incapacity includes, as before stated, lack of opportunity to work not due to his own fault, or to general business depression.

It is impossible to tell how far the reason last above quoted, based upon an erroneous conception of the law, entered into and influenced the Chairman's decision.

Appeal sustained.
Case recommitted to The Industrial Accident Commission to determine, in accordance herewith, the compensation to which claimant is entitled.

HARRY GUREWITZ *vs.* SAM WISE.

Androscoggin. Opinion April 13, 1923.

A confirmation of a composition under the Bankrupt Act releases the bankrupt from all provable debts scheduled in time for proof and allowance, or if not scheduled, if creditor has notice or actual knowledge of the proceedings in bankruptcy, in time to avail him of the benefits of the law.

Under the Bankrupt Act the confirmation of a composition discharges the bankrupt from his debts other than those agreed to be paid by the composition and those not affected by the discharge.

A discharge releases the bankrupt from all his provable debts—except such as have not been duly scheduled in time for proof and allowance—unless such creditor has notice or actual knowledge of the proceedings in bankruptcy.

Actual knowledge of the proceedings contemplated by this section is a knowledge in time to avail a creditor of the benefits of the law, in time to give him an equal opportunity with other creditors; not a knowledge that may come so late as to deprive him of participation in the administration of the affairs of the estate or to deprive him of dividends.

Plaintiff's actual knowledge in the case at bar came to him in ample season to protect his rights and to give him an equal opportunity with other creditors.

On exceptions. An action of assumpsit upon two promissory notes of one hundred dollars each, which the defendant had agreed to pay by a written contract. The plaintiff, Harry Gurewitz, and his brother, L. S. Gurewitz, were the joint makers of the notes. The defendant failed to pay the notes in accordance with the written contract, and the plaintiff finally was required to pay them, and brings this action to recover money paid to the use of defendant. The defense set up was composition in bankruptcy. Plaintiff contended that he did not have such actual knowledge of the bankruptcy proceedings as is required by the Bankrupt Act, and the presiding Justice ruled in favor of the plaintiff and defendant excepted. Exceptions overruled.

The case is fully stated in the opinion.

Pulsifer & Ludden, for plaintiff.

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

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

CORNISH, C. J. This is an action of assumpsit upon two promissory notes of $100 each made jointly by the plaintiff and his brother, but which the defendant by written contract had agreed to pay. The defendant failed to meet his obligation and the plaintiff, having paid the amount due, brought this action for money paid to the use of the defendant.

The defense is bankruptcy, to which the plaintiff replies that his claim was not barred thereby because he was not listed as a creditor and had no seasonable knowledge of the proceedings.

The dates are important. From the bill of exceptions it appears that the defendant's undertaking matured November 19, 1920. On January 25, 1921, an involuntary petition in bankruptcy was filed against the defendant. On January 26, 1921, he filed his schedules and the case was referred to the Referee pending the action of creditors upon the defendant's intended offer of composition before adjudication. Through inadvertence the plaintiff's name was not included in the list of creditors. On February 12, 1921, at a special meeting of the creditors held before the Referee the defendant made a composition offer of 25 per cent. At an adjourned meeting held on February 14, 1921, this offer was accepted in writing by a majority of the participating creditors in number and amount. On February 15, 1921, the defendant filed a petition for confirmation of the offer of composition upon which notice was ordered returnable February 26, 1921, and notices thereof were mailed to all scheduled creditors. On February 26, 1921, after full hearing, an order of confirmation was entered by the District Court, and distribution ordered.

The presiding Justice before whom the pending cause was tried without a jury, found as a fact that the plaintiff had actual knowledge of the bankruptcy proceedings on February 16, 1921, and as early as February 24, 1921 had actual knowledge that the defendant had made the composition offer and was then advised to file his proof of debt as declared upon in the writ and to participate in the composition settlement. These findings of fact by the presiding Justice are not reviewable.

It was the claim of the defendant that the plaintiff had actual and seasonable knowledge of the bankruptcy proceedings and that his debt was therefore barred. The presiding Justice held, however, that the plaintiff did not have such actual knowledge as is required by the United States Bankruptcy Laws in order for the plaintiff's debt to be barred, and rendered judgment for the plaintiff. The case is before this court on exceptions to this ruling.

The governing provisions of the Bankrupt Act are these: "The confirmation of a composition shall discharge the bankrupt from his debts, other than those agreed to be paid by the composition and those not affected by a discharge." Bankruptcy Act of 1898, Chap. 3, Sec. 14, Sub. C. U. S. Comp. St., Sec. 9598. What debts then are not affected by a discharge?

"A discharge in bankruptcy shall release a bankrupt from all his provable debts except such as . . . (3) have not been duly scheduled in time for proof and allowance . . . unless such creditor had notice or actual knowledge of the proceedings in bankruptcy." U. S. Comp. St., Sec. 9601. It is clear therefore that the plaintiff's claim is barred by the confirmation of the composition if he had such actual knowledge of the proceedings as the statute contemplates.

What is meant by the term actual knowledge, and at what point of time in the proceedings must the creditor be shown to have possessed it?

This has been defined by the Supreme Court of the United States in these words: "Actual knowledge of the proceedings contemplated by this section is a knowledge in time to avail a creditor of the benefits of the law—in time to give him an equal opportunity with other creditors—not a knowledge that may come so late as to deprive him of participation in the administration of the affairs of the estate or to deprive him of dividends." *Birkett* v. *Columbia Bank*, 195 U. S., 345, adopted in Collier on Bankruptcy, 12 Ed., 1921, Page 443; *Reynolds* v. *Whittemore*, 99 Maine, 111. The object of the mailed notices provided for in the Bankrupt Act is to protect the rights of creditors. If they have actual knowledge of the proceedings in time to do this, equal protection is afforded them.

Plaintiff's actual knowledge in the case at bar came to him in ample season to protect his rights. It is not necessary that he have knowledge at the very beginning of the proceedings, so that he may

vote for trustee and take part in every succeeding step. *Davis* v. *Findley*, 78 So., 869. "The fact that plaintiff did not have an opportunity to vote for a trustee would not alter the case for in considering the relative amount of plaintiff's claim as against the size of the estate and number of creditors his loss of the right to act in the selection of a trustee cannot be considered as a very material deprivation of any of his rights. He received notice in time to have participated in all the material proceedings and to have secured his proportional share of the estate." *Morrison* v. *Vaughn*, 18 A. B. R., 707, 104 N. Y., Supp., 109.

Applying the same reasoning to the pending case, we find that the offer of composition was accepted in writing by the requisite majority of the scheduled creditors on February 15, 1916. Twenty-five creditors out of thirty-three, with claims amounting to $6,153.17 out of a total of $8,258.17, joined in the written acceptance. Whether the plaintiff with his claim of $200.00 joined in that acceptance or not would have made no difference in the composition proceedings. They would have gone on to consummation just the same. He had actual knowledge of the bankruptcy proceedings on February 16, the next day after the written acceptance was filed. On February 24, he had actual knowledge of the composition offer and was advised to file his proof of debt and participate in the compromise settlement. That was two days before the hearing on confirmation in the District Court and therefore he had ample opportunity to take part therein and file objections if any he had, or he could file his proof and participate in the settlement. He could have secured his proportional share of the estate and his legal rights would have received the same protection as those of every other creditor. That is all the statute requires. He is entitled to nothing more, and having failed to act when he could, he cannot now be heard to contest the bankruptcy bar. *Fider* v. *Mannheim*, 78 Minn. 309; *Perry Naval Stores Co.* v. *Caswell*, 63 Fla., 552, 57 So., 660; *Armstrong* v. *Sweeney*, 73 Neb., 775, 103 N. W., 436.

This rule carries out both the letter and the spirit of the Bankruptcy Act, the equal distribution of assets among those entitled thereto.

Exceptions sustained.

STATE OF MAINE *vs.* JOSEPH L. DOW.

Cumberland. Opinion April 13, 1923.

Exceptions must be overruled unless the excepting party sustains the inevitable burden of showing that he was prejudiced by the ruling to which exceptions were taken.

In the instant case, an indictment for liquor nuisance, a witness for the State having testified to making purchases from respondent, was asked on cross-examination whether any threats or promises were made to him in the County Attorney's office prior to the trial, which was excluded and the respondent excepted.

The witness testified on direct examination to what he said was the full and complete conversation in the County Attorney's office and that contained neither threat nor promise. The fair inference therefore is that none was made and the exclusion may be deemed harmless.

Further, the defendant has not shown that he was prejudiced by the exclusion.

On exceptions. The respondent was found guilty on an indictment for a liquor nuisance. During the trial the presiding Justice excluded certain questions propounded to a witness on cross-examination, and respondent excepted, and also excepted to a refusal of the presiding Justice to give a requested instruction. 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.

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

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

CORNISH, C. J. Indictment against respondent for a liquor nuisance. Verdict guilty.

During the course of the trial a witness for the State testified that he had made purchases of cider vinegar from the respondent during

the period alleged in the indictment. On cross-examination this witness testified that he had had two conversations in the County Attorney's office the morning before the trial relative to the case. He was then asked by respondent's counsel whether or not any threats were made to him about the story he told there. This was excluded. He was then asked if any promises were made to him in the County Attorney's office if he would tell the story he had told in court. This also was excluded. To these two rulings exceptions were duly taken by the respondent and these are the only exceptions pressed before the Law Court.

They cannot be sustained, and for two reasons. In the first place the case shows that the witness testified as to the full conversation in the County Attorney s office on both occasions, stating that he told a full and complete story the first time he was there, and the second time just the same. The fair inference would seem to be that if the witness gave all the conversation that took place in the office and that conversation as stated contained no threat or promise, none was made. Therefore the exclusion of the direct question may well be deemed harmless.

In the second place and more effective is the reason that the respondent has not shown that he was prejudiced by the exclusion. The excepting party always has that burden. It is not enough to show that a technically admissible question was excluded, but he must go farther and show affirmatively that he was prejudiced by such exclusion. It must appear in the bill of exceptions or in the record that the answer would have been in the respondent's favor, otherwise no harm could have been done. Had this question been allowed by the presiding Justice and the witness had answered that neither threat nor promise was made, the respondent would gain no advantage. Quite the reverse. What the answers would have been in this case does not appear, and no one has a right to guess. There is not even a claim that they would have sustained the respondent's contention. He rests his whole argument on the exclusion of an admissible question, and stops there. That alone cannot be a ground for reversal.

Exceptions overruled.
Judgment for the State.

STATE OF MAINE *vs.* EMILE L. COTE.

York. Opinion April 13, 1923.

A licensee having accepted a license providing for suspension, without notice or hearing, is not deprived of any constitutional right if it is suspended in accordance with its own conditions.

A license to take lobsters having been granted under a statute providing in substance that the Director of Sea and Shore Fisheries may suspend the license whenever he has evidence that the licensee has violated the lobster law, such provision for suspension reads itself into and becomes a part of the license itself.

In the instant case the statute does not neither expressly or impliedly require notice and hearing as a condition precedent to such suspension.

On report. The respondent was found guilty in a Trial Justice Court of fishing for lobsters on November 22, 1921, after his license had been suspended on August 21, 1921, by the Director of Sea and Shore Fisheries, and an appeal to the Supreme Judicial Court was taken. Counsel for the respondent, contending that the statute authorizing a suspension of the license was unconstitutional and void because it violates Section 6 of Article I of the Constitution of the State of Maine, at the conclusion of the evidence, moved for a directed verdict of "not guilty," which motion was overruled, and respondent excepted. Counsel for respondent then moved that the court direct that the case be taken from the jury and go to the Law Court on report of the evidence, which was granted by agreement of the parties. Judgment for the State. Sentence to be imposed below.

The case is fully stated in the opinion.

Edward S. Titcomb, County Attorney, for the State.

John P. Deering and Arthur E. Sewall, for respondent.

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

DEASY, J. The respondent is accused of setting traps for lobsters after the suspension of his license. His defense is that his license was suspended without notice and hearing and therefore illegally.

The power of the director of sea and shore fisheries to grant licenses to take lobsters is contained in Act of 1921, Chapter 98. His authority to revoke or suspend licenses is derived from Section 4 of the same chapter.

With the revocation of licenses we are not concerned. Revocation is a consequence of conviction. The respondent has not been convicted. His license has been suspended, not revoked.

The statute says in effect that the license shall be suspended while a prosecution is pending and further provides that "The director of sea and shore fisheries in his discretion may before conviction suspend the license of any person, firm or corporation whenever he has evidence that such person has violated any of the laws relating to lobsters." The suspension in this case was by virtue of the above quoted clause. At the time of the suspension no formal complaint had been made.

The respondent's counsel challenge the validity of this statute. They invoke the constitutional guaranty that an accused person shall not "be deprived of life, liberty, property or privileges but by . . . . the law of the land."

They contend rightfully that notice and opportunity to be heard are of the very essence of "the law of the land" a phrase identical in meaning with the "due process of law" of the Federal Constitution.

They argue that by the terms of the act, if valid, a fisherman's license may be suspended and his property or privileges thus taken away without notice or opportunity to be heard. For this reason they contend that the act is unconstitutional.

But numerous authorities, some of which are below cited, hold that a license is not within the protection of the constitution. "A mere license by the state is always revocable." *Doyle* v. *Ins. Co.*, 94 U. S., 540, 24 L. Ed., 148.

"As a license lacks the essential elements of a vested right or property it may be revoked." 8 Cyc., 1124. See *Child* v. *Bemus*, (R. I.), 21 Atl., 539; *Board of Excise* v. *Barrie*, 34 N. Y., 667. *State* v. *Cooke*, 24 Minn., 247; *Wallace* v. *Reno*, (Nev.), 73 Pac., 528; *La Croix* v. *Co. Comrs.*, 50 Conn., 328; *Sprayberry* v. *Atlanta*, (Ga.), 13 S. E., 199. *Calder* v. *Kurby*, 5 Gray, 597; *Martin* v. *State*, (Neb.), 36 N. W., 557; *Portland* v. *Cook*, (Or.), 87 Pac., 772; *Dreyfus* v. *Montgomery*, (Ala.), 58 So., 730.

There are a few opposing authorities. But it can hardly be questioned that where as in this case the statute requiring the license provides for its revocation without notice or hearing, (a provision that is either expressly or impliedly a part of the license itself) a person accepting such a license cannot complain if it is terminated in accordance with its own conditions.

The licensee in such case is no more deprived of property or privileges than is the tenant whose lessor takes possession of the leasehold premises upon expiration, or forfeiture of the term.

"By accepting and acting under a license the licensee consents to all conditions imposed thereby including provisions for its revocation." *Stone* v. *Fritts,* (Ind.), 82 N. E., 794.

"When as here, the license is granted under an ordinance that gives or reserves the power (of revocation) it is to be regarded as subject to the power and terminable by its exercise." *Wallace* v. *Reno,* (Nev.), 73 Pac., 528.

"A licensee takes his license subject to such conditions as the legislature sees fit to impose, and one of the statutory conditions of this license, was that it might be revoked by the selectmen at their pleasure. Such a license is not a contract and a revocation of it does not deprive the defendant of any property immunity or privilege." *Commonwealth* v. *Kinsley,* 133 Mass., 578. See also *Schwuchow* v. *Chicago,* 68 Ill., 450; *State* v. *Schmitz,* (Iowa), 22 N. W., 673; *Ruggles* v. *State,* (Md.), 87 Atl., 1080. *McMillan* v. *Knoxville,* (Tenn.), 202 S. W., 67.

The respondent's license contained either expressly or impliedly (for the statute reads itself into the license) the provision for suspension herein above quoted. In effect the license provides that the director in his discretion may suspend it whenever he has evidence that the holder of it has violated the lobster law.

The cases cited by the respondent's counsel are clearly distinguishable. *State* v. *McElhinney,* (Mo.), 145 S. W., 1142 involved the disbarring of an attorney at law. An attorney is not a mere licensee. He is a court officer. To deprive him of his office without notice or hearing is to invade his constitutional rights.

Smith v. *Medical Examiners,* (Iowa), 117 N. W., 1116-1118. The appellant, a physician, by the terms of the very act under which his certificate was sought to be revoked, was held entitled to notice and opportunity to be heard.

People v. *Wilson*, 166 N. Y. S., 211 and *Balling* v. *Elizabeth*, (N. J.), 74 Atl., 277 are also called to our attention. In the New York case a majority of the court held, without extended opinion, that an act for the regulation of the milk business including the licensing of dealers is void as class legislation.

The New Jersey case holds not that the act providing for licensing innkeepers and revoking their licenses is unconstitutional in any part but that the act, impliedly at least, requires notice and hearing.

Nothing in any of these cases sustains the respondent's contention that a license confers such a vested right that it cannot be terminated in accordance with its own conditions.

But it is claimed that the Maine Statute does impliedly require notice and hearing as a condition precedent to suspension. The statute authorizes the director to suspend licenses "at his discretion" "whenever he has evidence." Act of 1921, Chap. 98, Sec. 4.

We do not think that the Legislature intended the words "after notice and hearing" to be read into the statute. If such had been the intention that or some similar phrase would have been inserted. To interpolate such a provision would be to legislate, and legislation is not one of the functions of the court. Whenever the law-making body intends that, the revocation or suspension of a license shall be after notice and hearing it says so in plain language.

See R. S., Chap. 45, Sec. 58 (Licenses to propagate clams). Act of 1919, Chap. 60, (Taxidermists). R. S., Chap. 18, Sec. 34, (Dentists). Act of 1919, Chap. 211, Sec. 15, (Operators of motor vehicles).

It is suggested that the words of the statute "before conviction" impliedly limit the right of suspension to the period of prosecution leading to conviction. But immediately before the clause above quoted providing that the director "may suspend &c whenever he has evidence" the statute says that "the license shall be suspended from the date of complaint or indictment until the final determination by the court." It is a fair presumption that the Legislature did not intend in one sentence to provide that there *may* be done the same thing that the next preceding sentence it had said *shall* be done. This would be to first shake the fist and then the finger.

We would not be understood as approving the suspending of licenses without prior notice and opportunity for hearing. Such a practice is liable to abuse and might lead to great injustice. In this

case, however, the director in suspending the respondent's license did not transcend constitutional or legal limits.

Judgment for the State.
Sentence to be imposed below.

IVA B. CUTTING et als., In Equity,

vs.

JOSEPH B. HASKELL et als.

Oxford. Opinion April 16, 1923.

Declarations made subsequent to the execution of a declaration of trust as bearing on the purpose and intention of the declarant are inadmissible. Beneficiaries under a trust instrument, after the trust ceases, and their contingent interest in the trust estate has ceased, cannot in their behalf have an accounting by the trustee.

In the instant case the declarations of Peter N. Haskell made by him after the transaction as tending to show his purpose and intention are inadmissible.

The Trustee was to hold for twenty years with the powers specified, for the possible benefit of the grandchildren.

At the expiration of twenty years the trust ceased and the trust property undisposed of passed to the children who were the "other heirs" in the mind of Peter N. Haskell. They are now the rightful owners.

The bill alleges an excessive cutting of timber by the Trustee and asks an accounting in behalf of the grandchildren. As their contingent interest in the property has ceased, no accounting in their behalf can be had. But to avoid delay, the cause may be remanded in order that a master be appointed and such an accounting had if the children move therefor. Otherwise final decree may be entered for conveyance by the trustee to the children.

On report. A bill in equity asking for the construction of a trust deed given December 29, 1901, by Peter N. Haskell of Waterford, to his son, Joseph B. Haskell, conveying certain real estate in trust for a term of twenty years, with a provision that should any grandchild of the said Peter N. Haskell during the continuance of the trust

"come to want or stand in absolute need of pecuniary aid" the trustee could dispose of such part of the premises as would enable him to render the assistance needed in accordance with his discretion, up to an amount for each grandchild not exceeding three hundred dollars, and with a further provision that "and on the fulfillment of this the residue is to be equally divided among the other heirs." The cause was heard upon bill, answers, replications, and proofs, and at the conclusion of presentation of the evidence, by agreement of the parties, the case was reported to the Law Court with certain stipulations as to costs. Cause remanded. Decree in accordance with opinion.

The case is fully stated in the opinion.

Frederick R. Dyer, for complainants.

Walter L. Gray, for Clementine B. Rolfe and Georgia A. Haggett.

Eugene F. Smith, for Joseph B. Haskell, Etta M. Towne, Effie Towne, Mabel Lorenz, Grace DeLos Haskell, Harland P. Haskell and Andrew Johnson Haskell.

J. Bennett Pike, for Bertella A. Flagg.

Benjamin L. Berman, for Lillian A. Millett.

E. A. Turner, for Arthur Patten.

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

CORNISH, C. J. Peter N. Haskell was a resident of Waterford, Maine, on December 29, 1901, and was the owner of several pieces of timber land in that town. He had other real estate including his dwelling, the homestead farm of one hundred and fifty acres, mill machinery, water privilege and also a certain amount of money. His legal heirs were his five children, Joseph B. Haskell, Clementine B. Rolfe, Georgia A. Haggett, Etta M. Towne and Andrew Johnson Haskell, all of whom are now living and are named as defendants in this bill. At that time he had eleven grandchildren, ten of whom are now living and are named in the bill either as plaintiffs or defendants. The eleventh grandchild is deceased and is survived by her husband also named as defendant. All the parties in interest are before the court in these proceedings in which the court is asked to construe a certain trust instrument and enforce the rights of the parties thereunder. The cause is on report.

On said December 29, 1901, Peter N. Haskell conveyed by warranty deed all his wild land to his son Joseph B. Haskell. Within a few days thereafter, and admittedly as a part of the same transaction, Joseph executed a declaration of trust of the following tenor:

"Now know ye that I the said Joseph B. Haskell do hereby declare that the aforesaid pieces & parcels of land aforesaid, & more fully described in the several deeds aforementioned were exclusively the lawful property of the aforesaid Peter N. Haskell, & that said deed was made to me the said Joseph B. Haskell only in trust for the benefit of the grandchildren of the said Peter N. Haskell, their heirs and assigns. That I and my heirs will stand and continue seized of said premises in trust for the grandchildren of the said Peter N. Haskell, & that neither I nor my heirs will grant, release or assign any part of said premises to any person except for the benefit of said grandchildren of said Peter N. Haskell by virtue of conditions hereafter mentioned. The said Trustee J. B. Haskell has power year by year to dispose of timber, the product of said premises sufficient to liquidate all taxes or incidental demands which may occur. If within the lapse of twenty years, the allotted time to which this Trust may be extended either or any number of the above named grandchildren of the said Peter N. Haskell should come to want or stand in absolute need of pecuniary aid the said Trustee shall have power to dispose of such part of said premises as to enable him to render the assistance needed in accordance with his discretion. The sum paid to each one not to exceed Three Hundred Dollars, & on fulfillment of this the residue to be equally divided among the other heirs."

This trust by its terms was to continue for the term of twenty years and therefore terminated on or about January 1, 1922. This bill was brought by and in behalf of the grandchildren who claim that the trustee should now convey the property to them, and against the children who also claim to own the same in fee simple.

This presents the issue, and the decision must depend upon the construction of the trust agreement itself, taking all its provisions together. It was drafted by an itinerant tinker, who was wont to attempt such work in the intervals between mending clocks and soldering tinware, and as might be expected it is somewhat inartificially expressed and yet we think its meaning is reasonably clear. Oral evidence was introduced under objection as to certain declarations made by Peter N. Haskell after this declaration of trust was

executed tending to show his intention and the purpose of the instrument. Such evidence was inadmissible and cannot be considered. *Barstow* v. *Tetlow*, 115 Maine, 96, 105; *Tibbetts* v. *Curtis*, 116 Maine, 336.

The will of Peter N. Haskell, dated October 24, 1900, a little more than a year before the trust agreement, was also introduced for the same purpose and was also inadmissible to prove intention.

What then is the fair interpretation of the trust agreement? We think it is this: That during the period of twenty years the trustee, Joseph B. Haskell, or his successor, should hold this wild land in trust for the benefit of the grandchildren, in case any of them during that time "should come to want or stand in absolute need of pecuniary aid." In such event the trustee was given power to dispose of such part of the premises as would enable him to render the assistance needed in accordance with his discretion, up to an amount for each one not exceeding three hundred dollars. Then follows the litigious clause "and on the fulfillment of this the residue is to be equally divided among the other heirs." What did he mean by "on the fulfillment of this" and by the "other heirs"? "On the fulfillment of this," means not on the payment of three hundred dollars to each grandchild, for there is no authority for such unconditional payment, but on the "fulfillment of this" trust agreement, the residue, that is the balance left in the hands of the trustee, after all the terms have been complied with and payments to needy grandchildren, if any, have been made, is to be equally divided among "the other heirs."

And who are meant by the "other heirs"? This must be other than the grandchildren themselves. To give it to them would be to give it to the same persons as were entitled to the limited stipend in case of need during the trust term. The "other heirs" in his mind must have been his children; strictly speaking, not heirs at that time but in the future his only heirs. In his plan he divided his descendants, or the scrivener did for him, into two classes of heirs, his grandchildren and his children. He evidently believed that these lots of wild land, which the evidence shows in 1901 were worth about $3,000, would materially increase in value, and he did not wish them disposed of unless absolutely necessary for a period of twenty years. During that time the trustee was to operate the land sufficiently to liquidate the taxes and incidental expenses. If any of

the grandchildren should fall into distress during that time the trustee could assist them up to $300 from the trust property. But the grandchildren were given no beneficial interest whatever unless they were in need. They were not to have $300 each at the expiration of the trust, nor any part of the corpus at that time. The agreement is designed for their conditional protection during the twenty years, but no longer. Their interest is conditioned upon their financial stress up to the $300 limit, and this financial stress is a condition precedent within the sound discretion of the trustee. Then at the expiration of the trust term, when all the grandchildren shall have reached majority, all the balance of the corpus belongs to the children, the parents of these grandchildren.

It is agreed that no payments have been made by the trustee to the grandchildren during these twenty years and that no part of the soil has been conveyed; so that the trust property remains intact, so far as acreage is concerned, and must now be conveyed to the children. They are the rightful owners.

The bill alleges that the trustee has cut an amount of timber from the premises far in excess of the quantity required to pay the taxes and other necessary expenses, and asks for an accounting, in behalf of the grandchildren.

As their contingent beneficial interest in the property has ceased, no accounting in their behalf can be had. The children in their answers do not ask for an accounting, but in order to avoid unnecessary litigation, as long as all the parties are before the court, the cause may properly be remanded in order that a master may be appointed and such an accounting had if the children, or any of them, move therefor, and the sitting Justice so orders. Otherwise final decree may be entered for conveyance by the trustee to the children.

Since the bill was evidently brought in good faith to determine the legal and equitable rights of all parties mentioned in the trust agreement, it is equitable that a single bill of costs for the plaintiffs and reasonable counsel fees for all solicitors in the case be allowed by the the sitting Justice and be paid from the trust property in such manner as the sitting Justice may determine.

Cause remanded.
Decree in accordance with this opinion.

WILLIAM W. CHURCH, Plaintiff in Review

vs.

CHARLES F. CHURCH et als., Admr's.

Somerset. Opinion April 16, 1923.

The burden of proof of payment of any particular obligation rests upon the party asserting such. Where there is but one obligation or transaction between the parties requiring payment of money, a strong and almost conclusive presumption arises, in case of a mere payment, that such payment was made on account of such single obligation, but if there are two or more such obligations or transactions, no such presumption arises.

At the January Term, 1919, of the Supreme Judicial Court for Somerset County, Charles F. Church and Isaiah F. Crowell, administrators of the estate of Eunice Church, obtained judgment against William W. Church in the sum of $1,822.92 and costs by default. Upon petition therefor by William W. Church a review was granted and this action of review is before the Law Court on agreed statement of facts.

Held:

1. That a trust agreement was entered into September 4, 1899, between William W. Church as trustee and his mother Eunice Church, whereby he agreed that the sum of $1,600 should be deposited in some savings bank or institution in Maine and all the annual net income thereof should be paid to said Eunice during her lifetime.
2. The original suit was brought to recover the amount of this income. In this action of review William W. Church pleaded payment and introduced checks amounting to $1,182, in proof thereof. The precise issue is whether these payments were made on account of this trust obligation.
3. The burden of proof of payment rested on William W. Church, and he must prove that this particular obligation was paid in whole or in part.
4. It is a well-settled rule that if it appears that there was only one obligation or transaction between the parties requiring the payment of money, then from the mere payment a strong and almost conclusive presumption would arise that it was made on account of that single obligation.
5. But if it appears that there were two or more such obligations or transactions no such presumption arises.

6. We find that at least three different transactions are disclosed, aside from the trust agreement, and therefore the mere fact of payment of money is not sufficient to prove it was in discharge of the trust obligation, with the exception of one check of $17.50 which distinctly states that it was interest on money in the Augusta Savings Bank, one of the depositories of the trust fund. No other payment on this obligation is proved.
7. Compounding the interest on $1,600.00 at four per cent. from the date of the agreement to the death of Eunice, August 23, 1917, and giving credit for $17.50, makes the interest $1,642.50. To this should be added interest at six per cent. from August 23, 1917.
8. The first judgment was paid by William W. Church. The judgment on review exceeds that original judgment. The amount of excess can be determined by the Clerk and for that excess, together with costs on review, these defendants in review are to have judgment. R. S., Chap. 94, Sec. 11.

On report. A writ of review of an action originally brought by Charles F. Church, guardian of Eunice Church against her son, William W. Church, which was prosecuted after her death by her administrators, Charles F. Church and Isaiah Crowell, defendants in this action, who obtained judgment against the said William W. Church, plaintiff in review, in the sum of $1,822.92 and costs by default. Upon a petition therefor by William W. Church a review was granted, and by agreement of the parties the case was reported to the Law Court for final determination upon an agreed statement of facts. Judgment for defendants on review, amount to be computed by the clerk in accordance with opinion.

The case is stated in the opinion.

Fellows & Fellows, for plaintiff.

Merrill & Merrill, for defendants.

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

CORNISH, C. J. At the January Term, 1919, of the Supreme Judicial Court for Somerset County, William W. Church was defaulted in an action of assumpsit brought against him by Charles F. Church guardian of Eunice Church, the mother of both Charles and William, at the September Term, 1917. Eunice Church died on August 23, 1917, a short time prior to the entry of the writ, and the action was prosecuted by her administrators Charles F. Church and Isaiah F. Crowell.

Judgment at said January Term, 1919, in the sum of $1,822.92 debt and damage and $36.41 costs was obtained by default and was paid by said William W. Church.

Upon petition therefor a review was granted and the cause is now before the Law Court on an agreed statement of facts. For the sake of brevity and convenience we shall speak of Mrs. Church, the plaintiff in the original action, as the plaintiff here although her administrators are defendants in this writ of review, and we shall speak of William W. Church, the original defendant, as the defendant here, although he is really the plaintiff in this writ of review. Thus we shall consider the cause as if tried on the original writ.

The situation is this. The original writ was an action for money had and received to recover the income of a certain trust fund of $1,600 held by William W. Church as trustee for the benefit of his mother, under a trust agreement dated September 4, 1899. From this agreement it appears that William Church, the husband of Eunice, died in 1897, leaving a will under which his widow was given a life interest in certain real estate, and at her decease it was to become the property of his eight children in equal shares. In 1899 the buildings on this land, together with their contents, were burned, and the insurance was adjusted on the basis of $1,600 for the loss on the buildings and $471.75 on the contents.

This trust agreement was then entered into by the widow and all the children, by the terms of which the widow was to receive forthwith the $471.75 less any expense connected with the insurance settlement, and the income for life from the $1,600, the language being as follows: "The $1600 shall be deposited by the said William W. Church in some savings bank or institution in the State of Maine to be named by the said Eunice Church to be kept on deposit by the said William W. Church in trust for the following purposes: First, all the annual net income therefrom shall be paid to the said Eunice Church during her lifetime; and, second, at her death the money shall be withdrawn by the said William W. Church and divided equally among the other parties to this agreement."

The $471.75 was duly paid over to the plaintiff and is not involved in this action. The controversy arises over the annual income from the $1,600 fund, which it is agreed was deposited in three banks, the Augusta Savings Bank, the Waterville Savings Bank and the Pittsfield Trust Company, and the income from which at four per cent.,

payable semi-annually, was received by William W. Church up to the time of the death of Eunice on August 23, 1917.

The original suit was brought to recover all this income. The defendant pleaded payment and introduced in evidence eighteen receipts and checks as proof of such payments.

It is agreed that the proceeds of sixteen of these, aggregating $980.50, were received by the plaintiff. The genuineness of the other two, aggregating $201.50, is left to the court to decide. Assuming these to be genuine the total amount of payments by the defendant to the plaintiff was $1,182. The precise issue before the court is whether these payments, or any of them, were made by the defendant under this trust agreement and on account of the income or dividends due to the plaintiff from the Savings Bank deposits. The defendant contends that they were; the plaintiff that they were not.

What is the situation as a matter of evidence? Where rests the burden of proof? The defendant having admitted the receipt of the corpus of the trust fund and of the income at four per cent. up to the time of the death of the beneficiary, and having set up the defense of payment of the income to the beneficiary, the burden of proving such payment rests upon him. He must prove the discharge of his legal obligations as trustee. The plaintiff contends that that burden is not satisfied by merely showing payments of money to the beneficiary at various times, but that the defendant must go further and prove by some affirmative evidence that the various payments were made upon this particular debt. The defendant insists that he has met the burden of proof by merely showing these payments. This raises a question of law somewhat novel in this State. We think the position of the plaintiff is the one logically tenable. The burden is on the defendant to prove that this particular obligation on which he is sued was paid. The rule based on reason and authority seems to be well settled that if it appears that there were two or more obligations or business dealings between the parties calling for the payment of money, then the mere payment is not sufficient to meet the burden of proving it was paid in discharge of a particular one. The evidence is not sufficient to warrant that inference. It goes a distance, but not the full distance. If, however, it appears that there was only one obligation or transaction between the parties requiring the payment of money, then from the mere payment of money a strong and almost conclusive presumption would naturally arise that it was made on

account of that single obligation. No other conclusion could well be reached. *Somervail* v. *Gillies*, 31 Wis., 152; *Galbraith* v. *Starks*, 117 Ky., 915, 79 S. W., 1191; *Smith's Appeal*, 52 Mich., 415, 18 N. W., 195; *Light* v. *Stevens*, 159 Calif., 288, 113 Pac., 659; *Hill* v. *Green*, 127 Ark., 406, 192 S. W., 209.

Let us apply this reasonable rule here. What does the case show as to the number of transactions or obligations existing between the parties? There is no positive statement on this point, but the question is answered by the terms of the offered receipts themselves. At least three different transactions involving money liability are disclosed.

First; the receipt of January 17, 1900, states: "Received of Wm. W. Church $30. thirty dollars interest on money let W. G. Morrill. (Signed) Eunice Church." This evidently refers to an outstanding loan to W. G. Morrill, which is the property of the plaintiff and the interest on which is being collected by the defendant and turned over to her, a transaction having no connection with the trust agreement.

Second; the receipt of July 6, 1903, reads: "Received of Wm. W. Church, one hundred and fifty-six dollars, $156., Fifty-six dollars interest and one hundred dollars princeable money." This can have no application to the trust agreement because under that the principal was to be kept intact and only the income paid over. This is obviously an independent obligation. Connected with that same independent obligation is the receipt of October 20, 1904, the next year, for "Fifty dollars interest and one hundred dollars princeable." This links itself with the preceding transaction because another installment of principal is paid and the accrued annual interest in 1904 is fifty dollars instead of fifty-six, six dollars less, because of the payment of one hundred dollars on the principal the year before.

Third; an undated but admitted receipt reads: "Received of Wm. W. Church $47., forty-seven dollars payed to me by Tom Gleason and Wm. Whealer for land sold to them by Wm. W. Church." Just what this refers to is a matter of conjecture. A fair inference might be that the son was acting as agent for the mother in the sale of some of her real estate. In any event it is entirely disconnected from the trust agreement and payments thereunder.

Three separate obligations beside the trust agreement, making four in all, being thus shown by the evidence, the burden devolved

upon the defendant to prove that the payments made by him were in discharge of this particular obligation.

This he has failed to do. All the remaining receipts and checks are silent as to the purpose for which they were given save one, that of August 1, 1900, for $17.50, which distinctly states that it was "interest on money in Augusta Savings Bank." This payment meets the requirement. None other does. Therefore the only credit to which the defendant has proved himself entitled is this payment of $17.50, and for the balance he must be held liable.

How shall that balance be reckoned? Under the agreed statement it is admitted that the defendant received dividends at the rate of four per cent. per annum, payable semi-annually, from the date of the trust agreement, September 4, 1899, to the death of the plaintiff, August 23, 1917. According to the custom of Savings Banks and Trust Companies such dividends undrawn are added to the principal and themselves draw interest. Had the books been made up at the date of the plaintiff's death with interest compounded at four per cent., giving credit for the $17.50 from the Augusta Savings Bank, August 1, 1900, the amount of accrued interest in addition to the principal of $1,600.00 would have been $1,642.50. It would seem that this is the fair basis on which to compute the defendant's liability. It charges him with what he was entitled to receive. 15 R. C. L., Page 39, Section 37. To this should be added interest at six per cent. from August 23, 1917.

This is the amount to which defendants in review are entitled if judgment were rendered without regard to the former judgment. "When the original plaintiff recovers on review as debt or damage a sum exceeding that recovered by the first judgment, he shall have judgment for the debt or damage recovered on review, or for so much thereof as remains unsatisfied and for costs on review." R. S., Chap. 94, Sec. 11. The first judgment was paid by the original defendant. This judgment on review exceeds that original judgment. The amount of excess can be determined by the Clerk and for that excess, together with costs on review, these defendants in review are to have judgment.

So ordered.

FIDELITY TRUST COMPANY, In Equity

vs.

FRANKLIN W. MCDOWELL et als.

Cumberland. Opinion April 16, 1923.

A devise or bequest in a will of a life estate in all the property of testator, after payment of certain legacies, and the right to use such part of the principal as may be necessary in case the income proves insufficient for the comfortable support of the devisee or legatee, embraces as a general rule the entire income of the property during the time it is so held unless a different intention clearly appears in the will.

In the instant case the devise and bequest to the widow consists of two parts; first, a life estate in all the testator's property after the payment of certain legacies; and second, the right to use such part of the principal as may be necessary in case the income prove insufficient for her comfortable support.

A person holding a life estate is entitled to the entire income of the property during the time it is so held unless a different intention clearly appears in the will.

The provision as to use of principal extends rather than limits the widow's rights.

The unexpended income, with all accrued interest thereon since the death of the widow, belongs to the administrator with the will annexed of the widow.

On report. A bill in equity seeking the construction of a paragraph in the will of Benjamin F. Woodbury, late of South Portland. Testator in the paragraph in question gave to the widow, Mary A. Woodbury, after the payment of certain legacies, the use and income of all his property during her life, and the right to use such part of the principal as might become necessary in the event the income should not be sufficient for her comfortable support, with a remainder over to certain relatives. At the decease of the widow there was an unexpended balance of income of $3,454.12. The question involved was as to whether this balance belonged to the estate of the widow or to the residuary legatees. The cause was heard before a single Justice upon bill, answers and replication, and, by agreement

of the parties, was reported to the Law Court. Ordered that the unexpended income with all accrued interest since the decease of the widow belongs to her estate. Bill sustained with costs. Decree in accordance with opinion.

The case is fully stated in the opinion.

John H. Pierce, for complainants.

Cook, Hutchinson & Pierce, Edward C. Reynolds and Courtenay Crocker, for respondents.

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

CORNISH, C. J. Bill in equity brought by an administrator with will annexed to obtain judicial construction of the following item in the will and codicil of Benjamin F. Woodbury, late of South Portland:

"All the rest, residue and remainder of my estate, real, personal or mixed of which I may die seized and possessed, or in which I may be in any way interested at my decease I give, devise and bequeath unto my wife Mary A. Woodbury, for and during the term of her natural life, with the right to the custody, use, possession and enjoyment of the whole of said estate and with the right of disposing of such part thereof as she from time to time may deem necessary for her comfortable support and maintenance.

At the decease of my said wife, or in the event of her decease before me I give and devise to my nieces, Carrie H. McDowell and Alice N. McDowell one half, and to my nephew Franklin W. McDowell one half of the Beach Point homestead and the land belonging therewith, ... All the rest, residue and remainder of my estate at said time, I give, devise and bequeath unto my nephews and nieces, viz.: George S. H. McDowell, Franklin W. McDowell, Carrie H. McDowell, and Alice N. McDowell . . ."

The testator died on November 27, 1917. The widow, Mary A. Woodbury, died on April 11, 1921, leaving a will which was duly probated and one William W. Grieves was appointed administrator with will annexed June 20, 1921.

The testator's estate amounted to about $47,000. The gross income during the time from the death of the testator to the death of the widow was $9,396.99. The amount paid to the widow and on her account during that time was $5,942.87, leaving an undistributed balance of income amounting to $3,454.12. The question propounded

to the court is whether this balance belongs to and shall be paid to the administrator of the widow's estate or to the residuary legatees. In our opinion it belongs to the administrator.

The devise and bequest to the widow consists of two parts; first, a life estate in all his property, after the payment of $500 in certain legacies enumerated in item one; and second, in case the income arising from the life estate were not sufficient, the right to dispose of and to use such part of the principal or corpus of the estate as the widow might deem necessary for her comfortable support and maintenance. His wife was the first object of the testator's solicitude and benefaction and he provided for her amply in this way.

It is a general rule that a person holding a life estate is entitled to the entire income of the property during the time it is so held, unless a different intention clearly appears from the will. Applying this general rule, Mrs. Woodbury was entitled to all the income of this estate during her life, and any balance of income remaining unexpended at the time of her death belonged to her estate, not to the residuary legatees and devisees. The death of the life tenant marked the dividing line between the two estates. Up to that time all the income belonged to the life tenant, whether expended or not. At that time the property, the corpus, passed to the residuary devisees and thenceforth the income was theirs.

Of course the testator if he had seen fit might effectually have provided that any unexpended balance of the life tenant's income should also pass with the corpus to the residuary devisees. But no such provision was made here. If, therefore, the will contained simply this provision as to life estate, there could be no question as to the party entitled to the unexpended balance. It would be the administrator of the widow's estate.

But the residuary devisees contend that the addition of the second provision as to the disposition and use of any part of the corpus by the widow if necessary for her comfortable support and maintenance so modifies and limits the first provision as to life estate as to restrict her use of the entire estate, under both provisions, to her actual expenditures during life, and gives the unexpended balance to the residuary devisees.

We cannot so construe it. The second provision extends rather than limits the widow's rights. As the holder of the life estate she is to have the income in any event. That is hers. Then if that is

inadequate she is to use so much of the principal as may be necessary. At her death all the unused principal passes to the residuary legatees, but the unused income passes to the estate of the widow. "All the rest, residue and remainder of my estate at that time, I give, devise and bequeath to my nephews and nieces" are the words of the residuary gift. It is the residue of his estate that then passes to them. But that does not attempt to carry and does not carry any residue of her estate. The unexpended income was her estate, the undisposed of corpus was his estate. This construction carries out the expressed intention of the testator and is in accordance with a leading precedent in this State. *Union Safe Deposit and Trust Company* v. *Dudley,* 104 Maine, 297.

Our answer to the interrogatory propounded therefore, is that the unexpended balance of $3,454.12, with all accrued interest thereon since the death of the widow, belongs to William W. Grieves as administrator with the will annexed of Mary A. Woodbury.

So ordered.

ROLAND W. MANN et al., Trustees in Equity

vs.

CAROLINE A. MANN et als.

Penobscot. Opinion April 20, 1923.

The court, under R. S., Chap. 73, Secs. 10 and 11, may, in an equitable proceeding, grant authority to the trustees of a trust created by will, to disregard the conditions of the trust, to best conserve the purpose of the testator in creating the trust, resulting from changed conditions.

Bill in equity brought by trustees under the will of Isaac M. Bragg to obtain authority to sell and convey a part or the whole of the real estate embraced in the trust and convert the proceeds into income-bearing securities.

Held:

1. That this court, under R. S., Chap. 73, Secs. 10 and 11, has the power to grant the request and has exercised it in other cases.

2. That because of the radical changes that have taken place in the property and in the surrounding conditions, the purpose of the testator in creating this trust will now be best conserved by granting the prayer of the trustees.
3. That the changed conditions as to the Wytopitlock wild land and the Bangor real estate now warrant their sale and the reinvestment of the proceeds in sound income-bearing securities, and authority therefor is hereby granted.

On report. A bill in equity brought by testamentary trustees seeking authority to sell and convey certain real estate embraced in a trust and invest the proceeds in good securities. A hearing was had upon bill, answers and proof, and at the conclusion of the evidence, by agreement of the parties, the case was reported to the Law Court. Bill sustained. Decree in accordance with opinion.

The case is stated in the opinion.

Howard M. Cook, for complainants.

Gillin & Gillin, for respondents.

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

CORNISH, C. J. Bill in equity brought by testamentary trustees to obtain authority to sell and convey a part or the whole of the real estate embraced in the trust and convert the proceeds into income-bearing securities.

Isaac M. Bragg of Bangor died in 1891 testate, leaving a widow, Augusta H. Bragg, and two daughters, Mrs. Caroline A. Mann and Mrs. Florence E. Buzzell. In his will he left all his property, both real and personal, in trust, and directed that the net income should be divided equally between his wife and his daughters. In case of the death of either daughter, leaving issue, the issue was to take the mother's share; but if without issue such daughter's share was to be divided between the mother and the surviving daughter. Upon the death of the mother the entire net income was to go to the daughters or the survivor of them and the issue, if any, of the deceased daughter, one half to each. Upon the decease of the mother and both daughters the trust was to cease and the estate pass to his legal heirs.

The thirty-two intervening years have wrought many changes. The original trustees were the wife and the grandson, Roland W. Mann. The wife died in 1902, and the daughter, Mrs. Buzzell, was

appointed co-trustee in her place. Mrs. Buzzell died without issue on January 20, 1922, and Edward H. Harden was appointed co-trustee with Roland W. Mann in her place, and they are the plaintiffs in this bill in equity. Caroline A. Mann the sole surviving beneficiary under the trust is eighty years of age, and entirely dependent on this income for her support. The real estate embraced in the trust has also undergone many changes owing to the altered conditions, and at present the net income is entirely disproportionate to the market value of the property. It is pitifully small. A part of the property consists of wild land in two townships, the estimated value of which is about $140,000. But owing to heavy cutting of the land in years past, the taxes, the loss through trespassers, or the enforced employment of a person to prevent trespassing, the income is small. The balance of the real estate is situated in Bangor and is valued at $50,000. The business conditions have so changed that the income from this property is far less than it was when Mr. Bragg died and the trust was created. In short the annual net income from the entire real estate is figured at $2,885 or a little more than one and one half per cent. on the total estimated value of the capital. These figures speak for themselves. The clause in the will which hampers the action of the trustees is this:

"While the trust lasts none of my real estate shall be sold or conveyed away, but the property be kept intact, the trustees to have power to sell stumpage from my timber lands and to rent other real estate to thus earn income for division as aforesaid. My trustees will keep the property well insured and in case of loss the insurance money to be expended in rebuilding or repairing, unless the trustees and other parties interested shall regard it more for the interest of the estate to sell the lot, in which case the proceeds of the sale and insurance shall be invested as capital, the income of which shall be divided as aforesaid, with other income from the estate, the trustees in such case being authorized hereby to make such conveyance."

From this restriction as to sale the trustees ask now to be relieved because of the radical changes in conditions since the testator died, and invoke the power of the court to grant authority to sell and convey the real estate, or such part as may be necessary, and reinvest the proceeds in income-bearing securities. This court clearly has this power under R. S., Chap. 73, Secs. 10 and 11, and has exercised it. *Elder* v. *Elder,* 50 Maine, 535. The object to be attained is to best

effectuate the purpose of the trust. The testator's object in the case at bar was to provide a suitable income for the beneficiaries, consistent with the proper conservation of the corpus. In case of fire in the insurable property the will itself gives the trustees the power to sell the lot and reinvest the proceeds from such sale and the insurance as capital. The changed conditions as to the Wytopitlock wild land and the Bangor real estate warrant now their sale and the reinvestment of the proceeds in sound and safe securities. The emergency contemplated by the testator has not arisen, but other emergencies not contemplated by him, and yet along the same general line, have arisen and the wise management of the trust estate now requires this sale and reinvestment both as to the Wytopitlock and Bangor properties. Such authority is hereby granted. If later it is deemed necessary to sell the timber land in No. 18, R. 12, authority can be given for that also on proper proceedings. The holding of this lot thus far has evidently increased the capital of the estate, as prices for wild land have increased rapidly during the past twenty years.

Bill sustained.
Decree in accordance with opinion.

ELMER L. HARLOW *vs.* CHESTER S. PULSIFER.

Androscoggin. Opinion April 21, 1923.

A person in possession of real estate under a contract of purchase has rights similar to those of a tenant, and trespass quare clausum fregit will lie for wrongful interfering with such possession, even if the interference is by the landlord. The general rule that equity having once acquired jurisdiction in any cause, or for any purpose, will determine all equities, is neither universal, unyielding nor infallible. An earlier judgment is an estoppel only as to matters determined in previous litigation.

While a person in possession of real estate under a contract of purchase, in some respects and for some purposes, is not a tenant, yet his rights are similar to those of a tenant.

The general doctrine that, when once equity acquires jurisdiction of a cause on any ground, or for any purpose, it will determine all equities of the suit, is neither universal, unyielding nor infallible.

Where a second action between the same parties is on a different claim or demand, an earlier judgment is an estoppel only as to those matters which were determined in the previous litigation.

Trespass quare clausum fregit is appropriate in form for damages for wrongfully interfering with a person's possession of realty, though the interference with possessory rights was by his landlord.

On exceptions. An action of trespass quare clausum fregit to recover damages for grass cut and removed by defendant from premises which the plaintiff had possession of under a contract of purchase.

By agreement of parties the action was heard by the court without a jury, the single Justice finding for the plaintiff in the sum of $225 and costs, and defendant excepted to certain rulings of the court on matters of law. Exceptions overruled.

The case is fully stated in the opinion.

Frank A. Morey, for plaintiff.

Pulsifer & Ludden, for defendant.

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

DUNN, J. Desiring to sell a farm he owned in Minot, the defendant caused it to be offered at auction on July 2, 1920, and the plaintiff became the successful bidder. The terms were, two hundred dollars down, the balance within seven days, unless the owner would put off the latter payment longer. He consented to a total delay of thirty days for the deferred part. Within that time the bidder tendered full payment and demanded a deed, but the owner refused to make the conveyance. The refusal continued until December when there was compliance with a decree for specific performance.

After receiving the deed, the plaintiff, as the grantee of that instrument, brought this action of trespass quare clausum, alleging, so far as essential to be recited, that, "on divers days and times during the month of August," his vendor entered the afterward conveyed premises, without the plaintiff's leave, and therefrom cut and carried away the grass.

The defendant interposed a brief statement advancing, (a) that he, and not the plaintiff, had had both title and possession of the premises till the December day when the deed was given; (b) that the judgment in equity for specific performance rendered this action res adjudicata since the bill carried an allegation, which the answer denied, that the defendant's refusal to deed made it "impossible for the plaintiff to cut the grass," followed by a prayer for resultant damages. Defendant reserved an exception to a refusal to nonsuit.

There is a general doctrine, to pass first to the second insistence, that when once equity acquires jurisdiction of a cause on any ground, or for any purpose, it will, on the same principle as that of avoiding a multiplicity of suits, draw into its consideration and determination all equities connected with the subject of the suit which the pleadings may authorize. Pom. Eq. Jur., Sec. 181; Story's Equity, Sec. 72; 21 C. J., 134; 10 R. C. L., 374; *Traip* v. *Gould*, 15 Maine, 82; *Nash* v. *Simpson*, 78 Maine, 142, 151; *Braman* v. *Foss*, 204 Mass., 404. This doctrine seemingly originates from the equitable jurisdiction for purposes of discovery. Not infrequently it is stated broadly and classified as valuable by courts and commentators. But it is neither universal, unyielding, nor infallible. It is permissive rather than peremptory. "It is not true, by any means, that when a court of conscience has acquired cognizance for one purpose, it

thereby acquires cognizance over the entire controversy for all purposes." *Lodor* v. *McGovern*, 48 N. J., Eq., 275, 27 A. S. R., 446. The application of the rule, again to quote the New Jersey court, "rests somewhat in the discretion of the chancellor." *Shaw* v. *Beaumont Co.*, 88 N. J., Eq., 333, 2 A. L. R., 122. See too, Story's Equity, Secs. 72, 73; *Freer* v. *Davis*, 52 W. Va., 1, 59 L. R. A., 556.

In the equity suit, the judgment in which the defendant invokes, the justice who heard it went no further than to enforce specific performance. Defendant points to that which he denominates as significant in the findings, namely, to this sentence, "that plaintiff did not enter into possession of the farm." The justice so said, but his words should be read in the light that the context throws upon them, in which it can be seen that his meaning was, that the plaintiff did not enter into possession of the farm within the thirty day period. Notice this excerpt from the findings: ". . . .; that the defendant at the request of plaintiff extended the time for payment of the balance for thirty days from day of sale; that within said period of thirty days the plaintiff tendered the balance of the purchase price and requested a conveyance, which defendant refused; that plaintiff did not enter into possession of the farm."

A prior domestic judgment constitutes an absolute bar concluding the parties and those in privity with them, with regard to every matter which was advanced to sustain or defeat the claim then made, and also as to every matter belonging to the subject which, under the pleadings, might have been brought forward, of right, at that time. *Buck* v. *Collins*, 69 Maine, 445; *Fuller* v. *Eastman*, 81 Maine, 284; *Rose* v. *Parker*, 116 Maine, 52; *Maddocks* v. *Gushee*, 120 Maine, 247. But where the second action between the same parties is on a different claim or demand, the earlier judgment is an estoppel only as to those matters which were determined in the previous litigation. *Smith* v. *Brunswick*, 80 Maine, 189. The sole question between the parties to this action which was considered and decided in the equity suit between them was that of specific performance. Touching this, as we have seen, it was stated that the plaintiff did not take possession of the property during the thirty days limited for final payment. The equity suit was not concerned with trespass. Let it be marked that the bill alleged that defendant's refusal to deed the land prevented the plaintiff from cutting the grass. Concerning this there was no decision. Again, the claims, without indulging in niceties of

words, were distinct. In the suit there was an assertion that, because of a refusal to convey the land to him, the plaintiff could not harvest the grass crop. In the action, an averment that the defendant had cut and taken away the grass, and that wrongfully. Besides, "divers days and times during the month of August" must have been, in part at least, in the absence of a different showing, after the thirty day period fixed for payment. Res adjudicata was unavailing.

Finding as facts, that the defendant, without the plaintiff's consent, after the tender and succeeding the thirty days, cut and carried away the grass while the plaintiff then had that possession of the property which, without opposition, he had both taken and afterward always retained, the justice hearing the trespass action, jury waived, ruled, as a matter of law:

"A person having a valid contract for the purchase of land who has done everything on his part required to be done to entitle him to an immediate conveyance and who without opposition has entered into possession of the property may maintain an action of trespass against another who cuts and takes away the grass growing upon the property, even though the person so cutting and taking away the grass is a person having the technical legal title which he has wrongfully refused to convey."

The plaintiff was in possession. To be sure he put himself into the occupancy of the farm, but the possession was lawful in inception and continuance as the trial judge found. Failure to purchase in accordance with the contract would have imported liability to pay for occupancy—a liability arising from a promise implied in such contingency. *Patterson* v. *Stoddard*, 47 Maine, 355. But there was no failure on the plaintiff's part. Nothing remained for him to do precedently to the right to a conveyance. He was in retention of possession pending completion of the legal title. When the deed was in fact given, the previous possession merged in the executed contract, and related back to the time that control of the property was taken. Plaintiff's possession, even before the deed, was sufficient to maintain trespass against him from whom he had contracted to buy. As to this point, *White* v. *Livingston*, 10 Cush. 259, decides that one in possession of land under a bond to convey is competent to maintain trespass against another to whom the owner deeded. The ground of the conclusion being that, in effect there was a demise so long as the purchaser was not in default, and that his tenancy was

not terminated by the conveyance to the other person. *Lapham* v. *Norton*, 71 Maine, 83, is authority for the statement that, while in possession of land under an unimpaired contract of purchase, a person is "in a certain sense a tenant at will." Chief Justice Wiswell made the situation certain when he said: "While a person in possession of real estate under a contract of purchase, in some respects and for some purposes, is not a tenant, yet, ... his rights are similar to those of a tenant." *Look* v. *Norton*, 94 Maine, 547. In Georgia, *Connally* v. *Hall*, 10 S. E., 738, it was held that a vendee in possession under a bond for title might sue for the destruction of his crops, caused by vendor's overflowing the land. The court said: "It is a well-settled principle of law that one may have the title to land, and another may have the right of possession and the actual possession; and, so long as this possession continues, any interference therewith, even by the person having the title, will give him who has the right of possession and actual possession a right of action therefor." Adapting language found in *Moshier* v. *Reding*, 3 Fairf., 478, whether this plaintiff be considered as lessee or not, he was so in possession of the premises that the defendant had no right to enter upon him at the time and in the manner that he did.

Trespass quare clausum fregit is an appropriate form of action for wrongfully interfering with a person's possession of realty, though the interference with possessory rights was by his landlord. *Moshier* v. *Reding*, before cited; *Bryant* v. *Sparrow*, 62 Maine, 546. The gist of the action is the improper entry. Whatever is done afterward is but an aggravation of damages.

The exceptions are without legal merit. Therefore they are

Overruled.

RALPH EMERY WILLIAMS'S CASE.

Oxford. Opinion April 21, 1923.

In industrial accident cases, findings by the Commission on questions of law are reviewable, but those of fact, if supported by any competent evidence, are final. The question of dependency is a mixed one of fact and law, but the extent of dependency is a question of fact.

Review in industrial accident cases is limited to questions of law. Findings of fact supported by competent evidence, whether the evidence be slim or ample, are closed.

Dependency is a mixed question of fact and law determinable "as the fact may have been at the time of the injury." The extent of dependency is a question of fact.

That this claimant only was a dependent on the earnings of the deceased employee, an unmarried and childless son of hers, was found from evidence of recognized probative value. The Commissioner's ruling of the law was errorless.

On appeal. A petition for compensation under the Workmen's Compensation Act, brought by the claimant, mother of one Ralph E. Williams, unmarried and childless, who died February 28, 1921, as a result of an accident arising out of and in the course of his employment which occurred on February 21, 1921, by coming in contact, while working on an electric light pole, with an emergency wire, which at the time was supposed to be dead, but instead was carrying 2300 volts. A hearing was had on the petition and the commission found that the petitioner was wholly dependent on the son, and awarded her compensation in the sum of $15 per week, commencing March 2, 1921, and continuing for a period not to exceed three hundred weeks from the date of the accident, the total sum so paid not to exceed $3500, and respondents appealed. Appeal dismissed with costs. Decree below affirmed.

The case is fully stated in the opinion.

Pulsifer & Ludden, for claimant.

Arthur L. Robinson and James A. Pulsifer, for respondents.

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

DUNN, J. In this industrial accident case the issue was, the dependency of the claimant upon the earnings of the deceased employee, an unmarried and childless son of hers, and, if dependent, the extent.

There was no evidence opposing that of the claimant and the four witnesses whom she called. Claimant was sixty-six years of age, a widow, infirm, and for property had only her savings amounting to fifty or seventy-five dollars. She and the decedent lived in different counties. After the death of her husband, which antedated the son's about four years, she lived at her brother's house; the employee having promised to pay for her support. The son's ability to make payment was limited to his earning capacity. Later the claimant did housework at different places for hire until, in her own words, "I got tired out and wished to stop," one year or more before the employee died. Then she came back to her brother's to board, where the son's promise was continuing. She paid one dollar a week for lodging in another house. The charge for board has not been paid. The son sent his mother money, but not regularly. "He gave me to understand," again to use her words, "I was not to want." When she needed money she called on him for it. Claimant added that she lived frugally because her son was defraying funeral and other charges of his father's. Plans were made, several months before the son's death, for the claimant to make her home with him. She was gathering her things together preparatory to removing there when she was told of the injury. She had deferred going to the son's on account of the illness of a niece. While the niece was in the hospital, claimant lent a helping hand in the house where she herself was boarding, without the expectation of and without receiving any pecuniary reward, the assistance which she rendered necessarily being slight. She attested positively that, for the seven months immediately preceding his death, she had been supported by the employee. This must mean, in the view of the full record, that she was wholly supported by him during that period. Other persons witnessed that she was so maintained.

The counsel who argued here was not in the case below. In his brief he pertinently observed that the record carries statements

which, if objection had been interposed, should have been excluded on the ground of inadmissibility. The record carries additionally, what perceptive quickness made him see, and that is, evidence of recognized probative value. *Mailman's Case*, 118 Maine, 172; *Larrabee's Case*, 120 Maine, 242.

The Chairman of the Industrial Accident Commission held, that the claimant only was a dependent upon the deceased employee's earnings and she wholly so. Compensation was awarded accordingly. Assigning a lack of supporting evidence the insurance carrier would upset the upholding decree. Review is limited to questions of law alone. *McDonald* v. *Pocahontas Co.*, 120 Maine, 52. Findings of fact supported by evidence are closed. Whether the evidence was slim or ample is not the question. Competent evidence was essential. But it is not for a reviewing court to say if the evidence was strong enough to justify the findings. *Hight* v. *Company*, 116 Maine, 81; *Simmons's Case*, 117 Maine, 175; *Westman's Case*, 118 Maine, 133; *Mailman's Case*, supra; *MacDonald* v. *Pocahontas Co.*, supra; *Gauthier's Case*, 120 Maine, 73; *Jacques's Case* 121 Maine, 353; *Orff's Case*, 122 Maine, 114. Massachusetts, having a like statutory provision, holds similarly. *Sponatski's Case*, 220 Mass., 526; *Pass's Case*, 232 Mass., 515; *Jakutis's Case*, 238 Mass., 308.

Dependency is a mixed question of fact and law. *MacDonald* v. *Pocahontas Co.*, supra. It always is determinable "as the fact may have been at the time of the injury." 1919 Laws, Chap. 238, Sec. 1, Par. 8. The extent of dependency is a question of fact. *MacDonald* v. *Pocahontas Co.*, supra; *Perotti's Case*, 233 Mass., 297.

At the time of his injury, the employee, who now is dead, in recognition of a moral if indeed not a legal bond of duty, was supporting his mother from his earnings, and she was entirely dependent upon such aid for her subsistence. The fifty or seventy-five dollars which claimant had is relatively so insignificant as to be a negligible factor in the inquiry of her total dependency. *Carter's Case*, 221 Mass., 105. In the case latest cited, Justice Loring says: "If the sum saved had been sufficient to constitute a means of support or a partial means of support, the existence of the savings would prevent a finding to that effect (entire dependency). But the income from the savings here in question is at the most $4 or $5 a

year, (it would be less in this case), and if the principal is used it would last so short a time that it cannot be taken to be a means of even partial support."

It remains but to say, that in the instant case the Chairman found facts from facts validly produced in evidence, and that there was no error in his ruling of the law.

Appeal dismissed with costs.
Decree below affirmed.

PAUL RADSKI

vs.

THE ANDROSCOGGIN & KENNEBEC RAILWAY COMPANY.

Kennebec. Opinion April 21, 1923.

A verdict for plaintiff not disturbed, all questions of fact involved being within the province of the jury, and the instructions of the court on the common law principles of negligence having been full and accurate.

This plaintiff's horse while escaped from his owner's barn and roving at large on a public way there came upon the tracks of the defendant's trolley line where he was struck by a car of the defendant and killed. No reason is perceived for over throwing the verdict.

On motion for a new trial. An action on the case to recover for the value of a horse belonging to plaintiff, alleged to have been killed through the negligence of the employees of defendant July 1, 1921. The cause was tried before a jury at the April Term, 1922, of the Superior Court in Kennebec County, and the jury returned a verdict for the plaintiff in the sum of $250. The defendant filed a general motion for a new trial. Motion overruled.

The case is fully stated in the opinion.

Benedict F. Maher, for plaintiff.

Andrews, Nelson & Gardiner, for defendant.

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

DUNN, J. Mr. Paul Radski's horse grazed in his owner's dooryard till after dark on a summer's night. Then Mr. Radski untethered the animal and put him into a stall, leaving the barn doors open and the beast untied while he himself went to fetch a pail of water. When he came back, perhaps five minutes later, the horse was gone. The owner started in search. In front of his house and extending in either direction in and along the highway were the rails of the defendant's trolley line. The horse was found a short way up the track, lying dying, a car having struck him.

Mr. Radski brought tort against the railway corporation for killing his horse. He recovered a verdict. The defendant has presented a general motion for a new trial.

The horse weighed fifteen hundred pounds or better and was no longer young. Plaintiff had had him for two years for working on his small farm and for driving to and from town in the winter seasons. He was safe and steady. Apparently the plaintiff in stabling the horse had left him unhitched at other times.

The time of the mishap was not far from ten o'clock. A little dampness and some fog were in the atmosphere after a rainy day. The rails were wet, and at the point where the accident occurred there was a slight up grade. From a curve in the track, around which the car came, the course was straight for a distance of at least three hundred feet. After it had struck the horse the car kept on going for ninety feet.

There was no direct evidence of any particular act of negligence. The plaintiff, urging the surrounding physical facts as evidential, insisted that those facts disclosed circumstances from which it was a reasonable inference that the defendant's fault was the thing without which the accident would not have been. That, when the defendant's motorman knew, or when by suitable watchfulness he ought to have known, of the presence of the horse in the zone of danger, he, by the exercise of requisite diligence, could have averted the accident, if his car had been running at an appropriate rate of speed.

Of the witnesses none but the motorman saw the collision. On his version the car was coasting, at from fifteen to twenty miles the hour, under the impetus gained on the down grade closely behind. He should have expected the headlight to have revealed the horse at

three hundred feet. He did not, however, see him until within about one hundred feet. Then, at once applying power, he reversed the motor,—than which he was powerless to do more,—to stop the car. But his effort was unavailing. The trolley was shaken from its wire by the impact of striking the horse. The motor was released from reverse, for the reason that the power had gone, and the emergency brake applied, yet the forty-five foot car ran for twice its length. The headlight showing obliquely as the car made the curve, an approaching automobile throwing the rays of its lights in the eyes of the motorman, the thickness of the night, the trees on both sides of the street, and the slipperiness of the track, all were proffered in an explanatory way.

Is the verdict manifestly wrong? Evidence of the defendant's negligence may have been slight. But is it to be said that the jury palpably and grossly erred with regard to the nature and force of the evidence, or that the inferences drawn therefrom were contrary to reason and common sense?

Assuming as a postulate that the defendant was negligent, was there such a failure by the plaintiff to exercise ordinary care to avoid injury to his property, as to make the continuing consequences of his own negligence, in concurrence with the defendant's negligence, the proximate cause of the horse's death? Certainly, as a matter of law, considered in a broad aspect, it is not negligence to leave a stalled horse untied for a space of time of short duration. It might or might not be in fact, the proof in each case determining.

If, to recur to the defendant's part, it was negligent, was such negligence the immediate cause of the final result?

All these questions of fact, together with that of damages which is not now pressed, were within the jury's province. Even the defendant tacitly concedes that the judge's instructions were full and accurate. The situation, let it be marked, was not that of an animal of value straying to and upon a railroad's privately owned location, but that of a horse which had escaped from his owner's barn and was roving at large on a public way. Common law principles of negligence were ruling. *Briggs* v. *Ice Company*, 112 Maine, 344; *Dyer* v. *Mudgett*, 118 Maine, 267.

In the administration of human disputes the law aims only at approximate conclusions—at practical and efficient justice. No reason is perceived for disturbing the verdict.

Motion overruled.

STATE OF MAINE *vs.* WALTER C. MAHONEY.

Waldo. Opinion April 23, 1923.

In an indictment "felonious assault" being an offense at common law and having a fixed and accepted meaning independent of statute, is sufficient in and of itself. It is unnecessary to allege all the elements recited in the statute, as they are implied in the word "assault" at common law.

In the instant case the respondent claims that an indictment merely charging the felonious making of an assault, without going into the details and reciting the elements of the crime, is insufficient, and cites as illustrations the supposed case of indictments for larceny, embezzlement, perjury, adultery or obtaining goods by false pretenses, which simply name the offense charged.

With the respondent's contentions on these illustrations the counsel for the State agrees, but urges that in the case of an assault, which is an offense at common law and has a fixed and accepted meaning independent of statute, the charge of a felonious assault is sufficient in and of itself.

The word assault at common law contains and implies all the elements recited in the statute defining the crime of assault and it was not necessary to allege them in this indictment. It would constitute redundancy, harmless but not essential.

On exceptions by respondent. At the September Term, 1922, of the Supreme Judicial Court in the County of Waldo, the respondent was indicted, tried and found guilty of an assault on one Elizabeth Palson, and counsel for respondent filed a motion in arrest of judgment on the ground of insufficiency of the indictment, which motion was overruled, and exceptions taken, and sentence was imposed. Exceptions overruled. Judgment for the State.

The case is fully stated in the opinion.

Ralph I. Morse, for the State.

Daniel I. Gould and Clinton C. Stevens, for the respondent.

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

CORNISH, C. J. The respondent stands convicted of an assault after trial before a jury. After conviction he moved in arrest of

judgment because of alleged insufficiency of the indictment which was in these terms: "That Walter C. Mahoney of Northport in said County of Waldo at Northport in said County of Waldo, on the thirteenth day of August in the year of our Lord one thousand nine hundred and twenty-two, on one Elizabeth Palson feloniously did make an assault against the peace of the State" &c.

The objections set forth in the respondent's exceptions to the overruling of the motion are fourfold.

1. Because the indictment does not contain any statement as to the nature of the acts or attempted acts, which the respondent is charged with committing.

2. Because the indictment does not set forth the manner in which the acts were committed.

3. Because "the indictment does not clearly, substantially and definitely set forth any actions, intentions or ability by or on the part of said respondent, nor any charge against him."

4. Because the indictment does not charge any offense against the laws of the State.

In brief the respondent claims that an indictment merely charging the felonious making of an assault, without going into the details and reciting the elements of the crime, is insufficient, and cites as illustrations the supposed case of indictments for larceny, embezzlement, perjury, adultery or obtaining goods by false pretenses, which simply name the offense charged.

With the respondent's contentions on these illustrations the counsel for the State agrees, but urges that in the case of an assault, which is an offense at common law and has a fixed and accepted meaning independent of statute, the charge of a felonious assault is sufficient in and of itself.

True, the Legislature has defined the crime of assault and provided the penalty therefor as follows: "Whoever unlawfully attempts to strike, hit, touch, or do any violence to another, however small, in a wanton, wilful, angry or insulting manner, having an intention and existing ability to do some violence to such person is guilty of an assault." R. S., Chap. 120, Sec. 26.

But the word assault at common law contains and implies all those elements and it was unnecessary to allege them in this indictment. It would constitute redundancy, harmless but not essential.

In *State* v. *Creighton*, 98 Maine, 424, the indictment alleged that

"the respondent in and upon one Brinton H. Penwarden. . . . . an assault did make and him the said Penwarden &c. did then and there beat, wound and illtreat and other wrongs to the said Penwarden then and there did" &c.

The respondent demurred on the ground that the indictment did not describe the act as done in a "wanton, wilful, angry or insulting manner, having an intention and existing ability to do some violence," these being the statutory words defining an assault, the precise point raised here. The court overruled the demurrer in these emphatic words: "The words omitted are not necessary to the validity of an indictment. They are all implied in the word 'assault.' The statute is merely declaratory of the common law. It adds nothing to the common law definition of assault and requires no additional allegation in an indictment."

Other authorities to the same effect are:

"With regard to the making of an assault the indictment or information is usually regarded as sufficient which alleges merely that defendant made an assault." Corpus Juris, Vol. 5, Page 764, Section 277.

"It is enough if the indictment charge an assault of the defendant on the prosecutor." Wharton's Crim. Law, Vol. 2, Section 834.

"It seems that most authorities favor the view that assaults may be charged in general terms, that is without specifying the means by which the assault is made." *State* v. *Clayton*, 100 Mo., 516, overruling prior decisions contra.

If the respondent's contention is sound, then in cases of assault with intent to kill, assault with intent to rape, and similar crimes, the statutory words defining assault must be set forth in detail; but it is common and, so far as we know, uniform practice in this State to allege simply an assault coupled with the intent.

An indictment must state in plain and concise language every element of the crime with which it is intended to charge the respondent, but it need go no further. The indictment here meets that requirement and must be sustained.

Exceptions overruled.
Judgment for the State.

ETTA M. BARNES *vs.* DIRIGO MUTUAL FIRE INSURANCE COMPANY

and

SAME *vs.* NARRAGANSETT MUTUAL FIRE INSURANCE COMPANY.

Lincoln. Opinion April 27, 1923.

A warranty by construction in an insurance policy cannot lawfully be declared to include anything not fairly within its terms. A policy with doubtful meaning should be construed most favorably to the insured, if such construction is a reasonable one and would prevent injustice, where a literal construction would result in manifest injustice.

These are two actions of assumpsit on two policies of fire insurance issued severally by the defendants. The cases are reported to this court.

To constitute a warranty during the term of the risk, requires more words than the insurers have used. We are asked to extend the meaning of the words "now personally and continuously occupied" and declare a warranty by construction. This cannot lawfully be done. A warranty cannot include anything not fairly within its terms.

A standard insurance policy being prepared by the insurers should be construed when the meaning is doubtful most favorably to the insured, who had nothing to do with the preparation thereof. A liberal construction of an insurance policy, if it is a reasonable one and will prevent injustice, should be adopted when a literal construction would lead to manifest injustice.

If it was intended by the insurers to insert words in the rider which should avoid the policy if the plaintiff did not continuously occupy the premises until the expiration of the risk by limitation, such intention is not apparent from the record.

On report on an agreed statement. The plaintiff owned a farm and certain personal property thereon in Wiscasset, Maine. On August 22, 1917, she procured two policies of insurance on the personal property, one in the Dirigo Mutual Fire Insurance Company for $2,000, and the other in the Narragansett Mutual Fire Insurance Company for $1,100. On June 1, 1919, the plaintiff leased the farm to one Dodge, who thereupon took possession of the same and the plaintiff removed therefrom. Each of the two policies had attached

to it a rider or slip as follows: "If the dwelling is not now personally and continuously occupied by the assured, or becomes vacant by his removal therefrom, and so remains vacant for more than ten days without a written permit, then this policy shall be void." On January 9, 1920, the buildings on the premises and the personal property insured were both damaged or destroyed by fire. At no time were the premises vacant. It was agreed that in the event the defendants were liable, the Dirigo should pay $1,369.72, and the Narragansett $964.28, and interest from March 22, 1920. By agreement of the parties upon an agreed statement the cases were reported to the Law Court. Judgment for the plaintiff in both cases.

The cases are fully stated in the opinion.

Arthur S. Littlefield and Carl M. P. Larrabee, for plaintiff.

William H. Newell and W. J. Knowlton, for defendants.

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

HANSON, J. These are two actions of assumpsit on two policies of fire insurance issued severally by the defendants. The cases are reported to this court upon the following agreed facts:—

Each of the defendants insured the plaintiff under the Maine Standard Policy issued August 22, 1917, for three years against fire, the Narragansett $1,000, on neat stock not to exceed $75 on each; the Dirigo $1,100, on neat stock not to exceed $75 on each, $100 on vehicles, and $800 on horses not to exceed $200 on each.

At the time of the insurance the premises were occupied by the assured and her husband and continued so to be until about June 1, 1919, when they were leased to Henry M. Dodge who before that lived near by and did the work about the place and barn of the plaintiff.

The plaintiff left there to be cared for by Dodge the personal property for which compensation is claimed and also some household furniture.

Dodge brought there his own furniture and several head of stock which were also lost in the fire without insurance.

While the premises were under lease to Dodge on January 9, 1920, the buildings with their contents were totally destroyed by fire.

It is agreed that the plaintiff lost insured property for which, if liable, the defendant Narragansett Mutual Fire Insurance Co. should pay $964.28 with interest from March 22, 1920, and the Dirigo Mutual Fire Insurance Co. $1,360.72 with interest from the same date.

The defendants contend that they are not liable because of the provisions of a rider attached to the policies, the first paragraph of which reads "If the dwelling is not now personally and continuously occupied by assured, or becomes vacant by his removal, and so remains vacant for more than ten days without a written or printed assent of the company, this policy shall be void."

If this contention is correct and constitutes a defense judgment is to be for the defendant, otherwise for the plaintiff.

The full policy need not be printed but may be used by either party.

Five of the neat stock were kept by Dodge and the plaintiff paid him therefor, the balance of the neat stock and the vehicles, harnesses and robes were leased with the premises to Dodge, all owned by the plaintiff. Lost twenty-six cows, one bull and one horse (being kept for the plaintiff) and the vehicles, etc.

The defendants' counsel in his brief claims that these two policies were void for the reason, 1. "that the plaintiff did not *personally* and *continuously* occupy the premises from the issuance of the policies to the date of the fire, in accordance with the terms of the rider attached thereto."

2. "because the understanding agreement and warranty between this plaintiff and these defendants was that she, the plaintiff, was then occupying the buildings and that she would occupy them personally and continuously during the times for which these policies were issued, or that the policies should be void."

3. "that such conclusion is the only tenable interpretation of the insurance contract between the parties."

This contention we are not able to sustain. The rider does not contain language from which such conclusion can fairly be drawn. Considered as a whole, it leaves no doubt as to the intention of its author. Provision is made for, and a limitation fixed in case of, a vacancy,—a limitation of ten days, as against that of thirty days as in the body of the policy. The latter provision would never have been made had the parties agreed that the plaintiff and none other should occupy the premises during the terms of the policies. The true interpretation of the rider is that the buildings should be occupied

continuously by the owner or some other person, and that a vacancy for more than ten days would invalidate the policy. The language used in the first sentence, "if the dwelling is not now personally and continuously occupied by the assured," must be held to be words of description, and not a warranty that the plaintiff would remain in the buildings during the continuance of the policy. Now "personally and continuously occupied" describes the use to which the property had been subject, its use at the date of the policy and its prospective use, which in fact continued its then (now) use for more than a year thereafter. The owner had been so occupying, was then occupying, and intended to occupy the property indefinitely, but evidently changed her intention, as she had the right to do, and in contemplation of just such happening, the defendants attached the rider providing for a vacancy for not more than ten days under a stipulation for forfeiture. See *Joyce* v. *Marine Insurance Co.*, 45 Maine, 168; *Stout* v. *City Fire Ins. Co.*, 79 Am. Dec., 539. If the parties intended to agree to any other forfeiture, it would have been an easy matter to have so stipulated, and avoid the ambiguity and uncertainty of the language actually used, which the defendants now urge as a continuing warranty of personal occupancy by the plaintiff to the end of the term. To so hold in the instant case would work manifest injustice, against which courts have hitherto pronounced. To constitute a warranty during the term of the risk, requires more words than the insurers have used. We are asked to extend the meaning of the words "now personally and continuously occupied" and declare a warranty by construction. This cannot lawfully be done. A warranty cannot include anything not fairly within its terms. *Blood* v. *Howard Insurance Co.*, 12 Cush., 472. In *Burlington Ins. Co.* v. *Brockway*, 138 Ill., 644, a building represented as occupied as a storehouse and dwelling-house, with a provision against vacancy, was held not avoided by its occupancy only as a storehouse, as the warranty related only to its use when insured, and express words are necessary for a continuing warranty. If property be denominated as the house occupied by a particular person, this is at most a warranty that it is, and not that it shall continue to be, so occupied. May on Insurance, Sec. 247; *Liverpool &c. Insurance Co.* v. *McGuire*, 52 Miss., 227; *Burlington Ins. Co.* v. *Brockway*, 138 Ill., 644. In *Catlin* v. *Springfield Insurance Company*, 1 Summ., 435, Federal Cases No. 2, 522, the insurance was "on a dwelling house in Vermont,

owned by Hayden & Hobart of Burlington and at present occupied by one Joel Rogers as a dwelling house, but to be occupied hereafter as a tavern and privileged as such." The ground of defense was that the building was insured to be occupied; that when burnt it had been a long time vacant, often deserted, derelict, and was destroyed by foul means, and that had the house been occupied as insured, the loss could not have occurred from the cause which destroyed it. It was held that the words in the policy did not constitute a warranty that the house should, during the continuance of the risk, be constantly occupied as a tavern, and that the risk continued although it was vacant.

See *Cumberland Valley Mut. Protection Co.* v. *Douglass*, 58 Pa., 419, 98 Am. Dec., 298; May on Insurance, Vol. 1, Page 501; 19 Cyc., 687; *Kimball* v. *Aetna Ins. Co.*, 9 Allen, 540; *Garnwell* v. *Merchants &c. Fire Ins. Co.*, 12 Cush., 167; *Foy* v. *Aetna Ins. Co.*, 3 Allen, 29; *Somerset Co. Mutual Fire Ins. Co.* v. *Usaw*, 112 Pa. St., 80. A standard insurance policy being prepared by the insurers should be construed when the meaning is doubtful, most favorably to the insured, who had nothing to do with the preparation thereof. *Matthews* v. *American Central Ins. Co.*, 154 N. Y., 449, 39 L. R. A., 433; *Rickerson* v. *Hartford Ins. Co.*, 149 N. Y., 307, 313. A liberal construction of an insurance policy, if it is a reasonable one and will prevent injustice, should be adopted when a literal construction would lead to manifest injustice. Idem.

Without the rider the policy in suit provided for vacancy by removal of the "owner or occupant,"—clearly contemplating occupancy by a possible tenant, as well as by the owner. The terms are plain, and a violation of the same releases the insurer from liability. "The standard policy by its terms is declared void if the premises become vacant by the removal of the owner or occupant, and so remain for more than thirty days without the assent of the company, in writing, or in print, irrespective of the question whether such vacancy materially increases the risk or not." *Knowlton* v. *Patrons Androscoggin Fire Ins. Co.*, 100 Maine, 481. But the dwelling-house never became vacant. It was occupied by a tenant as a place of abode at the time of the fire. The tenant moved in when the plaintiff moved out. For a dwelling-house to be occupied within the meaning of such condition, it must be occupied by human beings as their customary place of abode. *Herrman* v. *Adriatic Fire Ins. Co.*, 85 N. Y., 162.

No rule, in the interpretation of a policy, is more fully established, or more imperative and controlling, than that which declares that, in all cases, it must be liberally construed in favor of the insured, so as not to defeat without a plain necessity his claim to indemnity, which, in making the insurance, it was his object to secure. When the words are, without violence, susceptible of two interpretations that which will sustain his claim and cover the loss must, in preference, be adopted. While courts will extend all reasonable protection to insurers, by allowing them to hedge themselves about by conditions intended to guard against fraud, carelessness, want of interest, and the like, they will nevertheless enforce the salutary rule of construction, that as the language of the condition is theirs, and it is therefore in their power to provide for every proper case, it is to be construed most favorably to the insured. May on Insurance, Sec. 175, Note 1. The same author, by way of illustration, says: "Thus, if a stipulation be ambiguous, and no light can be thrown upon it in accordance with the received principles of law, from extrinsic evidence, the doubt is to be resolved against the party by whom and in whose favor the stipulation is made. Idem. The object of the contract being to afford indemnity, it will be so construed in case of doubt, as to support rather than to defeat the indemnity provided for. 19 Cyc., 657, and cases cited.

If it was intended by the insurers to insert words in the rider which should avoid the policy if the plaintiff did not continuously occupy the premises until the expiration of the risk by limitation, such intention is not apparent from the record.

The entry will be,

Judgment for the plaintiff in both cases.

AMOS S. SPILLER'S CASE.

Cumberland. Opinion April 27, 1923.

Under the Workmen's Compensation Act the findings of the Commission on questions of fact in absence of fraud, drawing inferences natural and more consistent with proved or admitted facts than is any other theory, are final.

This case shows that the illness from which the claimant suffered followed a heavy cold contracted about the date of the injury claimed, and that for several days thereafter the claimant continued in his employment and was then confined to his house. He later made a claim against an insurance company for sick benefits, being in the meantime treated for sciatica, until in May, or later an X-ray expert pronounced the illness due to injury.

There was testimony introduced by the plaintiff for the purpose of locating an injury at the time and place alleged, "arising out of and in the course of his employment," testimony conflicting and inconsistent with the claim set up by the petitioner.

With such condition and the questions of fact involved therein the law charges the Commission to deal. It was the duty of the Commission to weigh the testimony and to pass upon the credibility of the same. In the absence of fraud such findings by the Commission are final. "The Court will review the Commissioner's reasoning, but will not, in absence of fraud, review his findings as to the credibility and weight of testimony."

On appeal. The claimant in his petition for compensation under the Workmen's Compensation Act alleged that while in the employ of the Dana Warp Mills at Westbrook, Maine, as a beamer, in removing from its frame and placing it on a truck to be wheeled away, a beam wound full of yarn weighing about four hundred pounds, he received an injury to his back. Compensation was denied and an appeal taken. Appeal dismissed. Decree affirmed.

The case is fully stated in the opinion.

William Lyons, for petitioner.

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

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

HANSON, J. This is an appeal by the claimant from a decision of the Chairman of the Industrial Accident Commission denying compensation.

In his petition, filed with the Commission on the second day of August, 1922, the claimant alleged,—

First, that on the second day of March, 1922, while working on a beamer in the employ of the Dana Warp Mills at Westbrook, I received a personal injury by accident arising out of and in the course of my employment.

Second, said accident happened as follows: I was taking out a beam out of my frame.

Third, which resulted in an injury as follows: And when I stepped back my back gave way and I had to drop the beam on the track.

To the question on the petition, "Did employer have notice in writing of the accident," he answered, No; and to the following question,—"Did the employer have knowledge of the injury," he answered, No.

The respondents in their answer denied liability on the grounds,

1. That the petitioner did not suffer injury as claimed.

2. That he failed to give notice of an accident to the respondents within the statutory period.

3. That the disability suffered by petitioner is not due to a personal injury received while in the employ of the respondents.

4. That the petitioner has made a claim for and accepted money consideration from a company other than the respondent, in settlement of a disability due to illness.

5. That the illness for which this settlement was made is the same disability for which this petitioner now seeks compensation as a result of accident.

The issues raised by the petition and answer were clearly issues of fact.

After a full hearing the Commission denied compensation for the following reasons:

"First, failure to give the employer a notice in writing of the alleged accident, as required by statute, the employer having no knowledge of any injury due to any accident.

Second, failure to establish by the weight of the evidence the fact that the petitioner sustained a personal injury by accident arising out of and in the course of his employment as alleged.

A careful examination of the record discloses that the finding of the Commission is amply supported by the evidence. As to notice in writing required by Section 17 of the Act (Chapter 238 of the Public Laws, 1919) "that no proceedings for compensation for an injury under this act shall be maintained unless notice of the accident shall have been given to the employer within thirty days after the happening thereof," it was admitted that no such notice was given. The Commission further found as a fact that failure to give notice was not due to "accident, mistake or unforeseen cause." Sec. 20 of Chap. 238, Public Laws, 1919.

The case shows that the illness from which the claimant suffered followed a heavy cold contracted about the date of the injury claimed, that for several days thereafter the claimant continued in his employment and was then confined to his house. He later made a claim against an insurance company for sick benefits, being in the meantime treated for sciatica, until in May, or later, an X-ray expert pronounced the illness due to injury.

There was testimony introduced by the plaintiff for the purpose of locating an injury at the time and place alleged, "arising out of and in the course of his employment," testimony conflicting and inconsistent with the claim set up by the petitioner.

With such condition and the questions of fact involved therein the law charges the Commission to deal. It was the duty of the Commission to weigh the testimony and to pass upon the credibility of the same. In the absence of fraud such findings by the Commission are final. "The Court will review the Commissioner's reasoning, but will not, in the absence of fraud, review his findings as to the credibility and weight of testimony." *Mailman's Case,* 118 Maine, 172.

Appeal dismissed.
Decree affirmed.

COOPER BROTHERS COMPANY, In Review *vs.* HENRY H. PUTNAM.

Washington. Opinion April 27, 1923.

A new corporation, whose incorporators include with others the stockholders of a corporation which had ceased to do business, taking the assets of the old corporation, but not assuming its debts, is not liable for a debt of the old corporation in an action at law, in absence of a new contract to pay such debt. The assests of the old corporation taken by the new corporation may be followed in equity by a creditor of the former.

In the instant case the plaintiff in review is not liable for the debt of Cooper Brothers sued for by Mr. Putnam. We think the case is well within the rule that if the stockholders of a corporation which has ceased to do business, together with others, form a new corporation which takes the assets of the old corporation, but does not assume to pay its debts, the creditor of the old corporation cannot maintain an action at law against the new corporation unless the latter has made a new contract to pay his debt.

2. Where a new corporation is formed, the creditors of the old corporation do not, without something further being done, become creditors of the corporation. . . . They have an equitable right to follow the assets of the old corporation; but they cannot maintain an action against the new corporation, for there is no privity of contract. To render the new corporation liable there must be a new contract made, such as will amount to a novation.

3. There was no question as to the solvency of either partnership. Neither was there question as to the right of Mr. Putnam to follow the assets of the partnership, or bring suit against the surviving partner. Neither course was adopted. He relied upon his supposed legal right to bring an action at law against the new corporation. In so doing he erred. The new corporation had made no promise to pay the claim, and had done no act nor authorized an act from which such promise to pay could legally be implied. Withholding a check given by the partnership for three years, and failing to cash the same, with no claim made against the new corporation until just before the claim would be barred by limitation, are the chief facts in a series of events which forbid an inference, or the implication, that the plaintiff in review is liable as a contracting party, or that it can be held liable under the testimony in this case.

On report. An action in review. The original action was brought in Washington County at the October Term, 1919, in the Supreme

Judicial Court, defaulted, judgment entered and execution issued against the defendant in the original action, the plaintiff in review. On March 25, 1913, Alexander Cooper and Freeman Cooper were engaged in business at Newport, Maine, as partners, under the firm name of Cooper Brothers, and purchased of defendant in review 22,837 feet of hardwood at $25.00 per thousand. On receipt of the lumber Cooper Brothers contended that it was not such lumber as they had bought. They did not, however, reject it, but kept it and on December 18, 1913, sent to defendant in review a check for $128.52. On April 14, 1914, the corporation, the plaintiff in review, was organized by Percy L. Oakes, who had been a partner with the Cooper Brothers in another company, and those interested in the partnership, Cooper Brothers, principally, which new corporation, plaintiff in review, purchased the assets of the two partnerships, and assumed certain liabilities of such partnerships. On December 12, 1918, defendant in review wrote plaintiff in review asking for a settlement and the bringing of the original action followed. At the conclusion of the testimony, by agreement, the case was reported to the Law Court. Judgment for the plaintiff in review.

The case is fully stated in the opinion.

Clinton C. Stevens, for plaintiff in review.

R. J. McGarrigle and H. J. Dudley, for defendant in review.

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

HANSON, J. This is an action in review and is before the court on report.

On March 25th, 1913, there were engaged in business at Newport, Maine, two copartnerships. One consisted of Freeman Cooper and Alexander Cooper, who were doing business under the firm name and style of "Cooper Brothers," manufacturing veneering. The other copartnership was doing business under the name of "Newport Box and Novelty Company," engaged in manufacturing wood turnings and novelties. It consisted of the two Coopers, named above, and Percy L. Oakes of the same Newport. The two partnerships used in common certain offices and manufacturing facilities, and Mr. Oakes, who was in the active management of the Box and Novelty Company, did occasional work for Cooper Brothers.

On the above date a car-load of hard wood lumber was sold by Henry H. Putnam of Danforth to Cooper Brothers. It was ordered by Freeman Cooper of Cooper Brothers. It appears that the quality of the car-load was objected to, on its arrival at Newport, and that there was included a lot of ash lumber which had not been ordered, and which could not be used by Cooper Brothers. After a conversation by telephone with Mr. Putnam's Danforth office, Cooper Brothers disposed of the lumber, and on the 18th of December, 1913, sent Mr. Putnam a check for $128.52, which check Mr. Putnam received and retained. Mr. Putnam did not again mention the subject until on December 18th, 1916, three years afterward, when by a letter addressed to "Cooper Brothers," he asked for settlement. Shortly after the shipment of the car-load of lumber and the sending of the check of $128.52, Mr. Freeman Cooper, one of the firm of Cooper Brothers, died. On April 9th, 1914, about four months after sending the last mentioned check, the heirs and next of kin of Freeman Cooper, Alexander Cooper, surviving partner with him in Cooper Brothers, and Percy L. Oakes, who had been partner with the Coopers in the Newport Box and Novelty Company, organized the defendant corporation. It appears that one Arline Cooper, widow of Freeman Cooper's son, was also an incorporator. The latter had no previous interest or ownership in either copartnership. On April 13, 1915, Mr. Putnam wrote to Cooper Brothers Company, the defendant, to sell the ash lumber and get out of it what it could, and send him the proceeds. This it did, and later sent him a check for $15.00 for the same, which he received and retained.

On December 12th, 1918, five years after Cooper Brothers had sent the check for $128.52, Mr. Putnam again wrote to Cooper Brothers, asking for a settlement. And after that, and just before the six years from the time of shipment, a suit was brought by Mr. Putnam against Cooper Brothers Company, the plaintiff, and not against his original debtors, Cooper Brothers, the partnership.

The writ in the original action was entered at the October Term of court, 1919, at Machias, when the plaintiff in review was defaulted and judgment rendered against it; upon which judgment execution was issued.

A petition was presented to the court on February 13, 1920, by Cooper Brothers Company, asking for a writ of review, which was granted, and the writ issued returnable at the October Term, 1920.

Hearing was had at the May Term, 1921, at Calais, and by agreement of the parties the case was reported.

The plaintiff purchased the assets of the two partnerships, and so far as the evidence discloses assumed certain liabilities represented by notes of one of the partnerships, which when due were renewed by the plaintiff in its own name. No other liability of either copartnership was assumed by the plaintiff, nor is it claimed by the defendant that any promise was made by the plaintiff to pay the amount sued for by Mr. Putnam.

Defendant's counsel does insist, however, "that the new corporation, having taken over all the property of the partnership, the said corporation became liable for the debts of the partnership by implication, and because it has succeeded to the liabilities of the partnership by doing so, the rights of the firm's creditors followed the partners and the property into the corporation and the latter was bound to discharge the debt of the partnership upon the theory that it had received the property, on which the firm had received credit, and that in equity and good conscience it should pay the firm's debts."

Is Cooper Brothers Company, the plaintiff in review, liable for the debts of Cooper Brothers?

Upon a careful examination of the testimony we are of opinion that the case is not within the purview of the cases cited by the defendant to sustain the contention that "when it is shown that the new corporation is in reality a mere continuance of the old one, the creditors of the old corporation may maintain an action at law against the new corporation," as in *Douglass Printing Co.* v. *Ober*, 69 Neb., 320, 95 N. W., 656; or for the purpose of continuing a business of a partnership, and the parties remain the same, as in *Andras* v. *Morgan*, 62 Ohio, 236, 78 Am. St. Rep., 712; *Baker Furniture Co.* v. *Hall*, 76 Neb., 78, 90 How., 280; *Hall* v. *Herter Bros.*, 157 N. Y., 694; affirming *Hall* v. *Herter Bros.*, 90 Hun., 280. *Reed* v. *First Nat. Bank*, 46 Neb., 168.

In the instant case one of the constituent copartnerships was not a party to the original contract, and at no time assumed liability thereunder. In addition the parties in interest are not the same, inasmuch as one of the stockholders of the new corporation was not a partner or interested in either copartnership. We therefore hold that the plaintiff in review is not liable for the debt of Cooper Brothers sued for as above by Mr. Putnam. We think the case is well within

the rule adhered to in the following cases holding, that "If the stockholders of a corporation which has ceased to do business, together with others, form a new corporation which takes the assets of the old corporation, but does not assume to pay its debts, the creditor of the old corporation cannot maintain an action at law against the new corporation unless the latter has made a new contract to pay his debt." . . . . And holding in addition, that,—

"It is obvious, however, that where a new corporation is formed, the creditors of the old corporation do not, without something further being done, become creditors of the new corporation. . . . They have an equitable right to follow the assets of the old corporation; but they cannot maintain an action against the new corporation, for there is no privity of contract. To render the new corporation liable there must be a new contract made, such as will amount to a novation." *Ewing* v. *Composite Brake Shoe Co.*, 169 Mass., 72. In *Beck & Pauli Lithographing Co.* v. *Nebraska City Cereal Mills*, (Supreme Court of Wisconsin, Feb. 1, 1901), 85 N. W., 127, a partnership which had contracted to buy certain show-cards from plaintiffs, to be used as advertising matter, was succeeded by the defendant corporation, the President of which, on being shown the correspondence with the partnership, and the sketches and proofs of the cards, stated "that he would take up the matter of the show cards next spring, and use them at that time," it was held "that such statement was not sufficient to show an agreement by the defendant to carry out the contract. Where copartners or other joint owners of a solvent going business transformed themselves into a corporation, to which the joint property was transferred in exchange for shares of stock, the new corporation is liable for the debts of the former partnership only where it has assumed them; but such assumption may be implied as well as express." *Liemer* v. *C. G. Bretting Mfg. Co.*, (1911), 147 Wis., 252, 133 N. W., 139; 15 A. L. R., 1132 note.

There was no question as to the solvency of either partnership. Neither was there question as to the right of Mr. Putnam to follow the assets of the partnership, or bring suit against the surviving partner. Neither course was adopted. He relied upon his supposed legal right to bring an action at law against the new corporation. In so doing he erred. The new corporation had made no promise to pay the claim, and had done no act nor authorized an act from which such promise to pay could legally be implied. Withholding a check

given by the partnership for three years, and failing to cash the same, with no claim made against the new corporation until just before the claim would be barred by limitation, are the chief facts in a series of events which forbid an inference, or the implication, that the plaintiff in review is liable as a contracting party, or that it can be held liable under the testimony in this case.

Judgment for the plaintiff in review for $805.91 with interest thereon.

GIST BLAIR et al., Trustees, In Equity *vs.* WOODBURY BLAIR et als.

Cumberland. Opinion May 1, 1923.

The net income of a trust estate goes to the persons designated in the will, the distribution thereof being deferred by the occurrence of certain events as provided in the will, and no part thereof becomes a part of the principal. If any part of said income is used in carrying out the provisions of the will, such part so used is to be restored from the principal to the income, at the time such income becomes distributable under the terms of the will.

In this case the Trustees are advised:

First. That the persons designated in said will as entitled to the entire net income of said trust estate are entitled to the income thereof accruing from the date of the death of the testatrix, distributable to them from and after the date of the completion of said memorial building or the expiration of five years from the date of the death of the testatrix, whichever event occurs the earlier, until the expiration of said trust; and that the portion of the net income of the trust estate which accrues prior to the completion of the memorial building, or before the expiration of five years from the death of testatrix, whichever event occurs the earlier, does not become a part of the principal of said trust fund.

Second. That the Trustees are authorized by fair implication from the language of the will, for the purpose of erecting said memorial building, temporarily to use the net income of said estate accruing since the date of the death of said testatrix so far as, in their judgment, may be necessary for that purpose; but in view of the amount of available resources in the hands of the trustees, the court does not perceive any existing or probable necessity for so using the income of the trust estate.

Third. That, if in the judgment of the Trustees it becomes necessary to use any portion of the net income of the trust estate for the purpose of erecting said memorial building and any net income is so used, they are authorized and directed to take from the principal of said trust estate, when said income becomes distributable under the terms of said will, a sufficient portion to restore to the fund accruing prior to such distribution as income to be distributed, such sums as have been appropriated by said trustees for the erection of said memorial building.

On report. This is a bill in equity seeking instructions from the court as to the duties of the complainants as trustees under the will of Mary J. E. Clapp, late of Portland, deceased. The questions involved related to the use of the income of the trust created under Article 12 of the will, and what portion, if any, of said income might be used by the trustees for the erection of the Memorial Building mentioned in said article. At the conclusion of the evidence, by agreement of the parties, the case was reported to the Law Court upon bill, answers, replication and evidence. Bill sustained.

The case is fully stated in the opinion.

Bradley, Linnell & Jones, for complainants.

Clinton C. Palmer, Arthur D. Welch, Verrill, Hale, Booth & Ives, John H. Pierce and Roger V. Snow, for respondents.

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

MORRILL, J. Mary J. E. Clapp, the last surviving lineal descendant of a family resident in Portland for several generations, died on the ninth day of September, 1920. She left a will, with four codicils, later duly proved and allowed, of which the plaintiffs were executors; the plaintiffs were also named as trustees under said will; they duly qualified, and letters of trust were issued to them on the thirteenth day of July, 1921. They settled their accounts as executors, and delivered to themselves as trustees the balance of personalty in their hands as such executors on December 1, 1921. They received as executors income of the estate to the amount of $11,588.40; as trustees they have received income on real estate from the death of the testatrix, and on personal property from said December 1, 1921, to August 24, 1922, the date when this bill was filed, to the amount of $76,491.46.

As trustees, the plaintiffs bring this bill asking for instructions as to the disposal of this income after deducting charges, and net income accruing since the filing of the bill.

After making pecuniary bequests, providing several annuities, distributing numerous articles of personal property in the nature of family portraits, heirlooms, silver, furniture, and articles of similar kind, and expressly ensuring perpetual care for the family tombs and burial lots, Miss Clapp by the twelfth article of her will bequeathed and devised to trustees the residue of her estate, in trust, "to hold, invest and re-invest the same and to apply the net income thereof as herein set out."

Then follow carefully framed provisions for the administration of the trust, conferring powers of sale, lease or other disposition of the property, both real and personal, protecting the trustees against loss except by wilful default, perpetuating the trusteeship by providing the manner of filling vacancies, and for managing the trust estate while any vacancy exists.

The will then provides, in the fourth paragraph of Article 12:

"The entire net income of the trust, except as otherwise provided in this my last will and testament, shall annually, or oftener, at the discretion of said Trustees, be paid over to or applied for the benefit of the descendants of my grandfather, Asa Clapp, and my grandmother, Elizabeth W. Q. Clapp, hereinbefore in the Eighth Article of this will enumerated, during the period of the entire natural life of the last survivor of such descendants living at my decease as are then or may thereafter become entitled to share in said net income, and during the additional period of twenty one (21) years and after the death of such last survivor. At the expiration of said Twenty-one (21) years all the principal, residue and remainder of the trust fund shall be transferred, conveyed and distributed to and among such of the aforesaid descendants of my said grandfather and grandmother as may then survive, as tenants in common, to hold to them, their heirs and assigns forever, each of said descendants taking the same share of such principal, residue and remainder as according to the provisions hereof he or she is at the time entitled to receive of the income aforesaid. Such net income shall be paid over to or applied for the benefit of the aforesaid descendants in the following proportions, namely: In equal shares to such of the grandchildren of my said grandfather and grandmother, that is to such nephews and

nieces of my father, descendants as aforesaid of my said grandfather and grandmother, as may at the time and from time to time be living, and to the issue at the time and from time to time living of any such nephew or niece who have deceased before me, or may thereafter decease, such issue taking per stirpes, to each for and during his or her natural life, provided that, except as otherwise expressly directed at all times and from time to time, the issue of any such deceased nephew or niece shall receive as tenants in common the same share per stirpes which at the same time would be received by said nephew or niece if living. In all respects the principle of survivorship shall govern, so that at no time shall any part of the said net income be undevised estate."

A portion of the real estate of the testatrix was the homestead of her father and grandfather situated on the easterly corner of Congress and Elm Streets, in Portland; this "entire lot" she directs shall "be retained by my Trustees during the entire period herein designated for the continuance of the trust aforesaid, and during that period no portion thereof be sold or otherwise disposed of except by ordinary and customary leases. The net rents thereof and of whatever buildings may be thereon shall be taken as a part of the net income of the trust aforesaid, and such lot and buildings thereon shall be held as parts of the principal of such trust, subject to the special provisions herein concerning the same."

She recurs to this subject in the following language:

"It is my wish and will, and I direct, that no part of my said homestead lot shall pass to any other person or corporation or be used in any other manner than as provided in this my last will and testament said lot having been retained by me unincumbered since the decease of my honored father for the purposes in this will set out, and for no other."

The purposes to which she devotes the family homestead are thus described:

"I direct that said Trustees shall forthwith after my decease commence thereon, proceed with and complete a handsome, imposing and substantial block facing Congress Street, which shall be in memory of my honored father and my grandfather, Asa Clapp, and shall be especially adapted for occupancy by stores, offices and halls. Inasmuch as the same is to be a memorial block, the Trustees are not to sacrifice to economy or the production of large net income, its

architectual character or its complete suitableness to the central and prominent locality which it will occupy, and the Trustees are to bear always in mind that my special desire and directions are that they shall erect and maintain in the best of condition and rebuild in case of destruction this building on said lot thus occupied by my father and grandfather as their homestead as a fitting reminder to the citizens of Portland of them as residents of that City and of their life-long interest in its welfare. At a suitable point on the front of said block there shall be cut in granite or some other enduring substance the name of my grandfather, in fac-simile of his handwriting, as follows: "Asa Clapp," and underneath it that of my father, in fac-simile of his handwriting, as follows: "Asa W. H. Clapp." Said Trustees shall use for the purposes of erecting said block any and all such other portions of my real estate and personal estate as far as desired to accomplish my purposes herein set out, and no portion of my real estate or personal estate or of the net income thereof shall be distributed or paid out in legacies until said block is completed, except as herein otherwise directed, but this clause shall not delay such distribution or payment for more than five (5) years from my decease."

She recommends, further, that the construction of said improvements shall cost not less than three hundred thousand dollars, exclusive of the value of any material taken from the homestead buildings.

It is the provision quoted above, for withholding payments of income to beneficiaries during the construction of the block, which furnishes the occasion for bringing this suit. In a previous clause the testatrix had provided that this provision withholding payments of income should not apply to specific legacies, pecuniary legacies, the payment of annuities, or to expenditures required for maintaining the family tombs as she desired. The provision concerns only the persons designated by name as descendants of her grandfather and grandmother, and their descendants. Of the eight beneficiaries designated by name, one has died without children surviving her, and one is disqualified under other provisions of the will not necessary to be recited; the remaining six, one of whom is a Trustee, whom we will designate as Life Tenants, are in accord as to the construction of the will; ten adult children of the Life Tenants are made parties and have answered the bill; these are in accord with the Life Tenants, except three adult children of George Gardiner Fry, one of the Life

Tenants; ten minor children and grandchildren of the Life Tenants, four of whom have been born since the death of the testatrix and prior to the filing of the bill, are made parties and have made answer by guardians ad litem; the answers of four of these minors, grandchildren of George Gardiner Fry, are in accord with the contention of their parents, children of said George Gardiner Fry; the answers of the remaining minors admit the allegations of the bill, and join with plaintiffs in the prayer for the construction of the will and codicils.

The controversy which justifies the filing of this bill by the trustees for instructions as to the execution of the trust, is thus between the Life Tenants and the children of George Gardiner Fry.

The former contend that they are entitled to the net income of the trust estate, to be computed from the death of the testatrix, and that the clause directing that "no portion of my real estate or personal estate or of the net income thereof shall be distributed or paid out in legacies until said block is completed" only postpones the time of payment.

The latter contend, as stated in the brief of counsel for the adult defendants, "that any portion of the net income of said estate which accrues prior to the completion of the Memorial Building or before the expiration of five years from the death of testatrix, whichever event occurs the earlier, was intended by said testatrix to become a part of and should become a part of the principal of said trust fund, distributable as provided in said instrument among those persons designated by the testatrix as entitled thereto at the completion and expiration of said trust," and "Second: That if not so held as principal and distributed at the expiration of the trust herein created, said fund should be used by the trustees hereunder to help defray the cost of erection of the Memorial Building referred to; that the trustees are fully authorized to so apply the net income of the estate and under the terms and purposes of those instruments are in duty bound to do and that any income so used by them and put into this Memorial Block is transferred permanently into the principal of said trust estate without right of being restored later to the use of income beneficiaries."

Being in doubt as to their authority and duty relative to the distribution of said net income, to the application of said net income to the construction of said building, and to the restoration of such

portion of said income as is so used, by the application of principal of said trust fund for that purpose, the trustees ask for instructions from the court upon those points.

First. As to the distribution of the net income, the trustees are advised that the persons designated in said will as entitled to the entire net income of said trust estate are entitled to the income thereof accruing from the date of the death of the testatrix, distributable to them from and after the date of the completion of said memorial building or the expiration of five years from the date of the death of the testatrix, whichever event occurs the earlier, until the expiration of said trust; and that the portion of the net income of the trust estate which accrues prior to the completion of the memorial building, or before the expiration of five years from the death of testatrix, whichever event occurs the earlier, does not become a part of the principal of said trust fund.

This will is most carefully drawn and is very explicit in making clear the intentions of the testatrix as to the trust estate. In creating the trust in the first paragraph of the Twelfth Article of the will, the testatrix directed the trustees "to apply the net income thereof as herein set out"; searching further for directions as to the application of the net income, we find them in the fourth paragraph as follows:

"The entire net income of the trust, except as otherwise provided in this my last will and testament, shall annually, or oftener, at the discretion of said Trustees, be paid over to or applied for the benefit of the descendants of my grandfather and grandmother."

Disregarding for the time being the exception, language cannot be found to express more definitely a gift of the entire income to the descendants whom she had so carefully designated. Having regard to the position of the excepting clause, immediately following the subject with which the sentence deals—"the entire net income of the trust"—it is clear that the exception is from the "entire net income" and refers to other provisions expressly creating charges against income, viz.: the annuities and the preservation and care of the family tombs and lots, which latter she had expressly reminded the trustees "are to me the dearest and most important of all matters for which I can provide by will." The exception cannot relate to time of payment; that is qualified by the clause, "at the discretion of said Trustees."

The constantly recurring phrases of the will are consistent only with the idea that the Life Tenants and their descendants received a gift of the entire net income of the trust subject to the payment of the annuities and the maintenance of the family tombs and lots, . . . "No other person whomsoever shall ever receive any portion of said income or trust estate, except as otherwise expressly provided in this will." Payment is to be made "during the period of the entire natural life of the last survivor of such descendants living at my decease." In providing for payment to issue of any such nephew or niece who might die before or after the testatrix, such issue is to take "per stirpes, to each for and during his or her natural life." . . "At no time shall any part of the said income be undevised estate." . . . "No portion of any of said income shall so long as this trust exists be paid to any person except the beneficiaries aforesaid entitled thereto."

The provisions of the will also make clear that the "entire net income," to which the Life Tenants are entitled, includes the income from the death of the testatrix. This is in accordance with the general rule as recognized in this State. *Weld* v. *Putnam*, 70 Maine, 209. *Union Safe Deposit Co.* v. *Dudley*, 104 Maine, 297, 312. *Doherty* v. *Grady*, 105 Maine, 36. There is no contrary intent shown by the will. Throughout the will there is careful discrimination between principal and income. In the last paragraph of the Eighth Article the testatrix speaks of those "to whom or for whose benefit the net income of the trust in this will provided is to be paid or applied," and those "among whom the trust estate is to be distributed at the expiration of the trust." Throughout the provisions for the creation and management of the trust and the application of income, there is no indication of an intent that any portion of the income shall be regarded as principal; the two funds, principal and income, are always kept distinct. In the fourth paragraph of Article Twelve, before quoted, she provides for the transfer, conveyance and distribution of the principal of the trust fund to and among such of said descendants as may then survive as tenants in common, and, in another sentence, for the distribution of the net income from time to time; thus clearly indicating the existence of the two funds. And when the testatrix gave her express directions to the trustees that the homestead lot should be retained during the entire period designated for the continuance of the trust and that during that period no portion

of said homestead should be sold, she expressly recognized the segregation of principal from income, and provided that the net rents of the homestead shall be taken as a part of the net income of the trust, and the homestead lot and buildings thereon shall be parts of the principal of the trust. The will speaks from the death of the testatrix and contemplates the existence of the trust as beginning at that time. To fix a later date for the beginning of the fund of income, and to permit the income to accumulate as a part of the principal for any period subsequent to the death of the testatrix would take away income from the tenant for life and apply it to the increase of capital for the benefit of those who may be entitled to share in the principal of the fund. *Sargent* v. *Sargent,* 103 Mass., 299. *Minot* v. *Amory,* 2 Cush., 380 et seq.

The contention of those defendants who are opposed to the Life Tenants is based upon the last sentence of the directions, above quoted, for the erection of the block, beginning with the words, "Said Trustees shall use for the purposes of erecting said block," etc. This sentence does not impose upon the trustees the duty of using income for that purpose, nor does it expressly authorize the conversion of income into principal by such use; the trustees are commanded to use the real and personal estate for that purpose, but there is no command as to income except that distribution thereof shall be postponed. Nor is there any language from which an intention that income accruing prior to the completion of the building, or before the expiration of five years from the death of testatrix, whichever event occurs the earlier, shall become a part of the principal of the fund can be inferred. Such intention cannot be predicated upon the use of the word "delay"; delay means to postpone, to defer. Standard Dictionary. If the intention of the testatrix had been as contended, she could easily have said that income earned previous to the completion of the building should be principal, and that the income available for distribution should be that which would accrue after completion of the building or after the expiration of five years from her death, whichever event should occur the earlier. We have no doubt, viewing the great care bestowed upon the phraseology of her will, that she would clearly have expressed her wishes, if such had been her intention, leaving nothing to inference or implication.

Having in mind her long cherished purposes as to her estate, and the amount and character of her property available therefor, which

she must have known, it is not difficult to understand her motive in withholding distribution of income until completion of the memorial building.

We learn from some of the answers and from briefs of counsel that the property which came into the hands of the trustees consisted of

Real Estate valued at	$782,663.00
Personal Estate valued at	73,767.33

Of the appraised value of the real estate, $600,000 represents the value of the homestead and the "Clapp Block," so called, on the opposite corner of Congress and Elm Streets; the latter property the testatrix directed should not be sold in order to raise the necessary funds for the construction of the memorial block "unless such sale is absolutely necessary in the judgment of my said Trustees." Thus the property available for the construction of the block at a cost of $300,000, was real estate valued at $182,633.00 and personal estate, $73,767.33.

Realizing the difficulty of financing the construction of the block upon such resources, Miss Clapp devised the plan of withholding payment of income and thus creating an emergency fund in the nature of working capital which might temporarily be used to defray expenses of construction pending sale of real estate, and be made good from proceeds of real estate which the trustees were expressly directed to sell. With good judgment the trustees have avoided this embarrassment by negotiating a loan of $300,000 secured by mortgage upon the Clapp Block, authorized by a decree in equity of a Justice of this court. One of the counsel questions the binding force upon his clients of the proceedings authorizing this loan and mortgage. We are not concerned with that question here; we only recognize the fact that to defray cost of construction of the memorial block at an estimated cost of $323,700, the trustees have available $300,000, proceeds of a mortgage loan, $73,767.33, personal property available as cash, in addition to real estate of an appraised value of $182,633.00 which they are directed to sell.

The foregoing discussion furnishes brief answers to the remaining requests for instructions.

Second. The trustees are advised that they are authorized by fair implication from the language of the will, for the purpose of erecting

said memorial building, temporarily to use the net income of said estate accruing since the date of the death of said testatrix so far as, in their judgment, may be necessary for that purpose; but in view of the amount of available resources in the hands of the trustees, the court does not perceive any existing or probable necessity for so using the income of the trust estate.

Third. The trustees are advised that, if in their judgment it becomes necessary to use any portion of the net income of the trust estate for the purpose of erecting said memorial building, and any net income is so used, they are authorized and directed to take from the principal of said trust estate, when said income becomes distributable under the terms of said will, a sufficient portion to restore to the fund accruing prior to such distribution as income to be distributed, such sums as have been appropriated by said trustees for the erection of said memorial building.

Bill sustained. Decree in accordance with this opinion. The plaintiffs may charge their taxable costs against the income in their hands. The sum of $2,500 is allowed for counsel fees, to be charged against income, and distributed by the trustees among counsel as may be agreed.

KNOBEL & BLOOM *vs.* CORTELL-MARKSON COMPANY.

Androscoggin. Opinion May 8, 1923.

A signed communication referring to another unsigned communication, taken together, may be a sufficient memorandum under the Statute of Frauds, and bind the party to be charged whether it was so intended or not.

In this case the existence of the contract and its terms are fully established.

A sufficient memorandum under the Statute of Frauds may be found to exist in a signed communication referring to another but unsigned communication, so that the two when taken together express the trade.

The letter signed by the defendant is none the less effective because it contains an attempted cancellation of the contract. The memorandum may bind the party to be charged whether it was intended to do so or not. The memorandum was sufficient.

On exceptions. This is an action of assumpsit to recover damages for refusal of defendant to accept thirteen garments which plaintiffs allege defendant purchased of them. The defense was cancellation of the order and also the Statute of Frauds.

The salesman of the plaintiffs, wholesale dealers in ladies' garments in New York City, on June 15, 1921, visited defendant's place of business in Lewiston and solicited an order, and plaintiffs allege that defendant gave to the salesman an order for thirteen garments, and the salesman made a memorandum of the garments on a blank used for that purpose and mailed it, unsigned, to the plaintiffs in New York. On July 26, following, defendant wrote to plaintiffs the following letter:—"Please cancel the order given your representative, as I will be in New York shortly and will make a different selection."

The presiding Justice ruled that the written order and the letter constituted a sufficient memorandum to remove the case from the Statute of Frauds. Judgment for $284.25 was entered for plaintiff, and defendant excepted. Exceptions overruled.

The case is fully stated in the opinion.

Pulsifer & Ludden, for plaintiffs.

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

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

CORNISH, C. J. This is an action of assumpsit on breach of contract, the plaintiff claiming damages for defendant's refusal to accept and pay for a shipment of merchandise.

The case was heard by the court without the intervention of a jury. Therefore, the findings of fact are conclusive, and in this case the presiding Justice found that the plaintiffs by their salesman solicited and received from the defendant an unsigned order to the amount of $562.75 on June 15, 1921, specifying thirteen different styles of garments selected from plaintiff's samples and lists and directing shipment on September 1, 1921.

On June 20, 1921, the plaintiffs wrote the defendant: "We beg to advise that we have today placed in work your order given our Mr. Salzman on the 15th inst for 17 garments to be shipped September 1st. . . . ." The defendant denied receiving this letter, but the court found that it did. On July 25, 1921, the defendant wrote the plaintiff: "Please cancel the order given your representative, as I will be in New York shortly and will make a selection." To this the plaintiffs replied on July 27: "We wish to advise that as per our letter of June 20 this order has been placed in work and is now in the process of manufacture, therefore, it will be impossible for us to accept your cancellation. This merchandise has been cut and made special to your order." The goods were shipped afterwards to the defendant which refused to receive them, and they were taken back and sold by the plaintiffs. This action is brought to recover the net loss which the court found to be $248.25 with interest from date of the writ.

The defense is the Statute of Frauds, and the decision turns upon the existence of any memorandum in writing, signed by the party to be charged, sufficient to take the case out of the statute.

The existence of a contract and its terms are established. The unsigned order as written out by the salesman, a copy of which he thinks he gave to the defendant, the court found to embrace the contract. The defendant attempted to set up another provision in the original trade to the effect that it was agreed that the defendant would have the right to cancel the order in the event that it found that other

garments could be obtained at cheaper prices and of better style. This the plaintiffs denied and the court found in favor of the plaintiffs on this issue of fact.

The only question then is the existence of a sufficient memorandum. The court found as a fact that the order referred to in the defendant's letter of July 25 was the written order given without signature to the salesman, and ruled as a matter of law that taking that order and this letter together they constitute a sufficient memorandum. To this ruling exceptions were taken, but they cannot be sustained.

No doctrine is more firmly established than that a sufficient memorandum may be found to exist in a signed communication referring to another unsigned communication so that the two when taken together express the trade. "It is sufficient if the letters or other writings signed by the party to be charged, contain by statement or by reference to others of the writings, all the essential parts of the bargain." *Weymouth* v. *Goodwin*, 105 Maine, 510.

The unsigned order is found to contain the full terms of the trade. This letter signed by the defendant recognizes the existence of that order, and is none the less effective because it contains an attempted cancellation of the contract. Benj. on Sales, 4th Ed. Vol. 1, Page 275; *Townsend* v. *Hargraves*, 118 Mass., 335. That is all that is required. The memorandum may bind the party to be charged whether it was intended to do so or not. *McClellan* v. *McClellan*, 65 Maine at 506.

At a later date, September 26, 1921, the defendant wrote to plaintiffs' attorneys a letter in which again it recognizes the existence of a prior contract and says, "I had the privilege to cancel the order, which I did, finding that I could get better goods for my trade, and I fail to see where he can hold me responsible for goods made up when I cancelled the order as agreed upon between the representative and myself."

The terms of the Statute are abundantly satisfied and therefore it cannot be utilized to thwart the legal liability of the defendant under a contract fairly made.

Exceptions overruled.

ELLA F. GUILD *vs.* EASTERN TRUST AND BANKING COMPANY et al.

Penobscot. Opinion May 11, 1923.

A promise in consideration of marriage, or a promise in consideration of an engagement of marriage, is within the Statute of Frauds and not enforceable unless in writing. But a promise to marry is not within the Statute of Frauds, and is enforceable without being in writing. An oral promise to pay money in consideration of a marriage promise is not enforceable, but a written promise to pay money in consideration of an oral marriage promise, like a check, is valid and enforceable. Any contract not required to be in writing may be complete without words. A promise to marry need not be express. It may be implied.

1. As between the drawer of a check and the drawee (bank) the check is an authorization to pay the amount of it out of the drawer's funds on deposit. If the drawer has not a sufficient deposit to meet the check, it authorizes payment and impliedly agrees to make reimbursement.
2. The authority may be revoked at any time before payment or acceptance. The revocation may be express. The drawer may "stop payment." The death of the drawer operates as a revocation and justifies the bank in withholding payment.
3. But as between the drawer and payee the check contains an implied promise that upon presentment the instrument will be accepted or paid or both, and that if dishonored the drawer upon proper proceedings will pay the amount of it to the holder.
4. If the check is a gift the drawer's engagement that the bank will pay is without consideration, and while it is good in the hands of an innocent indorsee for value, it is not enforceable by the original payee.
5. But if it is given for a consideration it is a contract, and if it is dishonored the payee has an action, to recover the amount of it, against the drawer or in the event of his death, against his executors or administrators.
6. A promise in consideration of marriage is by reason of the Statute of Frauds unenforceable. So also is a promise in consideration of an engagement of marriage.
7. A promise to marry is not within the Statute of Frauds. It is not promises of marriage but promises "made in consideration of marriage" that must be in writing. The statute concerns itself not with the subject of the promise, but with the consideration for it.

8. Promises of marriage are nearly always, though not necessarily mutual. If mutual they are literally within the terms of the statute because the promise of each party is made in consideration of the reciprocal promise of the other party. But centuries of judicial interpretation have established the principle so firmly that every lawyer and every layman knows that mutual promises of marriage do not have to be in writing in order to be binding.

9. An oral money promise in consideration of a marriage promise is invalid. But a written money promise, like a check, made in consideration of an oral marriage promise is a perfectly good and enforceable contract.

10. A promise to marry need not be express. It may be implied. Spoken words may be presumed from circumstances. Moreover, any contract not required to be in writing may be complete without words. A contract requires a meeting of minds not of words. It demands mental not vocal accord.

11. A check for seventy-five thousand dollars in consideration of a marriage promise is not rendered invalid by reason of the fact that the parties contemplated a still larger payment to be made which larger payment cannot be enforced because not evidenced by writing.

12. The testator on the day of his death delivered to the plaintiff his check for seventy-five thousand dollars saying "if I live till Monday I will fix up the rest." The bank refused payment owing to the testator's decease. This suit was brought against his estate. The evidence tended to show that three months before, the testator had promised to put five hundred thousand dollars in the plaintiff's name if she would marry him to which she assented.

Held:

That the jury would have been justified in finding that the check was given in consideration of the plaintiff's implied renewal or continuance of her promise to marry and therefore is valid and enforceable.

On exceptions. This is an action of assumpsit brought by plaintiff against the executors of the will of Frederick W. Hill, late of Bangor, deceased. The action was brought on a check drawn by Frederick W. Hill on April 10, 1920, for seventy-five thousand dollars, on the Eastern Trust and Banking Company, payable to plaintiff, and given to plaintiff by drawer on the day it was drawn. The drawer deceased on the day the check was drawn and on presentment of the check to the drawee on April 12, 1920, acceptance and payment was refused. After the defendants were appointed executors of the will of the said Frederick W. Hill, demand of payment of the check was made upon them, but payment was refused. The general issue was pleaded and also a brief statement alleging want of consideration. At the conclusion of the evidence for plaintiff, on motion by counsel for defendants, the presiding Justice directed a verdict for defendants, and plaintiff excepted. Exceptions sustained.

The case is fully stated in the opinion.
Louis C. Stearns and Alfred A. Schaefer, for plaintiff.
Ryder & Simpson, for defendants.

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

DEASY, J. The defendants are sued as executors of the will of Frederick W. Hill late of Bangor. Mr. Hill during his last years boarded at the Bangor House, but commonly spent his evenings at the home of the plaintiff, his second cousin. Both had been married, but some years before he had been left a widower and she a widow. In February, 1920, Mr. Hill became ill and was taken to the residence of the plaintiff where he remained until his death which occurred the following April. During his illness Mr. Hill gave and delivered to the plaintiff certain stock certificates of the approximate value of thirty-nine thousand dollars. On the day of his death Saturday, April 10th, 1920, he drew a check for seventy-five thousand dollars payable to the plaintiff and delivered it to her. On the following Monday the check was presented at the bank but, the drawer having deceased, payment was refused. Later, after due demand, the pending action was brought to recover the amount of the check.

ACTIONS ON CHECKS. WHEN MAINTAINABLE.

As between the drawer of a check and the drawee (bank) the check is an authorization to pay the amount of it out of the drawer's funds on deposit. If the drawer has not a sufficient deposit to meet the check, it authorizes payment and impliedly agrees to make reimbursement.

The authority may be revoked at any time before payment or acceptance. The revocation may be express. The drawer may "stop payment." The death of the drawer operates as a revocation and justifies the bank in withholding payment. *Gerry* v. *Howe,* 130 Mass., 350. *Burrows* v. *Burrows,* (Mass.), 134 N. E., 272.

But as between the drawer and payee the check contains an implied promise.

"Liability of Drawer. The drawer by drawing the instrument . . engages that on due presentment the instrument will be accepted or

paid, or both, according to its tenor, and that if it be dishonored, and the necessary proceedings on dishonor be duly taken, he will pay the amount thereof to the holder." Negotiable Instruments Act—1917, Chap. 257, Sec. 61.

If the check is a gift the drawer's engagement that the bank will pay is without consideration, and while it is good in the hands of an innocent indorsee for value, it is not enforceable by the original payee. "A man may not donate his own naked promise." *Whitehouse* v. *Whitehouse*, 90 Maine, 477. *Burrows* v. *Burrows*, supra. 28 Corpus Juris, 660, L. R. A., 1918, C. 340.

But if it is given for a consideration it is a contract, and if it is dishonored the payee has an action, to recover the amount of it, against the drawer or in the event of his death, against his executors or administrators. *Whitehouse* v. *Whitehouse*, supra.

It may be argued that a gift is good between the parties. True if there has been a delivery of the thing given. Otherwise not. And in theory of law the attempted gift of a check is not executed by delivery until the bank has paid, accepted or certified it.

THE ISSUE.

The parties disagree as to whether the check was intended as a gift or was delivered for a consideration. If the former it cannot be enforced. If the latter it is a contract and enforceable. The defendant says that it was an intended gift. The plaintiff replies that it was delivered to her by Mr. Hill for a valuable consideration, to wit, her promise to marry him.

The defendant rejoining denies the fact of such promise, or that any such promise was a consideration for the check, and further that even if true such a promise is void and ineffectual by reason of the Statute of Frauds.

To quote from the brief of the learned counsel for the defendant, the defense is—

"(1) That no such agreement was made as alleged—and (2) that such agreement if made was oral and invalid by reason of the statute of frauds, being in consideration of marriage and that said check consequently lacked all consideration and was not enforceable by suit."

We shall first consider the question of law, to wit, whether the alleged agreement was "invalid by reason of the statute of frauds being in consideration of marriage."

In discussing this legal question we shall assume, of course without deciding, that the facts are in substance as claimed by the plaintiff.

FACTS AS CLAIMED BY PLAINTIFF.

The witnesses relied upon in the main to prove the plaintiff's case were her son Henry and Agnes J. Sharpe, a nurse. Henry Guild testified that on January 26, 1920, at his mother's home, after considerable preliminary conversation, which it is unnecessary here to rehearse, Mr. Hill said to the plaintiff: " 'Now Ella I will agree to put five hundred thousand dollars in your name immediately if you will agree to be engaged to me', and she said she would. And then he said 'Now Ella remember that is a bargain and I have Henry as a witness' ."

Miss Sharpe's testimony is that on April 10th, Mr. Hill being then very ill called for his check book, wrote the check which is in suit, had Miss Sharpe witness it and calling the plaintiff he said to her, "Here I have written this check for you and if I live till Monday I will fix up the rest." Miss Sharpe goes on to say "and he handed Mrs. Guild the check in my presence."

The defendant denies that the facts are as claimed by the plaintiff and further says that if the facts and inferences are as the plaintiff contends she is barred from recovery by the Statute of Frauds.

STATUTE OF FRAUDS.

The Statute of Frauds is in the briefs of counsel discussed ably and with copious citation of authorities. Almost every American State and English Colony has a statute of frauds substantially like the British Statute enacted in the reign of Charles the Second.

The Maine Statute of Frauds is Chap. 114 of the R. S. Sec. 1 provides that no action shall be maintained in certain specified cases "Unless the promise, contract or agreement, on which such action is brought, or some memorandum or note thereof, is in writing and signed by the party to be charged therewith, or by some person thereunto lawfully authorized; but the consideration thereof need not be expressed therein, and may be proved otherwise."

One of the cases specified wherein a writing is made necessary is "To charge any person upon an agreement made in consideration of marriage."

The statute provides that "no action shall be maintained" upon oral contracts in consideration of marriage. Another section of the statute says that no oral contracts (of a specified character) "shall be valid." In some states oral contracts in consideration of marriage are declared to be "void." "But the distinction is without any essential difference and is now so regarded by authors generally, and in most of the decided cases." *Bird* v. *Munroe*, 66 Maine, 343. In this opinion we refer to such oral contracts as invalid or void.

AGREEMENT TO BE ENGAGED.

The plaintiff contends that while an agreement to pay money in consideration of a promise of marriage is invalid such an agreement in consideration of a promise to become engaged to marry is valid. This theory finds little support in authority and none, we think, in reason.

Followed to its logical conclusion an oral contract to convey land is invalid, but an oral contract to make a written contract to convey land is valid; an oral agreement to work for another for more than a year is bad, but an oral agreement to enter into a written engagement to work for more than a year is good. The theory will not stand the test of the reductio ad absurdum.

MORAL OBLIGATION AS A CONSIDERATION.

The plaintiff cites authorities holding that while a promise in consideration of marriage is invalid such a promise creates a moral obligation supplying a sufficient consideration for a postnuptial contract conveyance or payment.

But counsel for the defendants cite numerous cases wherein courts in other jurisdictions have held the contrary.

It is unnecessary here to analyze or further to refer to these conflicting authorities because in the recent case of *Roderick* v. *Paine*, 121 Maine, 420 this court held that a transfer of an automobile by a husband to a wife pursuant to an oral antenuptial promise was a voluntary gift the promise affording no consideration for the transfer.

But neither *Roderick* v. *Paine*, nor the other cases cited by counsel and referred to in this paragraph are decisive or very closely in point. In all of said cases an attempt was made to enforce an oral promise. In the pending case the contract sought to be enforced is a check. In the cases cited no scrap of antenuptial writing appears. In the case at bar the only promise coming within the statute is Mr. Hill's money promise and that is in writing and signed.

WHITEHOUSE CASE.

The plaintiff cites and relies upon the case of *Whitehouse* v. *Whitehouse*, supra. In that case, however, the check was given not in consideration of a promise of marriage, but in consideration of the postponement of a marriage that had been long before agreed upon. It was moreover, evidently not contended that the Statute of Frauds applied.

We think that the plaintiff's exceptions should be sustained, not on the ground that a promise in consideration of an engagement is valid, nor on the theory that an oral pre-nuptial promise provides a sufficient consideration for a postnuptial contract, nor yet upon the authority of the Whitehouse Case, but because a promise to marry is not in any case within the Statute of Frauds.

PROMISE TO MARRY NOT WITHIN STATUTE.

A promise to marry is not within the Statute of Frauds. It is not promises of marriage but promises "made in consideration of marriage" that must be in writing. The statute concerns itself not with the subject of the promise, but with the consideration for it.

"A promise to marry is not a contract or agreement made in consideration of marriage within the meaning of the statute of frauds and hence it is not necessary that the contract should be in writing." 9 Corpus Juris, 327.

"A promise to marry is not a promise 'in consideration of marriage' so as to require it to be evidenced in writing under the statute of frauds." 4 R. C. L., 151.

Promises of marriage are nearly always, though not necessarily mutual. If mutual they are literally within the terms of the statute because the promise of each party is made in consideration of the reciprocal promise of the other party.

But centuries of judicial interpretation have established the principle so firmly that every lawyer and every layman knows that mutual promises of marriage do not have to be in writing in order to be binding.

The statute reaches "not mutual promises to marry, but only promises for other things made in consideration of marriage." *Derby* v. *Phelps*, 2 N. H., 516.

The reason has been variously stated: The learned counsel for the defendant in his brief suggests that it is because of public policy, a suggestion not wanting in judicial sanction.

The Illinois Court has said that it is because such promises are "continuing contracts by consent." *Blackburn* v. *Mann*, 85 Ill., 226.

The Kentucky Court puts it on the ground of probable legislative intent.

"It would be imputing to the legislature too great an absurdity to suppose that they had enacted that all our courtships to be valid must be in writing." *Withers* v. *Richardson*, (Ky.), 17 Am. Dec., 44. But whatever the reason may be it is settled that while mutual promises of marriage are embraced in the language of the statute they are not within its purview and meaning.

STATUS BEFORE CHECK GIVEN.

Before the check was given no promise is shown to have been made to which the law gives effect. The defendant's promise to pay money was invalid by reason of the statute. His promise to marry was likewise void because an inseparable part of an entire contract, a part of which was void.

"Where the promise to marry is only a part of an entire contract which includes promises in relation to property and settlements, the contract is indivisible and no action can be brought on any part of it unless it is in writing." 9 Corpus Juris, 328.

Upon examination it will be found that the above quotation is somewhat broader than is warranted by the cases cited to support it. Nevertheless, it is apparent that the alleged marriage and money promises made in January constituted an entire contract. Mrs. Guild's promise to marry was not within the statute, but was invalid for want of consideration for the reason thus stated by the Michigan Court:

"In order to make one promise a valid and binding consideration for another, it must itself be valid and binding." *Liddle* v. *Needham*, 39 Mich., 149; *Binion* v. *Browning*, 26 Mo., 271; *Hooker* v. *Knab*, 26 Wis., 513.

If the testator's money promise made in January had been in writing the Statute of Frauds would have been satisfied. The marriage promises required no writing.

On April 10th a money promise was put in writing. A check is not merely a written memorandum of a contract. It is a written contract. But the defendant says that it is unenforceable.

EXISTING ENGAGEMENT AS PAST CONSIDERATION.

If it be said that when the check was delivered there was an engagement of marriage already existing, and that such past consideration will not support the contract, the answer is that a promise of marriage is not merely a past, but a continuing promise. *Blackburn* v. *Mann*, 85 Ill., 226; *Garmong* v. *Henderson*, 112 Maine, 385.

It has been held that "the fact that a promise to marry was made six years before the writing was drawn and signed does not impeach the consideration of the contract." *McNutt* v. *McNutt*, (Ind.), 19 N. E., 115.

"Even though the original engagement was absolute and not coupled with an express or implied understanding as to the marriage settlement, the parties by the subsequent written contract are taken, as a matter of law, to have entered into new promises including the engagement of marriage." *Re Appleby*, (Minn.), 111 N. W., 311. 13 R. C. L., 1016.

Thus it is held that notwithstanding an existing valid engagement, an engagement that would be recognized as valid in a breach of promise suit, a promise of marriage may be an efficient consideration for a money promise.

The theory of these cases undoubtedly is that under such circumstances the existing engagement is to be treated as broken by mutual understanding and new promises substituted.

But we have seen that up to the time the check was given while the parties may have regarded themselves engaged, no engagement existed recognized by law as a valid contract. The marriage promises were so yoked to an oral and therefore invalid money promise as to be themselves without legal effect.

PROMISE OF APRIL 10th.

The vital question to be determined is what if any promise is to be implied from the delivery and receipt of the check, taking into consideration all that had gone before. To repeat, the promises made in January had no legal standing. The money promise was invalid, because not in writing. The marriage promises were invalid because inseparably linked with the money promise. The occurrence of January is important, but only as it gives significance and color to what took place on April 10th.

Was the check proffered and received on April 10th as a gift prompted by relationship, friendship or love? or did the parties mutually intend to renew the promise which made before had been ineffective for want of a consideration?

CHECK AS A SEPARABLE TRANSACTION.

The defendant urges that the promise contained in the check is only a part of the transaction as shown by the plaintiff's testimony; that there was as claimed by the plaintiff an oral promise to pay a large sum, in all five hundred thousand dollars; that the check was a part of an entire contract and that a part having failed for want of writing the whole is invalid. In *Loomis* v. *Newhall,* 15 Pick., 159, relying upon and citing earlier authorities it is said in substance that an agreement which is void in part by the Statute of Frauds is void in toto. The later case of *Rand* v. *Mather* overrules *Loomis* v. *Newhall.*

In *Rand* v. *Mather,* Judge Metcalf says: "The true doctrine is this: If any part of an agreement is valid it will avail pro tanto, though another part of it may be prohibited by statute; provided the statute does not either expressly or by necessary implication, render the whole void; and provided furthermore that the sound part can be separated from the unsound and be enforced without injustice to the defendant." *Rand* v. *Mather,* 11 Cush., 7.

"If a distinct engagement as to any part or item cannot be fairly and reasonably extracted from the transaction no recovery can be had upon such part or item." Browne on Statute of Frauds, Section 140.

Applying these principles to the facts in the pending case the promise contained in the check does not depend upon the oral promise;

no statute renders the whole void; the check may be enforced separately without doing injustice to the defendants or the testator.

If the absolute promise which the statute reads into a check and a conditional oral promise of a further sum to be later paid were both made in consideration of the plaintiff's promise to marry, a distinct engagement that the check should be paid may fairly and reasonably, and must almost inevitably be "extracted from the transaction."

Where as in this case there is a distinct engagement, which is the subject of the suit, the writing need only relate to such engagement. So far as relates to the seventy-five thousand dollar claim, whether or not there was a consideration is a disputed question of fact. But the check is a sufficient writing. It contains all the terms of the separable contract, except such as are read into it by the statute itself, and except the consideration which need not be in writing.

CONCLUSION.

A promise to marry need not be express. It may be implied. Spoken words may be presumed from circumstances. Moreover, any contract not required to be in writing may be complete without words. A contract requires a meeting of minds not of words. It demands mental not vocal accord.

From the evidence the jury might have found,—that an agreement was made in January as testified to by Henry Guild. If not, there would have been no sufficient basis for finding an implied promise in April;— that in the delivery of the check on April 10th the testator intended to so deliver it in consideration of the renewal or continuance of the plaintiff's promise to marry him;—that in receiving the check the plaintiff understood Mr. Hill's intention, participated in it and so received the check in consideration of the continuance or renewal of her promise.

If the case had been submitted to a jury and the jury had so found, the verdict would not have been so manifestly wrong as to require reversal.

Exceptions sustained.

WILLIAM O. FROTHINGHAM *vs.* FRANK F. WOODSIDE.

Oxford. Opinion May 15, 1923.

The opinion of the sitting Justice upon a petition under R. S., Chap. 7, Secs. 87 to 91 inclusive, seeking to oust the Sheriff for the County of Oxford to whom a certificate of election had been issued, in the main adopted.

The rules established in this State as to what shall be deemed a distinguishing mark such as to invalidate a ballot have undergone much liberalization in order that the honest intent of the voter may not be thwarted.

A ballot should not be rejected on the ground of fraudulent marking when its appearance is consistent with any honest action or intention of the voter. The burden to show fraud is on the one who claims it. Doubts should be resolved in favor of the voter, unless the fraudulent purpose clearly appears.

Yet marks of every sort and character cannot be allowed. If so, the secrecy of the Australian ballot and the avoidance of bribery at elections sought to be secured thereby would be circumvented.

On appeal. This is a petition under R. S., Chap. 7, Secs. 87 to 91 inclusive to oust the Sheriff for the County of Oxford elected at the State election held on September 11, 1922. The returns, as counted by the Governor and Council, gave the respondent 5,002 votes; the petitioner 4,990; and scattering 2. A certificate of election was issued to respondent, whereupon a petition was duly filed to determine the election of sheriff, on which petition a hearing was had by the Chief Justice, from whose decision in favor of the petitioner, an appeal was taken to the Law Court in accordance with the statute. Appeal dismissed with costs.

The case is stated in the opinion.

Matthew McCarthy, for petitioner.

Hastings & Son and Frederick R. Dyer, for respondent.

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

MORRILL, J., dissenting. WILSON, J., concurring in dissenting opinion.

SPEAR, J. At the State election held on the second Monday of September, 1922, in Oxford County, Frank F. Woodside was the regular party nominee for sheriff on the Republican ballot and William O. Frothingham, the regular party nominee on the Democratic ballot, for the same office. The returns, as counted by the Governor and Council, gave Woodside 5,002 votes; Frothingham, 4,990; and scattering, 2. A certificate of election was issued to Woodside; whereupon a petition was filed in due time by Frothingham to determine the election of sheriff, which, upon due notice, was heard by Chief Justice CORNISH, and from his decision in favor of the petitioner, an appeal was taken, in accordance with the statute, to the Law Court. The decision of the case depends upon the construction of the Public Laws of 1917, Chapters 306 and 296, approved on the same date. If these statutes are to be construed together, as declared by the Chief Justice, then there is no question but that the petitioner had a plurality of the legally cast ballots; and vice versa if they are not to be construed together.

Inasmuch as the opinion of the Chief Justice embraces a full and clear analysis of his interpretation of the statutes referred to, as well as an illuminating discussion of the legal and illegal methods employed by the voters in exercising the franchise under the present statute, we substantially adopt his opinion as the opinion of the court, modifying it only in those particulars in which the court differs with his findings.

The opinion is as follows:

"This is a petition under R. S., Chapter 7, sections 87 to 91 inclusive, to determine the election of Sheriff for the County of Oxford at the State election held on September 11, 1922. The certificate of election was issued to the respondent. The petitioner seeks to oust him from office.

"I. ADMISSIONS.

"It is agreed between the parties and counsel as follows:

"1. That the total number of ballots cast, concerning which there is no contest, is 9955

"2. That of this number

"Frank F. Woodside, respondent, received 4987

"William O. Frothingham, petitioner, received 4968

"3. That the number of contested ballots was orginally 94 which formed themselves into nine groups.

"4. That group 1, consisting of 10 ballots, after further inspection by counsel should not be counted for either candidate. This group is therefore eliminated, leaving the total number of disputed ballots 84

"II. I will consider these contested ballots by groups, as follows:

"Group 2. Total 7.

"These ballots show a cross in the Republican party square. The name of Frank F. Woodside is not erased. The name of William O. Frothingham is written in the blank space below Woodside's name and a cross is placed in the small square opposite the name so written in.

"I do not count these ballots for either candidate. . . . . As they stand these ballots disclose an attempt to mark two names for one office. This cannot be done. R. S., Chap. 7, Sec. 20. These ballots are therefore rejected.

"Group 3. Total 16.

"No cross in either party square, but crosses made against individual names, mostly in the Republican column. Woodside's name erased. Frothingham's name written in in the blank space below Woodside's and a cross placed in the square opposite Frothingham's name so written in. Frothingham's name not crossed in the Democratic column.

"This raises a novel question of law. The respondent contends that these ballots should be rejected; that they cannot be counted for Frothingham because his name was printed on the ballot in another party column, and the only way in which a Republican voter could vote for Frothingham would be by erasing Woodside's name in the Republican column and placing a cross against Frothingham's name in the Democratic column.

"The statute provides two methods of voting, first, the group method by placing a cross in the party square and thereby including the names of all the candidates of that party printed below in the party column, unless some of them are erased; second, the voter may omit the cross in the party square and then the words are: 'and place a cross in the blank square at the right of the name of each candidate he wishes to vote for.' P. L. 1917, Chap. 306.

"In this group 3, the voters employed the individual method and they placed a cross against the names they wished to vote for, including the name of Frothingham written in under Woodside's. But the respondent contends that the necessity of crossing the printed name if it appears in another column is to be inferred from the next sentence of the same section which is: 'If the voter wished to vote for a candidate whose name is not on the ballot he may write the name under the name of the candidate erased.' It is argued from this that the name can only be written in when it does not appear in another column. If this is the true construction of Chapter 306, or if there is doubt as to its true interpretation, that doubt is cleared by the provisions of Chapter 296 of the Public Laws of 1917, approved on the same date as Chapter 306, April 7, 1917, and therefore the two statutes are to be construed together.

"Chapter 296, amending the provision as to the preparation of ballots, after reenacting the clause as to the blank space below the names 'in which the voter may write the name of any person for whom he desires to vote as a candidate for such office,' adds these significant words which had not appeared before: 'At the right of each name and at the right of the blank space above provided for there shall be left a blank square in which the voter may make a mark.' For what purpose is the voter allowed to place his cross in this blank unless his ballot so marked is to be counted? The Ballot in its amended form is an express invitation to insert any name below the name of the candidate erased and to cross it after it is written in. That invitation was accepted by the voters in this group under consideration. These two statutes so construed give the voter under such circumstances the option either of crossing the name in another party column, or of writing it in the blank space below the erased name and crossing it. Such would seem to be the ordinary and usual interpretation of the language.

"True, one act is numbered 296, and the other bears a later number, 306. But that is immaterial. The numbering of legislative statutes is a ministerial and not a legislative act, and, nothing appearing to the contrary, statutes approved on the same day are presumed to have been approved contemporaneously. *Harrington* v. *Harrington*, 53, Vt., 649; *Stuart* v. *Chapman*, 104 Maine, 17.

"Nor does the fact that Chapter 296 took effect in ninety days after adjournment, and Chapter 306 by its terms not until January 1,

1918, affect the situation. The reasoning of the court in *Stuart* v. *Chapman*, supra, applies here with equal force. It is absurd to suppose that the Legislature intended the amendment provided for in Chapter 296 to have effect only from July 6, 1917, to January 1, 1918, and then to be repealed instanter by Chapter 306, approved on the same day. It would have been simpler, if that was their intention, to withdraw the bill which afterwards was numbered 296, and pass the bill which became Chapter 306, especially as no State election intervened.

"Nor is there any force in the clause in Chapter 306, repealing acts and parts of acts inconsistent therewith. Even if this could apply to a bill approved on the same day, there was no inconsistency between these two acts. They simply gave the voter two methods instead of one, and if any reasonable doubt exists such doubt should be resolved against disfranchising honest voters.

"Considering therefore these amendments together, I think the statute authorizes the counting of this group for the petitioner, Frothingham.

"Group 4, Total 10.

"Cross in Republican party square. Woodside's name stricken out. Frothingham's name written in blank space beneath Woodside's name and crossed in the blank space opposite Frothingham's name so written in.

"This involves a similar situation to that in Group 3, the difference being that here the voters employed the party group instead of individual method of voting.

"The respondent relies upon the following provision of Chapter 306, P. L. 1917, as prohibiting the counting of these ballots: 'If the voter shall desire to vote for any person or persons whose name or names are not printed as candidates in such party group or ticket he may erase any name or names which are printed therein and place a cross (X) in the square at the right of the name of the candidate of his choice in any other party group or ticket.' The contention is that this is an exclusive method and if in voting by the group method the voter wishes to vote for a candidate of another party, he must cross the name of that candidate in its party column.

"Granting that a strict interpretation would lead to that conclusion, yet here again we bring in Chapter 296 of the same legislature, approved on the same day, and for the reasons given under Group 3,

construing the acts together, the method used by the voters here was authorized. Two methods were allowed and they selected one of them.

"These ballots I count for Frothingham.

"Group 5. Total 19.

"Cross in Republican square. Woodside's name stricken out. Frothingham's name written in in blank space under Woodside's in Republican column. No cross in small square at right of Frothingham's written in name.

"This goes one step further and raises the question whether where the party group method is employed, the written in name may be counted without being crossed; whether, in other words, the written in name is substituted for the printed name, has all the rights that the printed name has, and the party cross at the top covers and carries with it all the names in that group below whether party candidates or not. There is perhaps some plausibility for such a construction as would compel the voter employing the individual method to mark the substituted name as he marks all others, and would not compel the voter employing the group method to mark the substituted name any more than he marks the others. But the party group method of voting is based upon the fact that all the names in the party column are the names of that party's candidates who have been duly nominated according to law, and by placing a cross in that party square the voter adopts all those nominees, unless he erases their names. It covers the party nominees and no others. 'He may place such mark within the square above the name of the party group or ticket, in which case he shall be deemed to have voted for all the persons named in the group under such party or designation,' are the words of the statute. The persons named in the group are the regular nominees of that party and none other. I can find in the statute no authority for this method of voting. These ballots cannot be counted for Woodside because his name is erased. They cannot be counted for Frothingham because the substituted name is not crossed. Therefore the ballots in this group must be rejected."

Notwithstanding the interpretation of the statute above given, with reference to its application to the method employed by the voter to express his will in the ballots considered in Group 5, a majority of the court are of the opinion that the ballots in Group 5 should be counted for Frothingham.

"Group 6. Total 5.

"No cross in either party square. Woodside's name not crossed in small square at the right of his name, but cross appears in small square below, opposite blank space.

"I think these ballots should be counted. An inspection of them shows that the evident intention of the voter was to cross Woodside's name. They voted for many other candidates in the same way. . . . . The ballots in this group should be counted for Woodside."

"Group 7. Total 6.

"Four of these ballots, Nos. 1, 2, 5 and 6, have a cross in the Republican party square, and without erasing Woodside's name in that group, the voter placed a cross in the square at the right of Frothingham's name in the Democratic party group. If Frothingham's name had not been crossed the ballots would be counted for Woodside. If Woodside's name had been erased the ballots would be counted for Frothingham. As it is they cannot be counted for either, but must be rejected.

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"Group 8. Miscellaneous. Total 11.

"These are so-called miscellaneous ballots, a question having arisen as to each. I will consider them seriatim.

"No. 1.

"The cross in the Democratic party group is at the upper left hand corner, and partly within and partly without the square. This may have been made by a feeble person or one with defective vision. I think it should be counted for Frothingham.

"No. 2.

"Here a cross was originally placed in the Republican party square and then was erased so far as possible. A close inspection shows that it was not made by a stub of a pencil. Evidently the voter first made the cross and then intending to vote for only a portion of the candidates in that group he erased the cross as well as he could and made a cross opposite the names of four of the candidates out of the twelve in that party group. He used the individual method, but he did not cross Woodside's name. This ballot is rejected.

"No. 3.

"Cross in Republican party square. Woodside's name erased. Frothingham's name written in the blank space below Woodside's and crossed. Frothingham's name as printed in the Democratic party group also crossed. This voter emphasized his choice, and this ballot should be counted for Frothingham.

"No. 4.

"Cross in Republican party square. Woodside's name erased. Cross against Frothingham's name in Democratic column, an original line drawn through Frothingham's name and then erased as far as possible. The smooch caused by the erasure is quite different from the mark through Woodside's name and the cross in the square, which were made doubtless by the same pencil. A magnifying glass reveals the original line through Frothingham's name, which line was erased as far as possible. This ballot I count for Frothingham.

"No. 5.

"Cross in lower part of Democratic party square, partly within and partly without the square. I count this ballot for Frothingham.

"No. 6.

"No cross in either party square, but a check mark (✓) opposite each name in the Democratic column. The statute requires a cross to be made, and the marking must be by the symbol specified by the statute. *Bartlett* v. *McIntyre,* 108 Maine, 167. This ballot must be rejected.

"No. 7.

"Cross slightly within but mostly without the Democratic party square.

"I do not see how I can lay down any arbitrary rule as to the proportion that shall be within the square in order to be valid, and I rule that if any portion is within the party square the ballot should be counted. This, therefore, counted for Frothingham.

"No. 8.

"No cross in either party square. Three crosses made by the voter; one in the square at the right of Frothingham's name and two others directly across his name. This was equivalent to a striking out or erasure of the name.

"This ballot is rejected.

"No. 9 and No. 10.

"Cross in Republican party column. Sticker of brown paper with name of W. O. Frothingham written upon it placed over Woodside's name.

"Under the Public Laws, 1917, chapter 306, 'Stickers shall not be counted unless used to fill a vacancy or correct an error in the printed ballot.' Neither contingency existed here. These ballots must therefore be rejected.

"No. 11.

"Cross in Republican party square. Woodside's name erased. In blank space beneath was written 'William O. Frotham,' and not crossed. This ballot must be rejected . . . . 'Frotham' cannot be counted for 'Frothingham.'

"Group 9. Distinguishing marks. Total 10.

"The rules established in this State as to what shall be deemed a distinguishing mark such as to invalidate a ballot have undergone much liberalization in order that the honest intent of the voter may not be thwarted. 'A ballot should not be rejected on the ground of fraudulent marking when its appearance is consistent with any honest action or intention of the voter. The burden to show fraud is on the one that claims it. Doubts should be resolved in favor of the voter, unless the fraudulent purpose clearly appears.' *Murray* v. *Waite*, 113 Maine, 485. And yet marks of every sort and character cannot be allowed. If so, the secrecy of the Australian ballot and the avoidance of bribery at elections sought to be secured thereby would be circumvented. Purchasable voters could readily prove their agreed upon compensation. If names, words, initials or letters unauthorized by law are placed upon a ballot deliberately and designedly I think it is safe to say that ordinarily they are placed there for no honest purpose. Neither mistake, nor inadvertence, nor feeble sight has inspired them.

"It is obvious that the question of whether a given mark is or not distinguishing so as to invalidate the ballot is a question of fact and one upon which persons of equal intelligence, experience and learning may well and honestly differ.

"Taking up these ballots seriatim I hold as follows:

"No. 1.

"No cross in either party square, but the name of Woodside and of the candidate for County Attorney crossed in the Republican column.

"The alleged distinguishing mark is a capital 'R' with a period after it, placed in the Republican party square. I can see no excuse or reason for this, and I think this ballot should be rejected. It is similar to the ballot marked with 'Geo. H.' which was rejected in *Libby* v. *English*, 110 Maine at 457.

"No. 2.

"Cross in the Democratic party square, and below the cross the letters 'O. K.'

"For the same reason I reject this ballot.

"No. 3.

"Cross in the Democratic party square and the word 'Pittengill,' evidently intended for 'Pattangall' the Democratic candidate for Governor, written in the square below the cross.

"I regard this as a distinguishing mark and reject this ballot for the same reason as Nos. 1 and 2.

"No. 4.

"Cross in Republican party square. Name of Woodside erased in that column and a cross placed in the square opposite Frothingham's name in the Democratic column. Opposite that small square, close to it and in the margin is a cross covered by a circle, like this ⊕ . This is readily to be explained. The voter undoubtedly by mistake or indvertence first placed his cross opposite Frothingham's name but outside the column, and seeing his error remedied it by striking out the cross with the circle and then placed his cross within the small square.

"I see no evidence of fraudulent intent here, and count this ballot for Frothingham.

"No. 5.

"Cross in Republican party square, and a lead pencil mark of cancellation drawn vertically down through the entire Republican column. The voter thereby struck out the names of all the candidates and this ballot is rejected, but not on the ground of distinguishing mark.

"No. 6.

"Individual crosses in the Democratic column, and on the margin in lead pencil are written the words, 'I vote for F. L. Edwards.' Edwards was a candidate for Representative to the Legislature.

"This ballot I reject on the same grounds as Nos. 1, 2 and 3.

"No. 7.

"No cross in either party square, but the individual names crossed in the Democratic column and the word 'Straight' written in the Democratic party square.

"I reject this ballot on the same grounds.

"No. 8.

"An irregular cross in the Republican party square, something like a double cross.

"I see no evidence of fraudulent purpose. I count this ballot for Woodside.

"No. 9.

"An irregular mark in the Republican party square, resembling somewhat an algebraic cross and somewhat the letter 2. I do not think this is a distinguishing mark, and as there is a cross in the small square opposite Woodside's name, this ballot is counted for him.

"No. 10.

"A cross in the Republican party square with a single horizontal line made across it. Under the rules already given I count this ballot for Woodside.

In accordance with the opinion of a majority of the court, the summary is now as follows:

1. Ballots rejected.

Group 2	7
" 7	6
" 8, Nos. 2, 6, 8, 9, 10, 11	6
" 9, Nos. 1, 2, 3, 5, 6, 7	6
Total rejected	25

Ballots counted.

2. For William O. Frothingham, Petitioner,

Undisputed ballots	4968
Of the disputed ballots:	
From Group 3	16
" " 4	10
" " 5	19
" " 8, Nos. 1, 3, 4, 5, 7	5
" " 9, No. 4	1
Total for Frothingham	5019

3. For Frank F. Woodside, Respondent,	
Undisputed ballots	4987
Of the disputed ballots:	
From Group 6	5
" " 9, Nos. 8, 9, 10	3
Total for Woodside	4995
Plurality for Frothingham	24

It is therefore held that the petitioner, William O. Frothingham, having received a plurality of all the ballots cast for Sheriff of Oxford County at the State election held on September 11, 1922, was duly elected Sheriff of said County for the term beginning January 1, 1923, and is entitled by law to said office as now claimed by him.

Appeal dismissed with costs.

MORRILL, J. I am unable to concur in the opinion of the majority of the court and the importance of the questions involved justifies, I think, a statement of my reasons for dissenting.

The Justice hearing the case in the first instance divided the disputed ballots into nine groups; ruling upon the questions raised as to each group, he found that the petitioner, Mr. Frothingham, received 5,000 ballots which should be counted, and the respondent, Mr. Woodside, received 4,995 such ballots, thus reversing the decision of the Governor and Council and giving a plurality for Mr. Frothingham of 5 ballots; in arriving at this conclusion the Justice rejected 44 ballots.

The majority opinion in the main adopts the opinion of the sitting Justice; but counts for Mr. Frothingham Group 5, consisting of 19 ballots, rejected by the sitting Justice, thus reducing the number of rejected ballots to 25, and giving Mr. Frothingham 5,019 ballots, and Mr. Woodside 4,995 ballots, a plurality for the former of 24.

I think that the sitting Justice was right in rejecting the 19 ballots of Group 5, although not for the reasons given by him.

Counsel for Mr. Woodside contend that the sitting Justice erred in rejecting the seven ballots included in Group 2, and in not counting them for the respondent. In arriving at their result of 5,002 ballots

for Mr. Woodside, the Governor and Council evidently counted those seven ballots for him. It will be noted that the majority of the court although rejecting the ballots of Group 2, do not adopt the reasons given by the sitting Justice for so doing, those reasons being in their opinion inconsistent with the reasons given for not counting the votes in Group 5. The number of ballots in Group 2 (7) is not sufficient to change the result in any event, and the question involved need not be further discussed here.

I think, also, that the sitting Justice erred, as contended by counsel for Mr. Woodside, in counting for Mr. Frothingham the ballots of Group 3 (16 in number) and the ballots of Group 4 (10 in number), and that the ballots of both groups should be rejected; practically the same question is involved in the consideration of both groups.

The opinion gives Frothingham 5,019 votes including in that count the votes of Groups 3 (16), 4 (10), and 5 (19).

The opinion gives Woodside 4,995 votes.

If the votes of Groups 3 and 4 (26 in number) are improperly counted for Frothingham and should be rejected, his count will be 4,993 votes or two votes less than the number for Woodside.

If the votes of Group 5 (19 in number) were properly rejected by the sitting Justice, Frothingham's vote will be further reduced to 4,974 votes, or twenty-one votes less than the number counted for Woodside.

Thus the decision as to the ballots included in Groups 3 and 4 is controlling.

The ballots of Group 3 are thus described:

"No cross in either party square, but crosses made against individual names, mostly in the Republican column. Woodside's name erased. Frothingham's name written in in the blank space below Woodside's and a cross placed in the square opposite Frothingham's name so written in. Frothingham's name not crossed in the Democratic column."

The ballots of Group 4 are thus described:

"Cross in Republican party square. Woodside's name stricken out. Frothingham's name written in blank space beneath Woodside's name and crossed in the blank space opposite Frothingham's name so written in."

Counsel for respondent contend that these ballots cannot be counted for Mr. Frothingham for the reason that his name was

printed upon the ballot as a candidate for Sheriff under the party designation, that the law does not authorize the counting of names written on the ballot below a name erased when the name of the person thus written is elsewhere printed upon the ballot as a candidate for the same office, and that electors desiring to vote for Mr. Frothingham after erasing Mr. Woodside's name in the party column, should have done so by placing a cross in the square opposite Mr. Frothingham's printed name.

In this contention I think that they are absolutely right. Precisely the same question arose in the Androscoggin County Election Cases in 1918; upon consideration the sitting Justice then made the following rulings upon the question here presented:

1. If the name of the candidate of the voter's choice appears printed upon the ballot, that name cannot be written in a blank space as a candidate for the same office; the voter must indicate his choice by a cross in the proper place.

2. If the voter places a cross in the square at the head of the party column and wishes to vote for some candidate in another party column, he must erase the name of the candidate for the particular office in his own party column, and mark the name of the candidate for that office in the other party column with a cross in the square at the right of the name.

3. The voter may erase any name printed in the party column, and in such case the ballot shall not be counted for the candidate whose name is erased.

When those cases were before the Law Court, those rulings were acquiesced in by the parties. 118 Maine, 102. I think that the law, and the rules which should govern the method of marking ballots, were correctly stated in that case, and that the present opinion does not fully give effect to the change in the manner of voting made by the legislation of 1917.

In all cases arising under the ballot law in force in this State since 1891, it must be considered settled that the Legislature has the right to prescribe the manner of marking the ballot, and that the voter must follow the prescribed mode of marking, if he wishes his vote to be counted. The voter's intention must be legally expressed. The statute, in this respect is mandatory. "The marking must be as the statute commands, in a particular place and with a particular emblem." *Bartlett* v. *McIntyre*, 108 Maine, 167. "Whatever else

he does, the voter must express his intention as the statute requires." *Libby* v. *English*, 110 Maine, 455. This construction of the ballot law is well understood and unquestioned; yet there is a persistent tendency to disregard it, in yielding to the supposed intention of the voter as distinguished from his intention legally expressed.

I think that it was clearly the intention of the Legislature in enacting the legislation of 1917 (Chapter 296 and Chapter 306) to provide a method of voting by the use of a cross whereby all writing upon the official ballot, and changes by the use of "stickers," or otherwise, would so far as possible be rendered unnecessary. It is evident that the more simple the method, and the less writing or other change on the face of the official ballot, the less opportunity will exist for the use of distinguishing marks, and the less chance for dispute as to the intention of the individual voter. To this end the Legislature provided (Chapter 296) for a ballot with a square at the right of the name of each candidate whose name appeared on the ballot, as well as at the head of the party column, and for two optional methods of marking the ballot (Chapter 306), one by the use of a cross in the square at the head of the party column, with or without crosses in the squares at the right of the names of the candidates in another column; the other, by the use of crosses in the squares at the right of the names of the candidates, without using a cross in the party square. The only contingency which could not be provided for by the use of a cross was the desire of a voter to cast his ballot for a person whose name was not printed on the ballot as a candidate for the office which the voter desired him to fill. To meet such a case the Legislature provided a blank space in which the voter "may write the name under the name of the candidate erased." This is the only provision found in the law for writing upon the ballot.

To make its purpose more effective the Legislature prohibited the use of "stickers" except when necessary to fill a vacancy or correct an error.

To some extent the method adopted was similar to that provided by the original Act of 1891, Chapter 102, Section 24, prior to the Amendment of 1893, Chapter 267. Under the Act of 1893, as amended by the Act of 1903 permitting the use of "stickers," (R. S., 1903, Chap. 6, Sec. 24. R. S., 1916, Chap. 7, Sec. 16) the greatest latitude was allowed voters to express their choice by making alterations on the face of the official ballot, thus giving unlimited opportu-

nity for the use of distinguishing marks, rendering the counting of the ballots unreasonably burdensome, and increasing disputes as to the intention of the voter. The Legislature of 1917 aimed at allowing an equal latitude to the voter in expressing his choice by the use of the cross in the manner clearly pointed out in Chapter 306, by placing the cross "within the square above the name of the party group or ticket," or as an optional manner of voting, "if the voter shall desire to vote for any person or persons whose name or names are not printed as candidates in such party group or ticket," by erasing "any name or names which are printed therein and place a cross (X) in the square at the right of the name of the candidate of his choice in any other party group or ticket."

To effectively accomplish the results intended the method of voting adopted must necessarily be exclusive. It would be of little use to prohibit the use of "stickers," if the voter was at liberty to erase a name printed upon the ballot and below the name erased *write* the name of a candidate for the same office printed in another party column.

The opinion controverts this construction of Chapter 306 by reference to Chapter 296, approved on the same date as Chapter 306, and therefore to be construed with it. Chapter 296 relates to the preparation of the ballots; Chapter 306 prescribes the manner of marking and casting the ballot. Assuredly they are to be construed together, and when so construed in the light of the existing statute to be amended, support the construction here contended.

The opinion says:

"Chapter 296, amending the provision as to the preparation of ballots, after reenacting the clause as to the blank space below the names 'in which the voter may write the name of any person for whom he desires to vote as a candidate for such office,' adds these significant words which had not appeared before: 'At the right of each name and at the right of the blank space above provided for there shall be left a blank square in which the voter may make a mark.' "

The clause last quoted is indeed significant; it is the only substantial change made in the section; the clause providing for a blank space to be left after the names of the candidates for each different office in which the voter might write the name of any person for whom he desires to vote as a candidate for such office, had been in

the statute relating to the preparation of ballots for many years; unless the "significant words" were added, there would be no direction in law for preparing a ballot, which the voter could mark with a cross at the right of the name of the candidate of his choice, as expressly provided in Chapter 306. Hence the provision for a blank square at the right of each name and at the right of the blank space was added to harmonize the two statutes and to authorize the printing of ballots which should conform to Chapter 306.

The opinion proceeds:

"For what purpose is the voter allowed to place his cross in this blank unless his ballot so marked is to be counted? The ballot in its amended form is an express invitation to insert any name below the name of the candidate erased and to cross it after it is written in."

The purpose for which the blank square is provided, and for which the voter is to place the cross therein, is obvious when the two sections are read together. The blank square was provided to enable the voter to mark his ballot with a cross; and he was allowed to place his cross in the blank square at the right in accordance with Chapter 306, and when so placed to have his vote counted; if he has not placed a cross in the square at the head of the party column, his vote will be counted without other action on his part; if he has placed a cross in the square at the head of the party column, he must erase from the party column the name of the candidate for whom he does not wish to vote; and if he wishes to vote for a candidate whose name is not on the ballot as a candidate for the particular office, he may write the name under the name of the candidate erased.

The ballot in the form prescribed *before* the amendment was an express invitation to insert any name below the name of the candidate erased, and had been so understood and acted upon since 1893. In the law of 1893, in force until the passage of Chapter 306 of the Laws of 1917, there was no provision for the use of a cross except at the head of the party column. The ticket was "split" by writing in the name desired, and since 1903 by the use of "stickers".

The ballot in its amended form when Chapters 296 and 306 are considered together, was an express invitation to use the squares at the right of the printed names for the purpose of marking the candidate's name with a cross, and to insert in the blank space below the erased name, and to mark with a cross, the name of any person for whom the voter may desire to vote, not printed on the ballot as a

candidate for such office. To construe Chapter 296 broadly as permitting the voter to write *any name* in the blank space is construing it without reference to Chapter 306 and its obvious purpose; such a construction defeats the prohibition against the use of "stickers" and recognizes as valid a poor substitute for the latter, in effect reverting to the practice existing before the use of "stickers" was authorized in 1903.

As so construed together the two statutes are harmonious; upon any other construction they are inconsistent, and the legislation of 1917 fails of its full purpose.

It follows that the ballots in Group 3 cannot be counted for either candidate; not for Woodside, because his name is erased; not for Frothingham, because by writing in the latter's name instead of marking it with a cross in the Democratic column, the voters failed to observe the statute and thus failed to legally express their intentions.

For the same reason, the ballots in Group 4 must be rejected. They cannot be counted for either candidate.

For the same reason the ballots in Group 5 were correctly rejected by the sitting Justice, but not for the reason given by him, and should not be counted for Mr. Frothingham, as the opinion counts them.

The ballots of Group 5 are thus described:

"Cross in Republican square. Woodside's name stricken out. Frothingham's name written in in blank space under Woodside's in Republican column. No cross in small square at right of Frothingham's written in name."

These ballots cannot be counted for Woodside because his name is erased, nor for Frothingham because his name, appearing printed in the Democratic column, is written into the Republican column. Again the voters have failed to legally express their intentions.

The result is, as above stated, that Mr. Woodside is shown to be elected Sheriff of Oxford County by a plurality of twenty-one votes.

ALEXIS MORNEAULT *vs.* SAMUEL COHEN AND TRUSTEE.

Aroostook. Opinion May 16, 1923.

A dispatch given to a telegraph company is generally held to be the original and should be proved, unless the moving party makes the company his agent, then the message delivered at destination is the original. In absence of evidence to show mistake in transmission, as between sender and receiver, a message delivered may be treated as the original. A reply message in answer to another is competent evidence. An offer by telegram accepted by telegram before revocation constitutes a complete contract. Copies of telegrams are admissible if proper foundation is laid. The rule of damages in cases where acceptance of the goods purchased is refused, is the difference between the purchase price and the price received less cost and expenses of resale. No exceptions lie to a refusal to give instructions which amount to a nonsuit.

In the instant case the evidence and progress of the case clearly established the identity of the defendant as S. Cohen, sender of the telegrams. As to the admissibility of the copies, the foundation having been laid by the plaintiff in his testimony and by the testimony of the telegraph operator at Grand Isle, the copies of the telegrams were properly admitted.

When a party commences correspondence by telegraph, he makes the company his agent, and then the message delivered at the destination is the original. Where the sender of a telegraphic message takes the initiative, the message as delivered may, as between him and the person to whom it is sent, be treated as the original, in the absence of evidence to show mistake in the transmission of it, and on proper foundation being laid.

A reply message from the destination office in answer to another is competent evidence.

Where an offer is accepted by telegram before a telegram revoking it has been sent, and the acceptance is received before the revocation of the offer is received, there is a complete contract.

If the purchaser of goods refuses to accept and pay for them, the owner may at once resell them for the most he can get for them and charge the first purchaser with the difference between the contract price and the price actually obtained.

If the goods have been resold by the vendor within a reasonable time after the breach of contract by the purchaser, the measure of damages will be the difference between the price agreed to be given and the price realized on the resale, with the costs and expenses of resale.

On exceptions. An action of assumpsit for alleged breach of contract in the sale of a car-load of potatoes. Plea, the general issue, and under a brief statement the statute of frauds was set up. The case was tried to a jury and a verdict for plaintiff was rendered. Exceptions were taken to several rulings of the presiding Justice and to several refusals to rule as requested. Exceptions overruled.

The case is stated in the opinion.

Shaw & Cowan, for plaintiff.

A. B. Donworth, for defendant.

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

HANSON, J. This is an action of assumpsit to recover damages for breach of a contract to sell and deliver a car-load of potatoes. The jury returned a verdict for the plaintiff for $407.22. The case is before the court on defendant's exceptions.

The transaction involved grew out of certain telegrams passing between the parties which are as follows:—

1. "Northern and Western Union Telegram.

New York, N. Y. Jan. 20, 1920.

To ALEXIS MORNEAULT
Grand Isle, Maine.

Will give four dollars and thirty five cents hundred one car U. S. Grade number one Mountains buying same through broker.

O. K. A C, 11.50 A. M. S. COHEN."

2. "Northern and Western Union Telegram.

Grand Isle, Jan. 20, 1920.

To S. COHEN
New York, N. Y.

Accept offer four thirty five delivered Harlem will ship soon as get heater.

ALEXIS MORNEAULT.

O. K. A c, 5.15 P. M."

3. "Northern and Western Union Telegram.

New York Jan. 30, 1920.

ALEXIS MORNEAULT
Grand Isle, Me.

You must ship car three sixty five you can cancel car four thirty five you have charge heater company for losses.

S. COHEN.

O. K. A C 11.50 A. M."

4. "Northern and Western Union Telegram.

New York, N. Y. Jan. 31, 1920.

To ALEXIS MORNEAULT
Grand Isle Maine

Wire immediately if you are shipping the two cars.

S. COHEN.

O. K. A C 1.16 P. M."

5. "Northern and Western Union Telegram.

New York Feby. 2, 1920.

ALEXIS MORNEAULT
Grand Isle, Me.

Do not ship that four thirty five car could not wait any longer have bought elsewhere as soon as you will have heater wire me. Will see what can do.

S. COHEN."

The potatoes in question were not delivered at Harlem River, but remained in the plaintiff's possession after defendant's refusal to receive them. They were later sold to other parties by the plaintiff at a reduced price, and this suit followed.

Defendants' counsel presents twelve exceptions. Exception No. 1 is to the ruling of the presiding Justice denying defendants' motion for a directed verdict. This exception has the same effect as a motion for a new trial on general grounds. In this case the verdict seems to be amply warranted, and the exception must, therefore, be overruled. *Berry* v. *Railway*, 109 Maine, at 332.

Exceptions Nos. 2, 3, 4, 5, and 6, relate to the admission by the presiding Justice of copies of all the telegrams in the case. The objection raised was based upon counsel's claim that the defendant was not identified as the sender of the telegrams 1, 3, 4 and 5, and that copies of the original telegrams were not admissible.

We think the evidence and progress of the case clearly established the identity of the defendant as S. Cohen, sender of the telegrams. As to the admissibility of the copies, the foundation having been laid by the plaintiff in his testimony, and by the testimony of the telegraph operator at Grand Isle, the copies of the telegrams were properly admitted. Those exceptions must be overruled.

The facts in the instant case bring it within the decisions following: "As to which message is the original, it is generally held that the despatch given to the telegraph company is the original, and should be proved. The exception to the rule is, when the party commences correspondence by telegraph, he makes the company his agent, and then the message delivered at the destination is the original." See *Howley* v. *Whipple*, 48 N. H., 487; *Anhauser Bush Brewing Assn.* v. *Hutmacher*, 127 Ill., 652. Where the sender of a telegraphic message takes the initiative, the message as delivered may, as between him and the person to whom it is sent, be treated as the original, in the absence of evidence to show mistake in the transmission of it, and, on proper foundation being laid, secondary evidence of the contents of the telegram is admissible. *Nickerson* v. *Spindell*, 164 Mass., 25, and cases cited; note page 28. Greenleaf on Evidence, 16th Ed., Vol. 1, Page 697, Note 1. See *Ayer* v. *Western Union Telegraph Co.*, 79 Maine, 493, citing *Durkee* v. *Vermont C. R. R. Co.*, 29 Vt., 137, wherein it was held that where the sender himself elected to communicate by telegraph, the message received by the other party is the original evidence of the contract. In *Cleveland* v. *Green*, 40 Wis., 431, the message received from the telegraph company was admitted as the original and best evidence of a contract, binding on the sender. In *Morgan* v. *People*, 59 Ill., 58, it was said that the telegram received

was the original and it was held that the sheriff receiving such a telegram from the judgment creditor was bound to follow it, as it read. There are dicta to the same effect, in *Wilson* v. *M. & N. Ry. Co.*, 31 Minn., 481, and *Howley* v. *Whipple*, 48 N. H., 488. See also note to *Smith* v. *Eastman*, (54 Md., 138), 39 Am. Rep., 355. A reply message from the destination office in answer to another is competent evidence. *Cairo & St. L. R. Co.* v. *Mahoney*, 82 Ill., 73; *Wilson* v. *Minnesota & N. W. R. Co.*, 31 Minn., 481; See 50 L. R. A., 250-253, Note.

Exception No. 7 is to that part of the charge of the presiding Justice relating to damages, and must be overruled. After restating the history of the transaction and adverting to the place of sale and place of delivery, the presiding Justice charged the jury as follows: "If you do find, however, for the plaintiff, you come to the question of damages, and only in that event, then you will consider what the carload of potatoes would have been worth at the price offered in these telegrams at Harlem River, the plaintiff paying the freight, and you will deduct what he sold them for at Grand Isle, or wherever he did sell them, here in Aroostook County, and whether that was a fair sale or not, and the difference is the amount of damages which you will assess." This instruction correctly states the law, and moreover, it is not perceived where the defendant was prejudiced thereby.

Exception No. 8 is overruled for the same reason, as in 2, 3, 4 and 5, involving the identity of the sender of the telegrams signed "S Cohen."

Exceptions Nos. 9 and 10, are to the refusal of the presiding Justice to instruct the jury that, 1, "inasmuch as telegram number 1 was to buy through a broker, and that as there was no acceptance to buy through a broker, that there was no contract, 2, that the refusal of the presiding Justice to instruct the jury that the plaintiff did not accept the offer, and hence there was no contract." These exceptions are overruled. The refusal was proper. The instructions, if given, would have been equivalent to a nonsuit. The refusal is therefore not the subject of exception. The instructions were correct in detail. No exceptions lie to a refusal to give instructions which amount to a nonsuit. *Bunker* v. *Gouldsboro*, 81 Maine, 196; *Hoyts, etc. Co.* v. *Atlantic Ry.*, 111 Maine, 108; *Auburn* v. *Union Water Power Co.*, 90 Maine, 71; *Dudley* v. *Poland Paper Co.*, 90 Maine, 260. That there was a contract considered by the defendant as binding on him

clearly appears in telegram No. 2, where the defendant, ten days after the contract was made, tried to 'cancel' it. "Where a party telegraphs and offers his wheat, of the quality and grade proposed, at a certain price, and the other party answers accepting the proposition, that moment the minds of the parties meet in agreement, and the contract of sale is complete." *Andrews* v. *Schrieder,* 93 Fed. Rep., 367. "Where an offer is accepted by telegram before a telegram revoking it has been sent, and the acceptance is received before the revocation of the offer is received, there is a complete contract." *Brauer* v. *Shaw,* 168 Mass., 198.

Exception No. 11 is to the refusal of the presiding Justice to instruct the jury that the measure of damages is the excess of the contract price over the market price at Harlem River. Exception No. 12, is to the refusal to instruct the jury, "that the potatoes left with Morneault, on Morneault's hands in Aroostook County, have nothing to do with the assessment of damages." These exceptions are urged in evident good faith and will be so regarded. Both involve and relate to the rule of damages, and both requests were sufficiently covered by the instructions of the presiding Justice particularly as the same relate to Exception 7. The rights of the parties and the rule for recovery in damages in similar cases are well defined and settled. "If the purchaser of goods refuses to accept and pay for them, the owner may at once resell them for the most he can get for them and charge the first purchaser with the difference between the contract price and the price actually obtained." *Atwood* v. *Lucas,* 53 Maine, 511. "If the goods have been resold by the vendor within a reasonable time after the breach of contract by the purchaser, the measure of damages will be the difference between the price agreed to be given and the price realized on the resale, with the costs and expenses of resale. Addison on Contracts, Vol. 2, Page 477; *Atwood* v. *Lucas,* supra." *Tufts* v. *Grewer,* 83 Maine, 407. The plaintiff acted within his rights, and the instructions of the presiding Justice were in accordance with settled law.

The entry will be,

Exceptions overruled.

MEMORANDA DECISIONS

CASES WITHOUT OPINIONS

MARK F. OUELETTE *vs.* FORT KENT ELECTRIC COMPANY.

Aroostook County. Decided November 1, 1922. This is an action on the case for damages resulting from a collision between the plaintiff's automobile and the defendant's gasoline truck. The jury returned a verdict for the plaintiff, and the case is before the court on general motion.

The record discloses that on the evening of November 14, 1920, the defendant's truck was left on the side of the highway while the operatives were absent procuring a supply of gasoline. On their return, and while defendant's operatives were pouring the gasoline into the tank of the truck, the plaintiff approached. Both machines were on the right side of the way. The plaintiff's car was properly lighted, while the defendant's servants used a lantern. Another automobile used by defendant's servants to deliver the gasoline stood fifty feet in front of the defendant's car. Each charged the other with negligence. The issue was submitted fairly, we must assume. From the record, which we have carefully read, we are persuaded that the verdict is amply supported by the testimony. Motion overruled. *C. J. Keegan and A. S. Crawford,* for plaintiff. *A. J. Nadeau and Powers & Guild,* for defendant.

EVERETT L. HUSTON *vs.* FORGIONE & ROMANO COMPANY.

Cumberland County. Decided November 22, 1922. This is an action in assumpsit on an account annexed which reads thus:

"For loss of use of mill by reason of drawing down head of water in my mill and keeping same drawn down from June 17, 1921, to September 6, 1921, inclusive, 82 days at $7.50 per day as per agreement, $615.00."

The jury returned a verdict for the plaintiff and the defendant presents a motion for a new trial based upon the customary grounds. There was conflict of testimony as to what the oral contract between the parties really provided, and arguments are presented as to the reasonableness of the claims made upon the one side and the other. The disputed issues are solely those of facts and we are not persuaded that the jury committed such manifest error as to warrant us in setting aside their verdict. Motion overruled. *Frank H. Haskell,* for plaintiff. *Arthur Chapman,* for defendant.

FRANK S. SAWYER *vs.* WILLIAM G. MEANS, JR.

Washington County. Decided November 25, 1922. Decision centered, in the trial of this case, on the question of the original transaction. Plaintiff asserted that he was unpaid for a Chevrolet automobile which he had sold and delivered to the defendant. Though admitting possession of the property, defendant contended himself to be a bailee to sell it for the plaintiff, whom he had succeeded as a dealer in that make of motor car. This issue was closely contested. The jury returned a verdict in the plaintiff's favor. That verdict the defendant is desiring should be set aside. In such behalf he has filed two motions. One is on the ground that the jury's conclusion is contrary to the evidence submitted. The other assigns the discovery, newly, of additional testimony, of which a report accompanies the motion.

Regarding the first, defendant has not met the requirement of clearly showing an insufficiency of supporting proof, and consequently a verdict which is distinctly wrong. In the instance of the second motion, if it be conceded that the defendant had not knowledge of the evidence previous to the trial, still the fact remains that when the new evidence is considered with that already in, it does not appear to be of such weight and value as to bring the situation within

the sphere of the probability that a different result would be attained in another trial. Both motions overruled. *Gray & Sawyer*, for plaintiff. *Herbert J. Dudley*, for defendant.

MAYNARD DAMON, Appellant

vs.

WESTBROOK GARAGE & MACHINE COMPANY.

Cumberland County. Decided December 22, 1922. This action is brought to recover damages for injuries to plaintiff's automobile, because of a bolt claimed to have been left by the defendant in the rear housing, when the machine was repaired at the defendant's garage.

The jury returned a verdict of $50 for the plaintiff, and the defendant filed a general motion to set it aside.

The issue was one purely of fact. The testimony was contradictory. The probabilities were somewhat in favor of the defense, but our judgment is not to be substituted for that of the jury unless the verdict is glaringly wrong. A careful study of the evidence does not lead us that far. Motion overruled. *Hinckley & Hinckley*, for plaintiff. *James H. McCann*, for defendant.

AUGUSTUS CURRIER, Jr.

vs.

BANGOR RAILWAY AND ELECTRIC COMPANY.

Penobscot County. Decided December 27, 1922. This case has been tried two or three times with a verdict finally for the defendant. It will serve no useful purpose to give an analysis of the testimony. It is conflicting from beginning to end. The plaintiff's testimony not only conflicts with the defendant's, but conflicts with itself.

It may be that a verdict either way might be sustained. But there was not only some evidence upon which the jury might have found for the defendant in the present case, but ample.

It is a clear case in which the verdict of a jury should not be molested by the court. Motion overruled. *Daniel I. Gould and Clinton C. Stevens,* for plaintiff. *Ryder & Simpson,* for defendant.

SUSIE J. RIDEOUT *vs.* THE A. & K. RAILWAY CO.

Sagadahoc County. Decided January 13, 1923. In this compensation case the only issue is that of causal connection between the industrial accident suffered by the petitioner's husband and his death which occurred two months later. The issue is one of fact. The statute gives this court no authority to decide facts. Another tribunal has been established for such purpose and except in case of fraud its findings of fact are final. Its errors of law are of course subject to review and correction by the court.

It is said that the Commissioner made an error of law in that he without evidence determined, in favor of the petitioner, the fact of causal connection.

If he made this finding without legal evidence it was an error of law. It was a violation of a fundamental legal principle. *Orff's Case,* 122 Maine, 114.

But the finding is supported by the opinion, introduced in evidence, of a reputable physician who attended and treated the patient. While such an opinion may fall far short of being a demonstration we cannot under the circumstances of this case say that a finding so supported is a finding without evidence. Appeal dismissed. Decree affirmed. *Frank A. Morey,* for plaintiff. *William H. Newell,* for defendant.

STATE OF MAINE *vs.* AMANDA MARTIN

York County. Decided January 15, 1923. Complaint for search and seizure of intoxicating liquors. After verdict of guilty the case

is before the Law Court on respondent's exceptions to the ruling of the presiding Justice declining to order a verdict for the respondent. *Held:*

That upon the evidence for the State, supplemented by the circumstances and the rather improbable story of the respondent, the jury were warranted in believing as they declared, that the respondent was guilty beyond a reasonable doubt. Exceptions overruled. *Edward S. Titcomb, County Attorney,* for the State. *John P. Deering,* for respondent.

MORRIS KNOBEL et al. *vs.* SAMUEL J. BRAMSON.

Cumberland County. Decided January 17, 1923. A traveling salesman, representing these plaintiffs, solicited from this defendant, a retail dealer, an order for certain suits and coats; the order being detailed, in duplicate, in writing, on otherwise partly printed sheets which the salesman carried for use in such cases. One copy of the order was sent to the plaintiffs and the other left with the defendant.

Plaintiffs, by way of a first installment of the ordered wearing apparel, forwarded all but three garments, of which shipment the defendant kept all but six; these he returned, claiming himself privileged so to do under the terms of the contract, which the plaintiffs disputed. In the course of subsequent correspondence, plaintiffs asked the defendant whether he was still desiring the omitted three garments shipped, and the defendant promptly wrote that he was not. After receiving his letter, plaintiffs shipped defendant the three garments, and with the three, the six that the defendant had previously sent back, which shipment the consignee refused from the common carrier of the merchandise. Meanwhile, defendant had tendered his check in payment for the garments retained in the instance of the first shipment. The tender was rejected on the ground, not of its medium, but of the insufficiency of its amount.

Action followed, based on a full performance of the original contract. In making their case, plaintiffs inquired of the salesman who took the order, whether, as filled in and submitted by him to the defendant, the order was inclusive of all the terms and conditions of

sale, and he answered that it was. The defendant, in turn, offered a letter, bearing a date six months later than the writ, that he had from the defendant, stating the conditions of the order somewhat differently than did the written order. But, on interposed objection, the letter was not accepted in the evidence, and rightly. The writing, bespeaking itself with completeness in no uncertain terms, was controlling. And this regardless of conflicting statements concerning its inclusiveness or omissions, and regardless, too, of the credibility of any witness. So, the reserved exception must fail.

Plainly, the tender was too small, for it did not cover payment for all the goods originally received, and hence, if for no other reason, the exception concerning the refusal to direct a verdict for the defendant, is insecurely rested.

But there is a difficulty with the plaintiffs' verdict. It is excessive. While the three garments were yet unshipped, the order was modified by mutual consent of the parties, on the initiative of the plaintiffs' letter, in respect to the three garments. Therefore, plaintiffs might not properly charge the defendant for them, and much less recover against him therefor. One hundred and ten dollars are included in the verdict's amount for these garments, erroneously. If the plaintiffs will remit this sum within twenty days from the filing of this rescript, the motion for a new trial will be overruled; otherwise, it must be sustained. *H. E. Nixon,* for plaintiff. *J. S. Judelshon,* for defendant.

FRED W. BROWN *vs.* ENOCH F. ANDERSON.

Waldo County. Decided January 30, 1923. The plaintiff is an attorney at law. He brought the present action to recover for professional services rendered and for moneys expended by him in the defendant's behalf, and prevailed against an interposed defense of previous adequate payment; the verdict embracing almost all that he claimed was his due.

Dissatisfied with the jury's decision, on the essential question of fact involved, the defendant has argued a usual form motion for a new trial. But, no sufficient reason being perceived for sustaining the motion, it must be overruled.

Nor is there any merit in an exception reserved by the defendant in a situation which may be briefly related. The plaintiff's account carried an item for trying a certain suit. The suit was one to redeem from a real estate mortgage. Plaintiff was asked, on cross-examination, if the outcome of that trial was not adverse to his client, and the plaintiff insisted otherwise. Later on, defendant's counsel inquired of the trial court clerk, as the custodian of the record, concerning that which the final decree in the suit required. The clerk, answering in the manner that interrogation invited, stated the result in close approximation rather than with preciseness. When it was in order for the plaintiff to tender rebutting evidence, he offered an attested copy of the decree, in contradiction of the general testimony that the clerk had given. To the introduction of this evidence the defendant unavailingly objected.

The ruling admitting the document obviously was correct to the degree that its verbal buttressing would be superfluous. Motion overruled. Exception overruled. *Fred W. Brown and John R. Dunton,* for plaintiff. *Buzzell & Thornton,* for defendant.

EDWARD J. CONQUEST, Trustee *vs.* JACOB GOLDMAN.

Penobscot County. Decided February 9, 1923. Upon retrial of this case after the decision reported in 121 Maine, 335 the plaintiff recovered a verdict, and the defendant now presents his case upon a bill of exceptions alleging ten erroneous rulings, and a general motion for a new trial. At the argument, however, it was conceded that the bill of exceptions and the motion, in fact embraced but two points, and the case will be so considered.

The action is in trover by a trustee in bankruptcy to recover the value of a stock of goods sold to defendant by the bankrupt in violation of the Bulk Sales Law, R. S., Chap. 114, Sec. 6, within four months before the petition was filed.

1. The plaintiff offered in evidence as admissions of the defendant his examination taken before the referee in bankruptcy. The defendant's counsel objected and "requested that the plaintiff select which parts were material but the court allowed the entire statement

to go in including statements of counsel and questions and answers objected to without ruling at the hearing before the referee."

The exceptions to this ruling are without merit. The examination was admitted only as statements, in the way of admissions, made by the defendant before the referee. The objection was directed particularly to the last question put to Mr. Goldman, and his answer thereto, which defendant claims was not given understandingly, but with a misunderstanding of the meaning of the question. The defendant took the stand, however, and had the opportunity of explaining his answer to the jury; and at the close of the charge the presiding Justice gave an instruction on the point which was satisfactory to counsel for defendant.

2. The plaintiff has declared upon his own possession of the goods on May 4, 1920, and the conversion of them on that day by defendant. The void sale was made January 1, 1920; the petition in bankruptcy was filed April 12, 1920. Therefore, the defendant contends that the evidence does not support the declaration, that the count should have been upon the bankrupt's title and a conversion from him, and that his motion for a directed verdict in his favor should have been sustained.

The answer is obvious; the plaintiff is not enforcing a right of action which belonged to the bankrupt, but a right of action for the benefit of creditors. The sale being void as to creditors, the property passed to the trustee to be by him reclaimed and recovered for the benefit of creditors. U. S. Bank Law, Sec. 47, Sub-section a, and Sec. 67, Sub-section e. This contention is settled adversely to defendant in *Philoon* v. *Babbitt*, 119 Maine, 172. "As between the defendant and trustee the stock belonged to the latter." Motion and exceptions overruled. *Simon J. Levi*, for plaintiff. *Maurice E. Rosen and George E. Thompson*, for defendant.

GLADYS L. CHENEY *vs.* HARRY I. CHENEY.

Sagadahoc County. Decided February 9, 1923. This is an action to recover for services as housekeeper and nurse rendered to defendant during the last illness of his wife. The defendant and his wife are the parents of plaintiff's husband.

The plaintiff does not claim to recover under an express contract; she states positively that there was none, and she further states that the services rendered by her prior to her mother-in-law's return home from the Fairfield Sanitorium, about June 1, 1920, were rendered without expectation of compensation. But she says that although she remained after the return of Mrs. Cheney, Senior, as a matter of family affection and friendship, she "expected to be paid something."

The defendant, on the other hand, says that the son, husband of the plaintiff, brought his family, consisting of his wife and two children, aged four and six years at the time of trial to his father's house solely upon the suggestion of the son; that no suggestion was made to him that the daughter-in-law expected payment from him for her services; that he had no reason to understand that she expected to receive compensation from him; that she never asked him to pay her, which she admits to be true; and that the only expectation of remuneration which either the son or his wife had, was the expectation that the son would receive a bequest under his mother's will, which he did receive amounting to $1,950.

We have carefully read the record in this case. There is a sharp conflict of testimony between the plaintiff and her husband, on the one side, and the defendant on the other. While there is much in the record to sustain the defendant's position that the plaintiff rendered her services without expectation of compensation from him, and that the claim here presented is purely an afterthought, yet there was testimony which, if believed by the jury, was sufficient to support a finding by the jury that the services were rendered under circumstances consistent with contract relations between the parties; that they were rendered by the plaintiff in the expectation and belief that she was to receive payment; and that the circumstances of the case and the conduct of the defendant justified such expectation and belief. When the parties bear the relationship to each other existing in this case, the law makes it peculiarly the province of the jury to determine, upon the circumstances existing in each case, whether the services were rendered upon the basis of a contract. *Saunders* v. *Saunders*, 90 Maine, 284. *Hatch* v. *Dutch*, 113 Maine, 405.

While the award of the jury may seem quite liberal, yet manifest error does not appear in determining either the question of liability or the amount of compensation; nor does the verdict appear to be

the result of bias or prejudice; the court is, therefore, not warranted in setting it aside. Motion overruled. *Wheeler & Howe and Dana S. Williams,* for plaintiff. *McGillicuddy & Morey,* for defendant.

JOSIE TYLER *vs.* CORA E. WRIGHT et als.

Sagadahoc County. Decided February 19, 1923. This is a real action to obtain possession of certain lands. The demandant claims under a mortgage given her by Charles R. Foote in his lifetime. The defendants are the heirs at law of said Foote. By way of brief statement the defendants allege that the mortgage was not intended to secure and did not secure any valid legal obligation or indebtedness and was never executed by Foote for that purpose; that there was no valid legal consideration for said mortgage; and that said mortgage was never delivered by Foote to the plaintiff. Briefly, the defendants invoke the familiar legal principle that it is essential to the validity of a mortgage and to the right of the mortgagee to enforce it that it should be supported by a valid consideration 27 Cyc., 1049; or to state the principle in more quaint form, since a conveyance cannot be a mortgage unless given to secure the performance of an obligation, the existence of an obligation to be secured is an essential element without which the mortgage instrument is but a shadow without substance. 19 R. C. L., 294.

The case was tried before a jury and at the conclusion of the testimony the presiding Justice directed a verdict for the defendants. Upon plaintiff's exception to this ruling the case comes before us. "It is a well established and familiar rule of procedure in this state that the court may properly instruct the jury to return a verdict for either party when it is apparent that a contrary verdict would not be allowed to stand." *Wellington* v. *Corinna,* 104 Maine, 252. We are to examine the report therefore in order to test the question whether upon the same a verdict for the plaintiff could be sustained. It is the opinion of the court that such verdict could not stand and that the presiding Justice was correct in his determination upon the law involved and the testimony given in the case to rule as he did. Exceptions overruled. *Edward W. Bridgham,* for plaintiff. *Arthur J. Dunton,* for defendants.

LEWIS A. RIDEOUT *vs.* HENRY E. RIDEOUT.

Sagadahoc County. Decided February 20, 1923. This is a bill in equity to compel specific performance of an alleged oral contract to devise certain real estate. The defendant, who is the appellant, admits that the sole issue is whether or not there was a contract between Edward A. Rideout, the father, and Lewis A. Rideout, the son, the latter being the plaintiff, whereby the father agreed to devise certain real estate to the plaintiff. The issue, therefore, is solely one of fact. The cause was heard by a single Justice who made a very clear and exhaustive statement of his findings and of the testimony upon which those findings rested. As a result of those findings a decree was executed sustaining the bill, sustaining the contract, and ordering performance and completion of said contract by the defendant who is the executor of the will of Edward A. Rideout.

No citation of authorities is necessary to support the well-established rule in this State that the decision of a single Justice upon matters of fact in an equity case will not be reversed unless the Appellate Court is clearly convinced that such findings are erroneous, and the further rule that the burden of proving such error is upon the appealing party. We have, with all possible care, examined the findings and the record of the testimony, as well as the very able arguments of counsel. It is the opinion of the court that the mandate of the court must be. Appeal dismissed with additional costs. Decree below affirmed. *George W. Heselton and Harold E. Cook,* for plaintiff. *McGillicuddy & Morey,* for defendant.

STATE OF MAINE *vs.* HARRY M. COLE et al.

Knox County. Decided February 24, 1923. Indictment for adultery. Verdict guilty. Motion for new trial addressed to the presiding Justice and denied. Appeal to the Law Court.

Held:

That the verdict is not so manifestly wrong as to require the intervention of this court. The evidence was flatly contradictory, and it

was the province of the jury to determine the truth. The authenticity of most damaging letters alleged to have passed between the parties was denied, but the explanation of the woman defendant who received them, even as it appears in cold type, is so inherently feeble as to forbid credit. Her appearance upon the stand, as well as that of the man, was a proper factor of determination on the part of the jury, and apparently it was unfavorable to the defense.

Taking all the evidence and all the circumstances together we are not convinced that the jury manifestly erred. Appeal denied. Judgment for the State. *Z. M. Dwinal,* for the State. *M. A. Johnson,* for the respondents.

AMERICAN FISHERIES COMPANY, Petitioner for Certiorari

vs.

LAUREN M. SANBORN

JUDGE OF THE SUPERIOR COURT FOR THE COUNTY OF CUMBERLAND
in the matter of

MILES B. MANK MOTOR CAR COMPANY

vs.

AMERICAN FISHERIES COMPANY.

PETITION OF AMERICAN FISHERIES CO.

and

MOTION OF MILES B. MANK

as to
Three Trespass Actions

Cumberland, ss. Supreme Judicial Court, April Term, 1921

AMERICAN FISHERIES CO.

vs.

MILES B. MANK MOTOR CAR COMPANY

and

MILES B. MANK.

Cumberland County. Decided March 1, 1923. This per curiam covers two cases, one, a petition for certiorari, and the other, a motion of the American Fisheries Company to restore to the docket certain cases for trial. The first case comes up on exceptions by the petitioner.

The petition for certiorari was for a writ to bring forward the following proceedings in which the defendants in error were plaintiffs in a process of forcible entry and detainer against the petitioner to

gain possession of certain described premises. In the Municipal Court judgment was rendered for the defendants in error. An appeal was taken, by the plaintiff in error, to the Superior Court of Cumberland County. The case was opened to a jury, the evidence submitted, and a verdict directed for the defendants in error, who were plaintiffs in the original suit. The petitioner assigns certain errors in the proceedings in the Municipal and Superior Courts, and asks that the record of the Superior Court, including the record of the Municipal Court, be certified to the Supreme Court for correction. The case was heard by Mr. Justice WILSON and his decision was in favor of the defendants in error. His decision was so manifestly correct, upon an assignment of errors so clearly without merit, that it would be neither of value as a precedent, nor of interest to the profession, to analyze his finding further than to quote the final paragraph, which sums up the whole case. "For every error alleged to have been committed there was ample remedy provided by the bill of exceptions. If the presiding Justice improperly refused them, Sec. 55, Chap. 82, provides a method of having them allowed. If Rule IV of the Superior Court applies to appeal cases tried without a jury the petitioner cannot now be allowed to complain because in his ignorance of the law he waived the right to reserve them. *Haines* v. *Co. Com.*, 110 Maine, 422. *Phillips* v. *Co. Com.*, 83 Maine, 541."

The motion to restore certain cases to the docket for trial also comes up on exceptions. The exceptions, however, are obviously insufficient to confer jurisdiction upon the law court, but, inasmuch as Mr. Justice WILSON, before whom the case was heard, has made a finding, the court will assume jurisdiction to the extent of approving of his decision so far as he has passed upon the facts therein contained. His finding was as follows: "The petitioner seeks to have certain cases tried at the April Term, 1921, of the Supreme Judicial Court, and which have gone to judgment, restored to the docket for trial upon the grounds that no legal verdict was rendered in the cases, which were tried together, and if any legal verdict was rendered, it was only against the Miles B. Mank Motor Car Company, a co-defendant, and not against said Miles B. Mank.

"The petitioner bases its contention that no legal verdict was rendered against either defendant upon the claim that the verdict was not affirmed by the Jury after it was signed by the Foreman in open Court, a verdict for the defendant or defendants being directed by the Presiding Justice.

"The cases were tried together, and obviously it was the understanding of all parties that the actions against both defendants were being heard. If the singular number was used by the Court in referring to the defendants, it must, under the circumstances, be understood as referring to both defendants. The Clerk of Courts testified at the hearing on the petitioner's petition, that the verdicts were affirmed by the Jury in usual course.

"It is, therefore, held that legal verdicts were rendered in all three cases.

"It further appears that through inadvertency, the written verdicts, which were prepared by the Clerk, included only one defendant, viz: The Miles B. Mank Motor Co. That it was an oversight and a clerical error on the part of the Clerk is clear. For this reason we think it may now be corrected in accordance with what we have not the slightest question were the facts; that all parties understood that the cases against both defendants were being heard, and the directed verdicts were against them both in all three cases.

"The motion of the defendant to correct the records is therefore allowed, and the Clerk of Courts is hereby ordered to correct his records in accordance with these findings." Exceptions in each case overruled. *Arthur L. Hersey*, for petitioner. *A. S. Littlefield*, for Lauren M. Sanborn and Miles B. Mank.

PATRICK FOLEY

vs.

DANA WARP MILLS & AMERICAN MUTUAL LIABILITY INSURANCE COMPANY.

Cumberland County. Decided March 7, 1923. This is a case in which total disability had ended on the 24th of August, 1921, and the present petition is based upon the claim of partial disability. An award for partial disability depends upon the claimant's earning capacity. The only question, therefore, presented in the present case is one of fact—whether the Commissioner had any evidence

upon which to base his decision. After hearing the testimony and discussing Section 15, under which the petition was brought, he comes to this conclusion: That the difference between his earning capacity before the accident and the established earning capacity since August 24, 1921, is fourteen and five tenths cents. Based upon that finding under the provisions of Section 15, he ordered and decreed that the Dana Warp Mills, or its Insurance Carrier, the American Mutual Liability Insurance Company, pay Patrick Foley compensation in the sum of nine cents per week commencing August 24th, 1921, and continuing according to the provisions of Section 15. The nature and extent of the claimant's disability was a question of fact upon which the finding of the Commissioner was final if there was any evidence upon which it could be based. A careful reading of the testimony is convincing that there was some evidence upon which the Commissioner was authorized to base his conclusion. The law does not require that he shall be controlled by the express language of the petitioner or his witnesses, or even of the physician who testified in the case. It was his privilege and province to pass upon the credibility of the testimony and consider it in connection with the circumstances and probabilities tending to prove or disapprove the testimony. The fact of what the petitioner had been earning might have been considered by the Commissioner as important evidence of his capacity to earn, and he did find, as a matter of fact, that Foley's earning capacity from September 11, 1921, to January 25, 1922, was $25.10 as compared with his earning capacity of $25.245 at the work he was doing when injured. From all the other evidence in the case, including the testimony of the doctor, whose testimony appears from the following question and answer, we are of the opinion that there was evidence to warrant the Commissioner's conclusion: Q. "He was doing work he successfully done for four months and five days. Don't you think if he done work that long he could have kept on and worked longer?" A. "Yes, I think he could."

Under a statute that provides that the finding of the Chairman shall be final upon the questions of fact in the absence of fraud, we are of the opinion that the court is not authorized to intervene in this case and set aside the finding. Appeal dismissed. *William Lyons*, for claimant. *Andrews, Nelson & Gardiner and Eben F. Littlefield*, for respondents.

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

Cumberland County. Decided March 19, 1923. Automobile collision with a verdict of $3,000 for the plaintiff, a passenger in one of the cars. This was the second trial. At the first trial the plaintiff recovered a verdict of $2,250 which was set aside by the Law Court on the ground of lack of evidence of any negligence on the part of the defendant. "There is no proof that the defendant was violating the speed law" or "was driving at an excessive rate" says the opinion. *Fernald* v. *French*, 121 Maine, 4.

At the second trial this gap was filled, if the jury believed the testimony, as they evidently did. One Logan, an avowedly disinterested witness who was produced by the plaintiff and who did not testify at the first trial, says that he was on the sidewalk about three hundred feet from the place of collision and just prior thereto when his attention was attracted by the great speed at which the defendant's car was approaching him, not less than forty miles an hour; that almost immediately he heard the crash, turned about, and saw the result.

Under our statute a speed in excess of 35 miles per hour is expressly prohibited, except under special permit. Public Laws, 1919, Chap. 211, Sec. 16. True, the defendant and the occupants of his car claim, as before, that their speed was only eight or ten miles per hour. But this vital issue was a question of fact for the jury under all the circumstances and conditions. With this new and positive testimony, squarely supporting the plaintiff's contention as to reckless driving on the part of the defendant, the court does not feel authorized to disturb the verdict. The finding of the jury stands.

The amount of the verdict, considering the nature and extent of the resultant injuries, is not so extravagant as to require modification by the court. Motion overruled. *Bradley, Linnell & Jones*, for plaintiff. *Frank A. Morey*, for defendant.

HENRY P. CUNNINGHAM *vs.* CHARLES W. HUSSEY.

Kennebec County. Decided March 19, 1923. This is an action for money had and received to recover from the defendant, an

attorney at law, certain money paid to him as the plaintiff claims under duress. The verdict was in favor of the plaintiff in the sum of $1,186.26, and the case is before the Law Court on defendant's general motion.

A detailed recital of the complicated facts would serve no useful purpose. It is sufficient to say that from the conduct of the defendant through a long series of unprofessional and persecutory acts, which the defendant did not see fit to take the stand either to explain or excuse the jury were amply justified in sustaining the plaintiff's contention.

The verdict, however, is slightly excessive. One item in the plaintiff's claim covers the amount paid by the defendant to another attorney for services due from the plaintiff, amounting to $81.55. This should have been deducted.

If plaintiff remits all of the verdict in excess of $1,105.71 within thirty days from the filing of this mandate, the motion for new trial is overruled, otherwise is sustained. So ordered. *Andrews, Nelson & Gardiner,* for plaintiff. *Pattangall & Locke,* for defendant.

Mary E. House Case.

Oxford County. Decided April 2, 1923. Charles House, husband of the petitioner, suffered an accident, arising out of and in the course of his employment from which death resulted. The only issue in the case is whether the petitioner was living apart from her husband for a justifiable cause, and was still dependent upon him for support so as to entitle her to the benefits of the Workman's Compensation Act relating to dependents. The finding of the Chairman of the Industrial Accident Commission was in favor of the petitioner. From this finding the defendants appealed. The answer required by Section 32 of the act was not filed.

It is the opinion of a majority of the court that the case should be referred back to the Chairman, before whom, after answer has been filed, further evidence of dependency may be presented by either side. So ordered. *Alton C. Wheeler,* for plaintiff. *Hinckley & Hinckley,* for respondents.

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

Cumberland County. Decided April 3, 1923. For the third time this case appears before this court. In the first trial, April, 1921, a jury verdict was rendered for the plaintiff and the case came to us upon defendant's exceptions and motion for a new trial. Upon a consideration of the motion, *Rand* v. *Symonds*, 120 Maine, 126, we carefully examined all the testimony offered, relating to the titles of the parties, and declared; "A comparison of these two record titles discloses on the one hand in the plaintiff's chain an unfilled gap of one hundred sixteen years followed by a mere quit-claim deed to herself from those who show no record title, while on the other hand the defendant shows record title beginning with a warranty deed dated twenty-three years earlier than the plaintiff's quit-claim and with an unbroken chain to the present time. Moreover, the plaintiff's early deeds are vague and uncertain in description while those of the defendant quite clearly and quite exactly give boundaries which include the land in dispute. It is, therefore, the opinion of the court that the defendant has the better title, that the jury must have failed to understand the rules of law pertaining to the case and the application of the evidence to those rules of law, with the result that their verdict was manifestly wrong." Accordingly a new trial was granted.

At the second trial, possibly because of the finding of this court upon the question of record title, the presiding Justice withdrew that question from jury consideration and submitted the case upon the one issue of adverse possession. Again the verdict was for the plaintiff and again the defendant came to us upon exceptions and motion for a new trial. The exceptions were not considered but the motion for a new trial was sustained, the court saying, among other things, that the plaintiff based her claim to adverse possession upon cutting timber and wood in small quantities in 1905, 1909 and 1918, and occasional cutting of firewood and marsh grass for bedding. These cuttings were upon land which she says was intended to be described in a deed to her from the Pillsbury heirs dated April 18, 1864. This is the quitclaim deed which was referred to in the first opinion as coming after a gap in the title of one hundred sixteen years. The court in the second opinion further said that this quitclaim deed of

1864 gives no sufficient description of the land but refers to a deed given one hundred and sixteen years earlier which was even more deficient in description. "From the various surveys, and the testimony of surveyors and others appearing at both trials," said the court, "a true location of the Pillsbury lot, or a Pillsbury lot, is an impossibility." Since the evidence utterly failed to locate such a lot as the plaintiff described in her declaration the court held in the second opinion that the verdict was clearly wrong, saying "If the Pillsbury lot cannot be located, what lot from the testimony did the jury have in mind when returning the verdict? The testimony does not disclose its proportions or extent, the writ gives no aid and a judgment based on the verdict would be meaningless."

For the third and last time the case is before us and this time it is upon report. In that report the parties stipulate as follows: "The evidence taken out at the trial held at the April term, 1921, both documentary and oral, as appearing in the printed case presented to the Law Court at the June term, 1921, shall be considered in the case with the same force and effect as if it had been taken out anew at this time. In addition to that the parties may take out any new testimony, either contradictory or supplementary to the testimony found in said printed case. Such new testimony, together with the printed case of June, 1921, to constitute the record of the case before the Law Court. Upon all this testimony, if the Law Court shall find that a verdict by a jury in favor of the plaintiff would be warranted and could be sustained, then the Law Court shall order judgment for the plaintiff. If on the other hand the Law Court finds that upon all such testimony a verdict for the plaintiff would not be warranted and could not be sustained then in such case the Law Court shall order judgment for the defendant."

By force of this stipulation both the questions of record title and prescriptive title are before us for consideration.

We have, therefore, carefully examined the testimony, both old and new, and as to record title we hold that a plaintiff's verdict could not be sustained.

In the new testimony no effort has been spared by the plaintiff to convince this court as to the location of the Pillsbury lot and the failure of the defendant's deed of 1841 to include the land in dispute. But when all the evidence has been considered, and it would be of no interest except to the parties to enter into an extended discussion of

the same, a majority of the court hold that the plaintiff has failed to persuade us by a fair preponderance of the evidence that the title, claimed by adverse possession, to the land described in her declaration, is superior to that of the defendant. Judgment for the defendant. *W. R. & E. S. Anthoine*, for plaintiff. *Frank H. Purinton*, for defendant.

GEORGE L. GOULD et al. *vs.* JOHN M. MCLAUGHLIN.

Waldo County. Decided April 10, 1923. This is an action of deceit. The plaintiffs bought real estate of the defendant. They claim that when the premises were shown them by the defendant he represented that the land he was selling included land which he did not own and which, in fact, was not included in the deed when the same was passed. The sole issue involved was whether such false representations were made. The jury heard the conflicting testimony, saw the witnesses in person, judged their credibility, and found a verdict for the plaintiffs. The case is before us upon motion for new trial. Under the oft-stated rules in such cases, including that of burden of showing manifest error on the part of the jury, we are of opinion that the defendant has failed to sustain his motion. Motion overruled. *Ralph W. Crockett and Rufus F. Springer*, for plaintiff. *Buzzell & Thornton*, for defendant.

EZRA ANDELMAN *vs.* SAMUEL SHULMAN.

Cumberland County. Decided April 18, 1923. Of the present case there is little to say. The defendant issued a stop-payment order against two checks which he had drawn in favor of and delivered to one Gallant and the bank dishonored them.

Then, the plaintiff, alleging himself the presenting indorsee of both checks, brought this action against their maker. Defendant pleaded an utter lack of consideration in the original transactions and that the plaintiff had not purchased in innocence for value.

Thus the issue was essentially of fact for the jury. Believing the defendant, and disbelieving the plaintiff and his witness, the jury decided accordingly. Now a motion for a new trial is urged.

When a cause has been fairly, justly and intelligently tried and a verdict reached, there 's an end of it. Motion overruled. *Harry L. Cram and W. K. & A. E. Neal,* for plaintiff. *Maurice E. Rosen,* for defendant.

LENA ROBITAILLE

vs.

ANDROSCOGGIN & KENNEBEC RAILWAY COMPANY.

Androscoggin County. Decided April 27, 1923. This is an action to recover damages for personal injuries claimed by the plaintiff to have been incurred through the negligence of the defendant. The jury returned a verdict for the plaintiff for two thousand dollars. The case is before the court on general motion for a new trial.

On September 27, 1921, at or about 11:25 P. M., the plaintiff and one Peter Hayes were standing by the track of the defendant awaiting the arrival of a car then on its way from Mechanic Falls to Lewiston. The location is in Auburn. The plaintiff was a visitor at the home of an uncle whose house was about ninety-five feet from the point of the accident, and three and one half miles distant from Lewiston. Mr. Hayes expected to take the defendant's car to Lewiston, the plaintiff intended to return to her uncle's house.

The testimony shows that the plaintiff was standing face to the electric road and about two and one half feet from the track, and that Mr. Hayes stood by her side with his face toward her. She says she signaled the motorman while the car was yet three hundred feet away, that she did not notice the motorman, or whether the car slowed down. Aside from the above she remembers nothing, and does not know how she was injured. She says she regained consciousness that night while in hospital, and that she returned to her uncle's home the next day suffering from pain in the head and right side. Her condition at the date of the trial was substantially normal. The plaintiff's companion was killed, without doubt, from contact

with some part of the electric car of defendant. The injury causing death was behind his left ear, the skull being crushed. He was standing between the plaintiff and the approaching car, his back toward the car. The plaintiff's testimony so locates Mr. Hayes, and the location of the injury corroborates her beyond peradventure. The theory of the plaintiff's counsel is that the car, going at a rapid rate of speed, struck Mr. Hayes, throwing his body against the plaintiff, causing her injury, which again is no doubt the fact. To sustain the theory sufficiently to cast negligence upon the defendant, testimony was introduced tending to show a badly constructed track, a projecting knob or handle on the side of the car door, a rate of speed about fifty miles an hour, and a consequent swaying car, swaying from side to side from one foot to eighteen inches,—from which it is claimed that passing the location of the accident, going at a high speed, the car swayed sidewise beyond the lawful limit of its course and caused the injury to the plaintiff.

There was opposing testimony as to the good condition of the rails and roadbed, as to the kind and quality of the car, that it was one of eight exactly similar in use on defendant's road, that no change had been made since the accident, in the road, the rails, or the car,—that the speed was not over twenty-five miles per hour, that the plaintiff and her companion were not seen until the car was within twenty-five feet of where they stood. There was testimony as well from competent witnesses as to the possibility of a car swaying from a foot to eighteen inches, and what would happen to the trolley connection if a car should sway either distance, and whether a car under such speed and swaying either distance would remain on the rails.

There was but one passenger on the car at the time, a lady who testified for the defendant. She said she read a newspaper during the passage from Mechanic Falls to the point of the accident, and did not notice that the car was proceeding at an unusual rate of speed.

The plaintiff had the burden of proving that the defendant was negligent and that its negligence caused her injuries. After a careful examination of the case, it is the opinion of the court that the plaintiff has failed to sustain the burden of proof, either affirmatively or by proof of facts from which negligence could legally be inferred.

The verdict is manifestly wrong. Motion sustained. New trial granted. *Frank A. Morey,* for plaintiff. *William H. Newell,* for defendant.

WILLIAM PENN WHITEHOUSE

IN MEMORIAM

SERVICES AND EXERCISES BEFORE THE LAW COURT, AT AUGUSTA DECEMBER 12, 1922, IN MEMORY OF

HONORABLE WILLIAM PENN WHITEHOUSE

FORMER CHIEF JUSTICE OF THE SUPREME JUDICIAL COURT

BORN APRIL 9, 1842, DIED OCTOBER 10, 1922.

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

The exercises were opened by Hon. L. T. CARLTON, President of the Kennebec Bar Association, who spoke as follows:—

MAY IT PLEASE THE COURT:

I am instructed by the Kennebec Bar to ask this Honorable Court, to pause in its arduous and important duties, for a time, that we may present to the court some resolutions and make some remarks upon the life, character and attainments of the late Hon. WILLIAM P. WHITEHOUSE, a former member of this court and one of its former Chief Justices.

Before calling upon those who are to take part in these exercises, I would be false to my best impluses, if I failed to pay my personal tribute to the memory of him, whom we mourn today. Death always preaches an impressive sermon, and feelingly teaches us what shadows we are. We often hear the respect paid to the dead, disparaged and undervalued. It is called a poor substitute for the just treatment of the living. To me it is most laudable, embodying as it does the best sentiments and the truest judgments of mankind.

Men see clearly and feel rightly at the grave, as nowhere else. Here clouds and mists disappear, and prejudices are carried away. Our lives are filled with the voices of the dead. They speak from records, books and associations. The dead are always with us. We converse with them, live with them, and always love them, in our busy, absorbing lives. How true it is, and how we appreciate its meaning, that to live in hearts we leave behind, is not to die. And is it not a compensation that in the grave our rest is undisturbed. No sorrow, no slander, no venom, and no temptations. The ocean that separates this world from the next no human eye can penetrate. The shadow of the future is on the shore of the present, and what lies in that shadow none of us can tell. We try to look at that sea, but it is shoreless.

The Greeks personified death by a beautiful boy, crowned with immortal youth, and after all meditation and reflection that ideal seems most fitting. The eyes of Judge WHITEHOUSE were ever turned upward. He never evaded a responsibility. He cultivated courage and the highest moral character. He was absolutely and unflinchingly honest as becometh a Judge. Honest with himself, honest with his fellow men, honest with his country, and typified all that is best in American life. Winter was on his head at the last, but eternal spring was in his heart. Turning to where man meets man in the obsorbing activities of life, where can we go, to whom can we point, for an example, in higher degree, to those elements of heart and soul, and courtesy, cheerfulness and charity, in private and business relations, in winning personality, than to Judge WHITEHOUSE?

He had a love of truth which ambition for success in the strenuous contests of life never caused him to violate. He was conservative in a high degree without a taint of want of courage. No storm of passion unbalanced him. He, whom we now commemorate, possessed the well-balanced character of true greatness, which every one admired, and every one loved so well. Though dead in the physical sense, yet, he speaks out to us with powerful influence in conception of an existence beyond all earthly things. In comtemplation of the days when he moved among us, beautiful, gratifying pictures, appear in the mind, of how much sweeter is life that he lived.

Winter's snows and spring time flowers, summer's sunshine and autumn's decay with their blending of gloom and brightness, may succeed each other over the physical resting place of this noble character, till the spot itself shall have been forgotten, except to the passer-by, who may read it cut in stone, even the granite or marble may fall into decay, yet the life of Judge WHITEHOUSE, what he did, how he lived, what he was, will continue to influentially reach out from the unseen beyond the impenetrable veil, 'twixt the finite and infinite, to guard and to guide those who shall come after. Something has gone from nature since he died, and life is not the same, nor can be. While we mourn the life of a friend we may feel comfort in the fact that of such a man as he was little is taken away by death. His spirit and character live after him.

"Whoever will, may find him anywhere,
Save in the grave, not there—he is not there."

And in the contemplation of his life we feel the force and truth of Webster's words— "How little there is of the great and good that can die. They live in all that perpetuates the remembrance of men on earth, in all the recorded proofs of their actions, in the offerings of their intellects, and in the homage and respect of mankind. They live in their example, and they live and will live in the influence which their lives and their efforts, their principles and their opinions, exercise and will continue to exercise on the affairs of men."

I wish to say in closing that Judge WHITEHOUSE was fond of Justice which in its most extensive sense, is the most necessary as well as the sublimest attribute of man.

Resolutions of the Kennebec Bar Association and the remarks of Hon. GEORGE W. HESELTON, a member of the Kennebec Bar Association, in presenting them:

MAY IT PLEASE THE COURT:

For the Committee selected by the Kennebec Bar Association, I present resolutions as a concrete and formal expression of the veneration and appreciation which our association has for the memory of Ex-Chief Justice WHITEHOUSE, who died on the tenth day of October,

1922. In a limited and simple way they express the abiding affection and universal respect which was entertained for him, not only by the members of our profession, but also by the public at large, throughout the State of Maine. These resolutions and the tributes given in these memorial exercises, and printed in our court records, will give to future generations, a slight conception of what manner of man he was, who for thirty-five years was a member of the Judiciary of of Maine, and for two years graced and honored the great office of Chief Justice of our Supreme Judicial Court, and who, during all of that time, was, in truth and fact, an "upright judge," administering the laws justly and equitably, and interpreting them with a wisdom that few equalled, and none surpassed.

He was truly an upright and learned Judge, but equally a true and worthy citizen. He had a profound love for his fellow-man, and manifested this feeling in his sympathetic and charitable dealings with all who came in contact with him, whether in the court proceedings, or in public life. In a word, as public official, or as a private citizen, he was a christian gentleman, one who "did justly, loved mercy, and walked humbly before God."

These are not the perfunctory and fulsome words of a friend who cherished his friendship, but the reiteration of the appraisal of his character, as expressed by the press and public, by the Bench and Bar of this State, when it was known that he had passed from our midst to the Great Beyond.

What he was as a distinguished member of our court, and as an influential citizen of our State, we can speak of with assurance, from personal contact, and association. What he was, as a husband and father, we realize almost as surely by observation. No one could have exhibited a finer sense of chivalry toward woman than he did towards his wife. No one could show a profounder devotion for wife and son than he.

This is a simple tribute to the memory of a great and gentle Judge, a worthy citizen, and a devoted husband and father.

I would that we might have a true portrait of him as he appeared to us off and on the Bench—a citizen, a Judge—or that some inspired mind could paint in words his portrait—describe the cordiality and friendliness of his every day appearance among us, his associates, friends, and neighbors, at the same time describe the dignity and poise of his bearing as a Justice of this court. Nature had moulded

him in an attractive personality, and cultivation and worthy aspirations had made him one toward whom everybody was drawn; and in whom all had implicit trust.

The true outward personal appearance of Justice WHITEHOUSE will pass with us who knew him, but the influence of his character, and example will endure through all time, not only helping us, but those who come after us, and may be influenced through something we may do that is traceable to his influence.

> "Were a star quenched on high
> For ages would its light
> Still travelling downwards from the sky,
> Shine on our mortal sight.
>
> So, when a great man dies,
> For years beyond our ken,
> The good he leaves behind him lies
> Upon the path of men."

The most imperishable records, however, of his mental and judicial capacity will be found in the opinions which he wrote, and which are included in the decisions of this court. I can give no truer estimate of the inspiration and purpose which guided him in that judicial work than by quoting his just appraisal of a brother associate on the Bench.

"These opinions are the products of a broad and vigorous mind, with legal common sense as one of its strongest attributes, and they afford abundant evidence that he never lightly permitted the substance of right to be sacrificed to the science of statement and shadow of form, or willingly allowed the trammels of technicality to hamper and impede his efforts to reach the result demanded by the manifest truth and justice of the cause."

So lived, and died, WILLIAM PENN WHITEHOUSE, our friend, our associate, our leader. That we may perpetuate his memory, and our appreciation of his character as a citizen, and public officer, so long as the records of this court exist, we present these resolutions, and ask that they may be entered as a part of those records.

BE IT RESOLVED: That the members of the Kennebec Bar Association hereby express their appreciation of the character and public service of former Chief Justice WILLIAM PENN WHITEHOUSE.

That in his death the Bench and the Bar of Kennebec County, and of the State, have suffered a great loss, which has brought personal sorrow to all; that though we mourn, we will hold in lasting remembrance his kindly sympathy, the inspiration and the hope that he gave to all, and the charming brilliancy of his mind, and we will cherish forever the strength and beauty of his life and character.

That this hour, given over to these exercises in memory of him who has left us, shall be also a time of consecration to the great fundamental principles of law and justice and right living, to which he devoted his splendid ability and learning during the long years of his service, the full fruitage of which no one can estimate.

That this court, so long and faithfully served by him, is requested to enter upon its records these resolutions as a sincere and heartfelt tribute to his memory and that a copy thereof be transmitted by the Clerk to his widow and son who survive him.

SANFORD L. FOGG,
FRANK G. FARRINGTON,
CARROLL N. PERKINS,
NORMAN L. BASSETT,
GEO. W. HESELTON.
Committee on Resolutions,
Kennebec Bar Association.

Remarks of CHARLES W. HAYES, Esq., President of the Maine State Bar Association.

MAY IT PLEASE THE COURT:

On this occasion, reverently set apart for the commemoration of the character and achievements of the late Chief Justice WILLIAM PENN WHITEHOUSE, I am glad to offer my tribute to his memory, for and in behalf of the Bar of Maine.

Judge WHITEHOUSE had lived a little more than four score years, every year of which was useful to the world. In his youth he acquired a fund of useful knowledge, and that knowledge broadened and deepened with the passing of the years, for he was ever a diligent as well as an intelligent student.

Members of the Bar now living remember but little of his career as a practising attorney, because early in his professional life, he was called to become the first Judge of the Superior Court of Kennebec County.

But his services as Judge of the Superior Court, as Associate Justice, and later as Chief Justice of the Supreme Judicial Court of Maine, the present members of the Maine Bar, young as well as old, know and appreciate. And the Bar and Bench, in future years, will turn to opinions, written by his pen with pleasure and profit, for the solution of legal problems, so long as our Commonwealth shall endure.

Much has been said, and much will be said, in praise and admiration of his judicial career; but the members of this court know better than we, that however strongly these expressions of praise may be, none can be termed flattery; his life, his work, and his achievements, merit all the good and gracious things which have been, or will be said of him.

The professional and judicial activities of his life having been devoted largely to the material problems of humanity, he became an expert advisor and expounder of business men's problems; and yet his heart remained as tender as that of a woman. While his hand was ever guided by justice, his heart was expanded by benevolence.

He was a cultured man, a student of all the lore of philosophy, history and religion. His philosophy of life was pure, sane and catholic. He had kept alive in his nature just enough of the humorous side of life to make himself charming to his associates, and himself happy and philosophical.

His breadth of culture and learning was such, that even in extemporaneous talks and speeches, he was able to draw material from the fountains of history or philosophy, poetry or fiction, and to clothe his ideas with that pure English and sparkling wit which had a peculiar charm and fascination.

But I desire to record and emphasize that characteristic of his nature which endeared him to all, namely his sympathy and love for mankind. He loved his brother man, and all men loved him. His sympathies for humanity were as broad and deep as the ocean, and high as the starry-decked canopy of heaven.

To the practitioner of law, and especially to the younger and less experienced, he was a source of help and strength, pouring the balm

of his gentle nature on their wounds and giving from the wealth of his wisdom, solace and strength in their difficulties and adversities. And this was effected, not by seeming admonitions and reproofs, but by those gentle suggestions and indirections, so that those benefitted almost felt that their own efforts produced the relief which he brought about.

It pleases me to compare his life with the waters of that river on the banks of which he passed his earthly life. In his restful moments, like the calm waters of that river, he gave from his sweetness, beauty and refreshment to all with whom he came in contact, causing life about him to adorn and beautify the landscape. When occasion offered, like the impounded waters of that river, he gave, of his accumulated wisdom, power and energy for the development and enrichment of his State, and incidentally of the world, and finally, when his earthly course was run, he passed quietly, calmly and confidently into the sea of Eternity, there happily to mingle with his own kind through the never-ending ages.

Tribute by Hon. CHARLES A. STROUT, President of the Cumberland Bar Association.

MAY IT PLEASE THE COURT:

We are met today to pay a tender and loving tribute to the memory of the late Chief Justice WHITEHOUSE. Eulogy is a difficult and delicate undertaking at the best. Sometimes it is mere distortion of facts, wanton exaggeration, attributing qualities and virtues to the deceased that he never possessed; lifting with words to almost heroic heights a man of only ordinary attainments.

Fulsome eulogy that comes not from the heart of him who speaks, and that utterly fails to impress those who listen. Vain and fruitless task.

Happily no apprehension exists on that score today, but a deep and settled conviction crowds in on us that words are inadequate to express fittingly the sentiments we feel in this hour, and far more inadequate to portray the character and life work of Chief Justice WHITEHOUSE.

His early successes at the Bar brought him in a striking manner to the favorable attention of his fellow townsmen, and his career was

assured. Important matters came to him and were handled so ably that his appointment to the Superior Court and later to the Supreme Bench seemed a proper recognition of his ability as a lawyer and his integrity as a man.

Though richly endowed with natural gifts, and trained and fortified by a liberal education, he owed his success in great part to a capacity for hard work throughout his career. Industry well directed and unflagging made him a broad man, an eminent lawyer, a wise and just Judge.

On the Bench he showed a wonderful fitness for the Judicial functions.

Of even temper, flowing courtesy, firm and just in his decisions he easily won the respect and admiration of the legal fraternity and of the public generally.

Keen as a damascus blade his intellect was so constituted that it enabled him to go through masses of irrelevant matter and legal sophistries straight to the real points of the case.

His written opinions are strong and forceful presentations of the law, and as literary productions show the touch of a master hand. He was not unduly fettered by precedents, but examined the reasons on which the precedents stood and oftentimes boldly disregarded them when he found that the symmetry of the law and the demands of justice under the changing conditions of the times seemed to him to require it.

Those opinions replete with legal lore, polished in form and brilliant in expression and imagery, will be preserved in our Reports an enduring memorial to him who met the great responsibilities resting upon him as a Justice of the Supreme Court of Maine and the graver responsibilities of a Chief Justice of that court, ably and conscientiously and in such manner as to fully deserve the encomiums showered upon him.

An engaging personality is an important factor and counts with telling effect in every walk of life. None more fortunate than he in that respect. Alert, responsive, quick in repartee, bright and cheerful at all times, he readily made friends wherever he went. It was a treat to see him passing along the street; brisk, animated, courteous, a cordial greeting for his acquaintances, creating about him an atmosphere of cheerful good fellowship.

His official duties took him all over the State, and he necessarily met many people and was widely known. Everywhere throughout the State the mention of his name brings quick appreciation of his talents and his deep and pervading influence in the affairs of his time, with profound regret that he has been taken from us.

Chief Justice WHITEHOUSE was not controlled by narrow views in converse with his fellow men. He could see the pure gold of noble character and high endeavor in whatever station it might be found, and always gave free and full recognition to those qualities wherever he noted them. Never overbearing he endeared himself to the younger lawyers by patient listening to their efforts and by kindly and helpful suggestions and advice. Their difficulties did not receive his criticism, but on the other hand, he was ever ready to assist them in every way that he could.

Death in the case of most of us recalls the words of the poet,—

> "You know how little while we have to stay,
> And, once departed, may return no more."

And we feel that he, who has penetrated that mysterious something that we call The Future, has gone forever and that his life work is finally closed and ended. While his memory may be cherished by a few, it is quickly forgotten by the many, and passes into oblivion leaving nothing permanent and lasting.

But the life work of Chief Justice WHITEHOUSE is not ended, it is not passing into the darkness of the night, it is coming in with the dawn of a perfect day.

The years of patient and unremitting labor in the walks of his profession and on the Bench, are crystallized and securely preserved in the Maine Reports. In the reports will be found many opinions written by him that will be quoted as establishing legal principles that will long endure as the law in this State. They show the scope of his great influence in shaping the body of our law as it stands today, and settling the important commerical, financial and civic questions that the development of our State brought to the earnest and thoughtful attention of the court.

Long after the hush of death is upon the lips of all present, those opinions will declare to succeeding generations principles of law and

rules of conduct that will be implicitly relied upon for their guidance, and will constitute the crowning triumph of a life full of great achievement and abundant success.

Our hearts are sad as we realize our great personal loss, and that the earthly presence of a true friend has gone from us forever.

Our sorrow must seek consolation, however, in the contemplation of a life nobly lived, of high ideals, pure and lofty aspirations, a brilliant career, an example of the highest type of American manhood, respected and honored by all.

Address by Judge CHARLES F. JOHNSON of the United States Circuit Court of Appeals.

MAY IT PLEASE THE COURT:

As a former member of Kennebec Bar, and still upon its retired list, I am grateful for the opportunity to add to that conveyed by the resolutions which have been offered, my tribute, not only of respect, but of warm appreciation for WILLIAM PENN WHITEHOUSE, eminent jurist, and sincere and loyal friend.

Nature, industry and learning made him a wise, impartial and eminent Judge, who brought to the discharge of his important duties a keen intellect, a well-balanced mind and a capacity for work; but she had also endowed him with a generous, sympathetic heart and upon his graceful, charming personality she had written, in characters easily discernible, the unmistakable evidence of its possession, which gave the assurance that he would respond to the magic touch of friendship or of human suffering and need in the expression of tender, sympathetic thoughts and the doing of kindly acts.

I tried my first case before him in the Superior Court of this County and thereafter before him, as a Judge of that court or as a Justice of the Supreme Court, I appeared more often than before all the other Judges in the State.

His courtesy and kindness toward me as a stumbling young lawyer, which were continued when my steps had become somewhat less uncertain, makes the remembrance of him that crowds upon me at this moment, not that of his great legal ability and his powerful intellect, which Bacon could possess in the highest degree and yet

be justly designated, "wisest, brightest, meanest of mankind"; but rather of him as a friend, who Emerson has said, "may well be reckoned the masterpiece of Nature."

The graceful beauty of his captivating personality arises before me as it does before you all, and with "increasing loveliness" will be a "joy forever" and "will never pass into nothingness."

During his long service upon the Bench I do not believe there was ever a lawyer who, however keenly he felt defeat, entertained any feeling of resentment or anger toward Justice WHITEHOUSE.

Here in this Bar we were bound to him by the strongest ties of affection, for there was not one who did not regard him as a friend, and whose life did not reflect the influence of that well-rounded, beautiful character, whose presence in this old court room shed its rays of kindly light and encouragement. To us all he was far more than the wise and impartial Judge; he was the sympathetic friend who loved justice, hated wrong, loathed meanness, and inspired all with higher ideals of our profession.

Beneath his gentle nature there smouldered the fires which could be easily fanned into flames by the sight of wrong and meanness, and then how those soft eyes would flash their indignation; and no less fiery and scathing would be the words that poured from his lips. None who once encountered this manifestation of his displeasure was foolhardy enough to appear before him again as the champion of a cause that elicited such displeasure.

He loved life, its pleasures, books, friends and neighbors; and his State and Country with a patriotic fervor which he was ever ready to display when the proper occasion arose.

In giving prominence to the qualities of heart and mind which made Chief Justice WHITEHOUSE the ideal friend and mentor, I do not intend to minimize his splendid judicial career, and the great service which he rendered the State during the long period through which it extended, covering in his service in the Superior Court and as Associate Justice and Chief Justice of the Supreme Judicial Court thirty-five years and constituting one of the longest, if not the longest, judicial service rendered by any one in the history of the State. Here his fame is secure and will be preserved in his written opinions which display his legal knowledge, industry, discriminating mind and the literary charm which characterized all he wrote.

If at times he seemed to strain at the barriers set by precedent, or the harsh and unyielding principles of the Common Law, it was because of his innate love of justice and desire to prevent the triumph of wrong. It is when he deals with equitable principles under the more flexible rules of equity jurisprudence and the conscience of the Chancellor is given freer rein, that his love of justice is shown, and displays his accurate knowledge of equitable remedies and their application.

Cheerily he pursued his way after his retirement from the Bench, never happier than when in the company of an old friend, preserving his brisk step, his pleasant smile, his cordial greetings, until near the end, and his

"Life's work well done;
Life's race well run,"

he passed on to other fields.

"So fades a summer cloud away;
So sinks the gale when storms are o'er;
So gently shuts the eye of day;
So dies a wave along the shore."

Response for the Court by Chief Justice LESLIE C. CORNISH.

BRETHREN OF THE BAR:

It is no easy matter to respond for the Court to the resolutions which have been presented and the tributes which have been paid in memory of our former Chief Justice. In all these, so discriminatingly conceived and so appropriately expressed we most heartily concur. But the personal element is so closely interwoven with the official, that the pen halts as though it were entering the confines of sacred friendship and were laying bare those intimate relations that more than two score years of close companionship have firmly welded. And yet it is fitting to record briefly our estimate of those qualities which made our friend a successful lawyer, an eminent jurist, a useful citizen and an incomparable companion.

We who knew him well will always carry with us a distinct picture of him as he moved among us. He was of slender build but of tough fibre, of less than medium stature, of erect carriage, nimble step, genial countenance, rapid speech and a blithe spirit that spread constant good cheer wherever he went. Some men meet you, some greet you. His was always a greeting. That swing of the arm which preceded the hand clasp and the jovial salutation bespoke the kindness of his heart.

We remember his loyal devotion to all good institutions, to his College which bestowed upon him its highest academic honor, as also did Bowdoin and the University of Maine; to his church in which he was a regular and constant attendant; to the Unitarian denomination in which he held high office in the State; to his city of which he was justly proud. Nor are we unmindful of his tender love of home and family. But this afternoon we must pass by all these and consider more especially the life of our friend in connection with the profession of the law.

The Romans had much to say of the blessings of a fortunate life. Such a life had Judge WHITEHOUSE, fortunate in his birth, in his early surroundings, in his education during the formative years, in the choice of a congenial profession, in his steady and rapid advancement, in home and family, in countless friends, and in years so many that his work was finished when his race was run.

WILLIAM PENN WHITEHOUSE, the son of John Roberts and Hannah (Percival) Whitehouse, was born in Vassalborough, in this County, on April 9, 1842. He was proud to trace his lineage on his father's side to Thomas Whitehouse who settled in Dover, New Hampshire, in 1658, and on his mother's to John Percival of Barnstable, Massachusetts. His parents were of the Society of Friends, and, loyal to their creed, gave their son the name so much revered by them, WILLIAM PENN. They were farmers and the neighborhood into which he was born was made up of sturdy, God-fearing New England stock, such yeomanry as peopled our Maine hills three quarters of a century ago, an environment unexcelled for the nurture of a right-minded and ambitious boy. He fitted for college at the old Waterville Academy, now Coburn Classical Institute, and entered Waterville, now Colby College, in 1859, graduating with high honors in the Class of 1863. Among his classmates was Honorable Percival Bonney of Portland, who in later years served as Judge of the Superior Court

in Cumberland County while Judge WHITEHOUSE was presiding over the Superior Court in Kennebec, these two being the only Superior Courts at that time in the State.

Following graduation he taught, as he had done during the long Winter vacations in his college course, and then began the study of law, first with Sewall Lancaster, Esq., of this city, and afterward with Hale and Emery of Ellsworth, the firm being composed of Senator Eugene Hale and Lucilius A. Emery. With the latter he served as Associate Justice of this Court from 1890 to 1911, a period of twenty-one years.

Completing his studies he was admitted to the bar of his native County of Kennebec on October 9, 1865, and at that same August term was admitted Enoch Foster, Jr., who later also served with him upon this Bench from 1890 to 1898. He at once formed a partnership with Lorenzo Clay, Esq., of Gardiner, which continued one year and then in December, 1866, he removed to Augusta and this city was ever after his home. It is interesting to note that he was content with what his native State and his native County could afford him, its schools, its college, its legal training, its opportunity for life work, and here within a distance of fifteen miles from his birthplace he spent his entire professional life. For a few months after settling in Augusta he was in partnership with George Gifford, Esq., also a native of Vassalborough, a graduate of Waterville College in the class of 1862, and for many years later in our diplomatic service abroad.

It was no feeble bar into which the young attorney had cast his lot. Among the active practitioners of that day were James W. Bradbury, Artemas Libby, Joseph Baker, Samuel Titcomb, Sewall Lancaster and Gardiner C. Vose, of Augusta; Wyman B. S. Moore and Solyman Heath of Waterville; Nathaniel M. Whitmore and Lorenzo Clay of Gardiner and Emery O. Beane of Readfield; all strong men and worthy adversaries.

In 1868, he was elected City Solicitor of Augusta and his name first appears in our Maine Reports in that capacity in the case of *Augusta Savings Bank* v. *Augusta*, 56 Maine, 176, argued at the Middle District term of 1868. And here let me anticipate by saying that his name last appears as counsel in *Thompson, Ap't.*, 119 Maine, 601 in 1921. Between these two stretch fifty-three years of time and sixty-three volumes of reports, more than half of all those published since our establishment as a State.

In October, 1869, he was appointed County Attorney by Governor Chamberlain to fill a vacancy and was twice elected to the office, making a term of seven years in all.

It was in the second year of his term that I first saw Judge WHITEHOUSE, then a young man of twenty-eight, alert both in body and mind, and with all the enthusiasm of youth. The occasion was the trial of Hoswell for murder at the October Term, 1870, in this very room. I, a lad of sixteen, came here from my home in the country on two succeeding days and sat in one of the crowded spectators' seats eagerly watching the proceedings. The scene was a memorable one, rendered so by the character of the participants. WILLIAM PENN WHITEHOUSE was County Attorney, Thomas B. Reed was Attorney General, Artemas Libby and Eben F. Pillsbury were counsel for the defense, while the presiding Justice was Charles W. Walton, then fifty-one years of age, the very embodiment of physical and intellectual vigor and a striking figure, tall, sedate, with his long, dark beard and his flashing dark eyes. It is no wonder that the country boy was deeply impressed by such a galaxy.

In 1878, the Kennebec Superior Court was established and on February 13th, at the age of thirty-six, WILLIAM PENN WHITEHOUSE was appointed its first Judge by Governor Connor. His peculiar fitness for the position was recognized by his associates at the Bar and their hopes and predictions were amply fulfilled. That Court at its inception was not a favorite with certain older practitioners who had opposed its establishment and its jurisdiction was rather closely restricted. To the honor of Judge WHITEHOUSE be it said that largely because of his ability as a trial judge, his tact and diplomacy, and his practical demonstration of the need of the Court in order to facilitate litigation, and correct that delay which had well nigh become a denial of justice, he raised the court to a high place in the regard of the Bar. Its jurisdiction was enlarged, and it came to occupy that firm position in the public mind which it has since maintained. It was a crucial but successful experience.

When on March 30, 1890, the Honorable Charles Danforth of Gardiner passed away after a distinguished service of twenty-six years as an Associate Justice of the Supreme Judicial Court, Judge WHITEHOUSE was appointed his successor by Governor Burleigh, and then began a service for the State of Maine that for twenty-three years knew no cessation, no abatement, no thought of personal

sacrifice. Think what a harvest of material wealth those twenty-three years, between the age of forty-eight and seventy-one, might have garnered for him, with all his legal learning, his richness of experience, and his wide acquaintance, had he seen fit to practice at the Bar. Instead he devoted all his talents and all his strength to his duties as a magistrate, in the settling of private rights and the vindication of public wrongs, and the people of this State owe him a debt of gratitude which should never be forgotten.

The work of a Judge at nisi prius has no lasting memorial, like that of the Appellate Judge in his printed opinions. Yet it is a task of the highest importance. Here he comes into personal touch with the parties, the witnesses, the jurors, the counsel, and upon each he makes his impression as he guides the case to a just conclusion. In this capcaity Judge WHITEHOUSE was particularly efficient. His experience of twelve years in the Superior Court fully equipped him for the same kind of work in the Supreme, and as he went about on the circuit he became what might be termed a popular trial Judge in the best sense of that rather abused term. He always held the reins but he held them so deftly that there was little pulling at the bit. His merits were obvious. He was keen of perception and swift of decision. His mind worked rapidly but accurately. Facility of decision admits of many grades. Slowness is not an indispensable element of sureness. The bullet speeds as unerringly to its mark as the arrow. Judge WHITEHOUSE had that type of mind which promptly grasped the legal point and then as promptly followed through to the logical conclusion.

And yet with this swiftness was combined rare patience. The alert intellect is apt to be impatient of one of slower mold, and it is difficult for some who have reached the logical destination to wait for those who are struggling on the way. Judge WHITEHOUSE was not of that type. He was patient and tolerant at all times and with all people.

Another outstanding characteristic of Judge WHITEHOUSE was his abounding charity, charity for the sinning and unfortunate, charity for the young and struggling attorney at the bar, charity for the embarassed witness on the stand. His whole life was the exposition of the 13th Chapter of 1st Corinthians, whether we take the word charity as in the King James version or translated as love in the revised version. This quality made every man his friend, and his passing a personal loss to a wide community.

And with this keenness of perception, this promptness of decision, this patience and this charity was a delightful vein of humor that had the sparkle of wit without its sting. This often relieved the tedium of a trial and cleared the atmosphere of the court room without lessening its dignity in the least. He was fond of people especially of gatherings of the legal profession, and his abounding good nature, his skill as a raconteur and his quickness of repartee made him the ever welcome companion. It is not strange that Judge WHITEHOUSE was deeply loved by the Bar of every County in the State, and he loved them in turn.

This was beautifully illustrated just before he left us. I called upon him three days before his death, little realizing that he was so near the end. He greeted me in the same old cordial way, and grasped my hand with that characteristic swing. I told him I was going to Washington County on the following Monday, the County where he held his first term of the Supreme Court. I asked him if he had any message for that bar. He quickly answered "Yes, give them all my love." His last message therefore to the Bar of Maine was a loving benediction. I gave the message, but before I could communicate to him the tender response, another had intercepted me.

In the work of the Law Court Judge WHITEHOUSE proved an invaluable member and contributed abundantly to the jurisprudence of this State. To one who dislikes the judicial life, nothing can be more irksome; to one who enjoys it, nothing can be more delightful. Judge WHITEHOUSE loved his appellate work and was never happier than when immersed in it in his chamber here at the Court House. He was a thorough student, possessed unstinted capacity for mental labor and spared neither time nor effort to reach the bottom of every question.

He had an innate love of justice; justice in its broader sense, not mere law, as a prescribed rule of conduct, but that higher and deeper justice which touches the very soul. Justice springs not merely from the head but from the heart. Cold intellectuality may construct the skeleton but only a warm heart can pour the life blood into it. Infinite justice reposes in the love as well as in the wisdom of the Judge of all the earth and finite justice is born of nothing less.

While therefore Judge WHITEHOUSE was diligent in tracing the sources of legal principles, precedents were his servants, not his

absolute masters, and he was inclined to struggle against rules of ancient origin which had outlived their usefulness and tended to thwart justice when applied to the affairs of modern life. How often have we heard him chafe at the necessity of a seal, a custom which he said arose in far off days when some barbaric chief being unable to write, smeared his hand with wax and impressed the document.

His style of composition tended toward the classical rather than the Anglo Saxon. He was himself a lover of the classics. He was fond too of the rather florid declamations of the orators of his younger days; of Webster and of Phillips from whom he delighted to quote. All this had its effect; and while his judicial style was not ornate or over embellished, it was copious, with a touch of the rhetorician, and a flavor of the days when men were not too busy to dress their thoughts as well as their person in becoming garb.

It follows that the opinions of Judge WHITEHOUSE gathered in twenty-eight volumes of the Maine Reports, beginning with volume 83, and closing with volume 110, form a vast body of well-wrought law and equity that not only reflect high credit upon their author for their judicial learning, but also confer an enduring benefit upon the profession and the public. They cover a wide domain, during a period when social, industrial and economic questions were pressing to the front in addition to the problems of life, liberty and property which have been the age-long concern of jurisprudence. They are unusually helpful. We turn to them again and again, and never so often, it has seemed to me, as since the pen has fallen from his hand. Within the past two months he has stood by my side more than once and has given me just the word of legal advice of which I was in search. And so it will be down through the long, long years ahead, not for me but for many of you, and for the bench and the profession as a whole. Though dead he yet speaketh.

On the retirement of Chief Justice EMERY, July 27, 1911, Judge WHITEHOUSE was appointed his successor by Governor Plaisted, and for nearly two years, or until April 8, 1913, he served as the tenth Chief Justice of this Court. The elevation was so much a matter of common demand and he had been so long a leading member of the Court that the change was hardly noticeable, and it served as a perfect rounding out of a consecrated service. His associates were glad to call him Chief, but he with characteristic modesty

regarded the Bench as really it is, a round table. When he was approaching his 71st birthday he tendered his resignation to Governor Haines, and on April 8, 1913, laid aside the ermine unspotted, and surrendered to the State the high trust that had been his so long. Then followed nearly a decade of rest mingled with congenial work, for he was one who "knew how to join the joy of youth without its silliness, and the wisdom of age without its weariness." And so he moved happily and gently on, with physical and mental faculties but slightly diminished, until on October 10, 1922, after an illness of only three weeks, the tired heart ceased to beat and he was at rest.

It was a beautiful departure from a world he loved and that loved him to a world in whose existence he had unbounded faith. The month of his going was symbolic. Judge WHITEHOUSE never reached the November of life, with its overhanging clouds and its grey and barren dreariness, but only the October with its golden foliage, its rich fruitage and its sweet and mellow benediction.

It was on the afternoon of such a perfect October day after a simple and tender service in his church home, that he was carried to his last resting place on the peaceful Western hill, surrounded by kindred and loving friends and escorted by his associates of Bench and Bar. As we stood uncovered by his bier, with grief for his death somewhat assuaged by gratitude for his life,we felt as never before the spirit of his favorite and oft-quoted poem:

"So be my passing!
My task accomplished and the long day done,
My wages taken, and in my heart
Some late lark singing,
Let me be gathered to the quiet west,
The sundown, splendid and serene."

The resolutions presented are gratefully received and will be entered upon the records of the Court, and as a further mark of respect this Court will now be adjourned for the day.

FREDERICK ALTON POWERS

IN MEMORIAM

SERVICES AND EXERCISES BEFORE THE LAW COURT, AT BANGOR, JUNE 5, 1923, IN MEMORY OF

HONORABLE FREDERICK ALTON POWERS,

A FORMER ASSOCIATE JUSTICE OF THE SUPREME JUDICIAL COURT.

BORN JUNE 19, 1855. DIED FEBRUARY 13, 1923.

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

Resolutions of the Aroostook County Bar Association, and the remarks of Hon. CHARLES F. DAGGETT, a member of the Aroostook Bar, in presenting them:

MAY IT PLEASE YOUR HONORS:

It is with deep sorrow that I now make formal announcement of the death of FREDERICK ALTON POWERS, former Associate Justice of the Supreme Judicial Court of Maine, which occurred at his winter home in Florida on February 13th, 1923, at the age of sixty-seven years.

In behalf of the Aroostook Bar Association, which was honored by his membership, I present the following Resolutions and move that they be entered upon the records of this court as a lasting tribute to his memory:

Whereas, our distinguished brother and former Justice of the Supreme Judicial Court, FREDERICK ALTON POWERS, has passed on, after a life full of high accomplishments and rich with honors, be it therefore

RESOLVED: That the members of this Bar Association desire to express their appreciation of his noble character, high attainments and public services, and place upon the records of this court their tribute to his memory.

In his private life, the Judge was kind, thoughtful, sympathetic and generous.

In his professional intercourse and business relations he was the soul of honor.

In his public services, he gave of his talents without reserve and won the gratitude of his constitutents and the State at large.

As a lawyer, he was one of the masters of the profession. His mind was clear, logical and well-balanced. He was careful, painstaking and devoted to the interests of his clients. He enjoyed their confidence and no one was too poor to gain his ear. With his brother attorneys he was always genial, kindly and helpful.

In his judicial career, the same traits of character and mind that made him conspicuous as a lawyer were crystallized in his labors upon the Bench. His opinions have added weight to the high reputation of our Maine Reports.

RESOLVED: That these Resolutions be presented to this court with the request that they be entered upon its records.

CHARLES F. DAGGETT,
RANSFORD W. SHAW,
HERBERT T. POWERS,
Committee on Resolutions.

Judge POWERS was born in Pittsfield, Maine. When a boy he went to Houlton where he lived with his brother, the late Governor Powers. He attended public schools there, fitted for college at Maine Central Institute in his native town and entered Bowdoin College in 1871. After his graduation he returned to Houlton and became a student at law in the office of his brother, Llewellyn Powers.

He was admitted to the Bar in September, 1876, and for a number of years was associated with this brother in the practice of his profession.

In 1887, he formed a partnership with his brother, Don, which continued until his appointment to the Supreme Bench.

Early in life he became interested in politics. When twenty-seven years of age he was a member of the Republican State Committee and for six years served in that capacity. In 1885 and again in 1887, he represented his district in the State Legislature. At both sessions he was a member of the Judiciary Committee and in 1887 served as Chairman of that Committee on the part of the House. Four years later he was elected State Senator from Aroostook County. He was chosen Attorney General of the State in 1893 and served two terms. On January 2d, 1900, he was appointed Associate Justice of the Supreme Judicial Court of Maine. His labors upon the Bench and the associations connected therewith were most congenial, but his business interests made increasing demands upon his time and after seven years of faithful service, he felt it his duty to resign.

Judge POWERS belonged to a family of distinguished lawyers. There were eight brothers, six of whom followed that profession. The late Governor Powers was the oldest, and Judge POWERS, the last of the family to pass away, was the youngest.

The partnership formed in 1876 associated these two brothers in a practice already long established by the senior member. The Judge was then twenty-one years of age. Endowed with a strong body and mind he was well equipped to meet the labors that were before him. It was his ambition to become a leader at the Bar, an ambition which was fully realized. He rose rapidly in his profession. His great ability, his strict integrity, his loyalty to his clients, his zeal and untiring efforts in their behalf soon earned him a reputation that placed him in the front rank of his profession. In the trial of cases he met with marked success. Almost by intuition he knew what ones to try and what ones to settle. He never went to trial without careful preparation. He wasted no time on what to him seemed immaterial. He was quick to grasp the vital points in his case and skilfully marshalled the facts to sustain the same. He presented the facts to the jury with a clearness and force that brought conviction to their minds. He was a safe counsellor. He advised his clients for their good rather than for his gain. His appointment as Associate Justice of this court was a fitting recognition of his splendid qualifications. He brought to the Bench a wealth of knowledge and experience reflected in his written opinions covering a period of seven years. He was a wise and upright Judge. At nisi prius he met his brother

attorneys upon the basis of the Golden Rule. To the younger members of the Bar he was especially patient, kind and helpful. He was never too busy to give them the benefit of his experience and wise suggestions. He inspired the confidence and respect of his fellow lawyers, and will be missed by the Bar of the State.

The members of the Aroostook Bar, to which he belonged, honored him when living and now that he has passed on, they mourn the loss of a brother, friend and companion.

In his home town where he occupied many positions of trust and honor, he was held in high esteem by his fellow townsmen. For many years and at the time of his death he was president of one of the local banks. He was enterprising and public-spirited and his value to the town both as a lawyer and citizen was appreciated by all.

And now a personal word. Judge POWERS was my close friend. My acquaintance with him dates back to the time I entered his office in 1877 as a student at law. A friendship was then formed which remained unbroken to the end. When a student in his office and afterwards in my practice, I had the benefit of his wise counsel and encouraging words. He made the rough places smooth. His helping hand was always extended. I love to think of him as a friend and companion; as I knew him in his home, where he was devoted to the happiness and comfort of those around him; as I knew him in his office, always cheerful, helpful and ready to give of his storehouse of knowledge; as I knew him when free from care, in the woods and by the campfire, where he shared both the joys and discomforts with an unselfish hand. He was no fairweather friend. Sunshine and clouds were alike to him. He was steadfast to the end.

An able lawyer, an upright Judge, a respected citizen and a good friend has passed away, but the results of his work will live, and memories of him will be sweetened by the imprint of his noble life, kind acts and friendly assistance.

We should not think of him as dead, Indeed—

"There are no dead; we fall asleep,
To waken where they never weep,
We close our eyes to pain and sin,
Our breath ebbs out, but life flows in."

Remarks of Hon. HANNIBAL E. HAMLIN, President of the Hancock County Bar Association.

MAY IT PLEASE THE COURT:

> "Of all the heavenly gifts that mortal men commend
> What trusty treasure in the world can countervail a friend."

The kind and loyal friendship shown me by our late Justice POWERS bids me tender a tribute upon this occasion. We were friends from our early boyhood days. He was but a little older than I, the few years of seniority being enough, however, to stimulate confidence and cause me to look up to him from the first. And when I say he has been a friend to me, I mean it in every sense, express and implied, the word "friend" can convey. Lacking should I be, did I fail to appreciate and be grateful for the friendship so generously given.

I leave others to speak of the details in the life history of Justice POWERS from its early date, a progressive history from the valley of its beginning to the peak of its prominence.

Though a citizen of a border county, we claim him as a citizen of the State, and of the Nation as well. Coming from a distinguished family, made strong through its rugged New England life, Justice POWERS could have been a citizen of only the highest type. Broad-minded, with a general knowledge of affairs, of sound judgment, sturdy, with keen foresight in public matters, he was a citizen we can ill afford to lose in these days of agitators and alarmists.

At the Bar Brother POWERS was an all-round lawyer. He was a master of the law, a sound adviser and brilliant trial lawyer. He once said to me, "while there are so many things beyond me I feel that when I make the most of what there is in me, I can do *something* at the trial of a case I have had a chance to prepare." And *try it* he certainly *could*. Well versed in the law of his case, quick to see all material issues as they appeared early or late, a keen cross-examiner and a strong advocate, I do not know that our State has furnished a more formidable antagonist at the Bar. His high-class service as Attorney General for four years added to his professional reputation throughout the State.

Brother POWERS was appointed Justice of the Supreme Judicial Court in 1900

As such Justice his life's work marks its greatest record.

It was Socrates who said: "Four things belong to a Judge: to hear courteously, to answer wisely, to consider soberly, and to decide impartially."

All these attributes and more were possessed by Justice POWERS. He was gifted with a natural, legal mind, and this, with the advantage gained by his training and experience, readily gave him high standing in the court.

He had great powers of comprehension, coupled with keenness of perception.

He had a remarkable memory for retaining the details of a case on trial including the important testimony.

He saw and appreciated both sides of every case and performed his duties fairly and impartially.

He had the courage to stand by his convictions, and ruled without hesitation and fearlessly.

Broad and equitable-minded, he had an inherent love for what was right and abhorred the attempted use of any mere technicality which might tend to thwart the ends of justice.

It can, therefore, be readily understood how he, with his great knowledge of the law, was able to so masterly guide the trial of a cause as to clearly assist a jury through a maze of entangled facts, and at the same time correctly expound all the difficult, legal principiples involved.

With dignity he presided over his court. To me he always extended that courtesy and kindness which made me feel my interests were treated with consideration and care and which won for him my respect and gratitude.

The opinions of Justice POWERS found in the Maine Reports are masterly, clean cut and to the point.

While he has left us, his deeds can never die. The learned and able opinions of this jurist have erected a monument to him, and one which will stand for all the years to come.

No man ever had a greater love for his family than did Justice POWERS. Here the heart conspicuously manifested itself. A loving and devoted father and husband, the happiest moments of his life were about his fireside with his family surrounding him. Fortunately

he was able, during the last years of his life, to lay aside the cares and toils of the faithful jurist and give his time largely to the companionship of the family he so loved.

In this busy world of ours many pass away almost unnoticed and are soon forgotten, but now and then there leaves us a person whose success in his life's work has caused him to stand out from the masses as does the tall, strong oak from among the low-grown, weakly bushes.

As time in its silent but kind and effective way may soften the pangs of grief, it will be some comfort at least to the family to look back and appreciate with pride, the mark attained by our late jurist in his never-fading record upon the Bench in the highest court of our State.

With marvelous courage, cheerfulness and patience, Justice POWERS fought his last fight. At the finish, however, the great strength of the Grim Reaper prevailed, the wan and tired body could no longer hold the spirit, and the spirit simply passed from him, traveling along that road, in which we all, sooner or later, must follow.

"I cannot say, and I will not say
That he is dead, he is just away!
With a cheery smile, and a wave of the hand,
He has wandered into an unknown land,
And left us dreaming how very fair
It needs must be, since he lingers there."

"And you, O you, who wildly yearn
For the oldtime step and the glad return,
Think of him faring on, as dear
In the love of There as the love of Here—
Think of him still as the same, I say
He is not dead, he is just away!"

Hon. CHARLES P. BARNES of the Aroostook Bar spoke as follows:

MAY IT PLEASE THE COURT:

I am speaking of a man whom I, as a small boy, coming in from the farm to the village, noted and remembered as even then promi-

nent and to be admired, as he walked down Court Street to his daily work, erect, self-poised and resolute, type of the men who claim and hold a boy's regard.

And then, in boyhood's valley, in its life of illusions, fancies, dreams, the bells ring with bright promise. They summon us to work, to play, to worship; and the monody of the great bell whose toll in early childhood first calls us to the church to bid farewell to another, is a new tone of a bell that may have seemed thoroughly known before.

The first call to say good-bye! How many years ago! How it stands by itself without another of its kind in a long, long period! Past the golden, glowing days of boyhood; out of its valleys and shaded places; leaving the mystery and imagery of its long play-day; out on the plain where the burdens are to be carried the long day through; out in the stress of life, in the heat of its demands, under the exacting mandates of the present day, for the first half of the distance across the plain the load seems light. The zest of accomplishment makes strenuous effort pleasurable, and, the bells that ring bring memories of their pleasant sounds in youth. The wedding bells, the bells that summon to labor in the morning, and presage rest at night!

But, past the middle of the plain, as we pause to ease off the burden and rest, at more and more frequent intervals, how commonly the threnody of the bells that tells the passing of a dear friend! Is it that we pause oftener to note the passing throng? Is it that we have a wider acquaintance than we had in boyhood days? Is it that those who started with us are all past the meridian of life, and that, with greater frequency as the days go by, the bells that mark the close of life hardly cease tolling in one home before their sad note is taken up in another quarter? But, shoulder to shoulder, close up the gap, as a comrade drops in the ranks!

In remarks that shall be in appreciation of the work and the worth of one who has blazed the path, or led the way, or counselled us when we were in doubt, how hard it is to choose the fitting words! And where there is a wealth of material, all of which might be profitably considered, and where the heart is full of what it would take a long, long time to say, it is difficult to make selection and, in a few moments, say anything that is worthy of the subject.

Our Brother POWERS, as he appeared in the days of his activities at the Bar, to those who were employed with him, was all courtesy and tact and assurance. In his office, to those who, less experienced than he, were desirous of suggestion that would lead them to the solution of a problem, he was a warm, hearty indefatigable friend, full of suggestion and cheer. The very atmosphere of his office instilled confidence.

I do not speak of his achievements as a jurist. This is done by men more discriminating than I. The members of that little band still left to each of us, and whom we call friends, are such, not because of distinguished achievements, but because of distinguishing attributes, on their human side. Our friends are not professors, and teachers, and jurists. Our friends are men and women, jurists, teachers and professors as well, perhaps. And when the recital of the doings of a man, in a business or profession, is made, it will be made by an impartial expert who marshalls his material according to rules of science.

When I am called upon to attempt an appraisal of a man who has gone, whether I will or no, his personal, human characteristics to me do most appeal. Can it be said of a man he was never too busy, never too deeply engrossed in his own matters, to pause to help another in search of truth? Can it be said of a man that when an eager questioner pressed in upon him, he laid aside *his* work, with a welcoming smile, turned his whole attention to the seemingly complex matter and rendered it simple.

Then the passing of that man in our profession leaves a void.

FREDERICK ALTON POWERS, husband, father, scholar, jurist, friend, the family circle of the Aroostook Bar closes at your passing, with a sigh, at the sight of your vacant chair, and bids you a loving farewell.

Hon. JOHN W. MANSON, a member of the Somerset County Bar Association, spoke as follows:

MAY IT PLEASE THE COURT:

Others have spoken of Judge POWERS as an active attorney and as a prominent member of the Supreme Judicial Court. I shall speak of him as a boy, as one of a large family distinguished by their

activities in the history of the State, always strong, forceful men, efficient and worthy of emulation. I shall speak of him as a man not only contributing to the welfare of this State in his own time but as helping to lay a foundation for its future, and especially in educational lines.

I remember him, as a younger boy remembers one a few years older, a few years ahead of him in school and college, who has left an impression that should inspire the earnest, willing follower with a desire to accomplish things and be a useful member of society, a help to the community and State.

Judge POWERS accomplished nothing more than a knowledge of his early history would foretell. He was precocious, and finished school at an early age, yet he impressed his teachers and friends as well as his associates with his earnest purpose to learn the lessons of his day and use the knowledge in the most practical way to round out a successful life. He was a bright and painstaking student. He knew his books and he knew the human qualities of those about him. He was practical as well as scholarly.

He was, above all, loyal to those institutions from which he acquired the mental equipment to succeed in after life. I knew him as a member of the Board of Trustees of the Academy from which he was one of the first to graduate, as an overseer and later Trustee of the college which he attended. The duties of these positions were to him a pleasure. At their meetings he was a constant attendant, cheerfully contributing of his knowledge and experience to betterment of their condition. No work that he was called upon to do was too onerous, no commission too humble to call out the best that he could give, and this was no small contribution. His worth will long be remembered and his memory cherished by those who knew him in such capacities.

The family of which he was a distinguished member will always be remembered for the loyalty to the home where they were born. The family was large. Many became prominent citizens of this as well as other States. Several were more than usually successful in business, in their professions, in politics. They were active and busy men in their daily affairs but they often found time to visit the old farm, the theater of their childhood.

The Judge was the youngest member of the family and he acquired the title to the Powers place located at Powers Corner. He spent

much summer time at the old place, far removed from business or any artificial pleasures. Coming with his wife, his car and his chauffeur, he would remain for weeks. There were no modern improvements or conveniences about the home. It retained all the simplicity and homliness of his youthful days, yet to him it seemed the most attractive place on earth. He knew the history of the place. He knew the traditions of the neighborhood. He knew the old families and loved to mingle with them and their descendants reviewing youthful experiences and gathering news of the events, however simple and commonplace, which had come into their experience later in life.

He was a charming raconteur and an interested listener. He was welcome in every farmhouse, and every farmer's family was interested and gratified by the success and honors that had gradually come to him. He advised them upon such legal questions as always disturb such rural communities. They sought and accepted such advice as he gave and without doubt he prevented much useless and expensive litigation as sometimes come to those who can ill afford it. He certainly healed many incipient quarrels and wrangles which otherwise would have caused community feuds and permanent ill will.

He never lost interest in his old neighbors. They never ceased in their esteem for him or to glory in his achievements. It is a wonderful heritage for one to leave, the devotion and pride of the community where one is born and where one is known so well from childhood to death. The Powers family had these qualities in common, we might say, but in no other were they so prominent as in Judge POWERS.

The older members acquired wealth, gained prominence, loved and helped make great their State. He did all this and in addition he had that quality of citizenship which added a sort of finish to the family. He was modest while sure of his own worth. He was observant of those rules of society which grace one man's intercourse with his associates. He was dignified at all times and in all places. He was a gentleman. He respected your opinions and your position. He expected you to respect his.

Studious, industrious, honorable and conscientious in his dealings with his fellowman, ambitious, successful in business and in his profession, he has left an example to those who follow him from his

community, his academy, his college and his State of that high rank that can be attained by them should they choose to follow in his footsteps.

Hon. RANSFORD W. SHAW, Attorney General for the State of Maine, paid the following tribute:

MAY IT PLEASE THE COURT:

I want to speak of Judge POWERS as a friend and neighbor.

He was a loyal and unselfish husband, a kind and indulgent father, and a good neighbor. With his family he was liberal, even to a fault, and his money was considered by him only a trust for their benefit.

I knew him well as a neighbor, as I lived near him for over forty years. To the people in general he appeared very dignified, and even haughty, but to his neighbors he was free from formalities, cordial, and reassuring in his manners. The very minute you crossed his threshold, he made you feel that the best he had, and plenty of it, was at your disposal.

I know personally that no task was too hard, and no service too exacting, if he could help a neighbor who was in trouble. I personally know that it gave him pleasure to arise at any hour of the night to do a good turn to one in need of help.

Within the walls of his beautiful home, true hospitality was ever ready for all who came. I have seen there, governors, judges and legislators, business men and professional men, from all parts of the country, old ladies from the back settlements, and laboring men from out of the woods and from the farms—and all feeling at ease and pleased at the privilege of enjoying his acquaintance and his company.

When I first knew him he was just beginning his professional and business career. He was associated with his brother Llewellyn and in those days it was customary to keep offices open evenings. His office was the meeting place for other lawyers and the business men of the town. I remember well his popularity in those days with all who were fortunate enough to take part in those social evenings.

He had a high regard for his brother Lew and adopted many of the latter's views and methods of business.

Senator Frye, on the occasion of the memorial exercises in Washington, in January, 1909, on the death of the late Llewellyn Powers, said:

"He began the practice of law in Houlton, Aroostook, when that County was undeveloped. He gained what in those days and in his State was a large and lucrative practice, so large that he was obliged to take as a partner, his youngest brother, FREDERICK, who later on became a Judge in our Supreme Court. Mr. POWERS was a business man of great sagacity, of clear foresight, and invested his surplus earnings in wild lands which became very valuable and made him a wealthy man. At the time of his death he was one of the largest individual owners in Maine."

What a remarkable coincidence that these words can with such accuracy be applied to our departed brother.

He was a good conversationalist and enjoyed talking of the old days and old town characters. He hated cant, despised hypocrisy, laid firm hold on the everlasting truth, and did not believe that might made right. He stood for equal rights to all, special privileges to none. He was honest in thought, honest in word, honest in deed. "He had the rectitude of the rocks, the faith of the surging stream rushing oceanward, the hope of the summer's sun welcoming the harvest time." He died full of honors in the service of his country—a faithful public servant, mourned by all who knew him, and by thousands who only knew him by his works in the vineyard of human endeavor.

But great as he was, let me keep to my text and emphasize the fact that as a private citizen, as a friend and neighbor, he will be missed and mourned by the many who felt the touch of his true and tried friendship.

Friend and neighbor, farewell! We believe that your sentence in the Great Court before which we must all sooner or later appear, was, "Well done, good and faithful servant."

Hon. AUGUSTUS F. MOULTON, of the Cumberland County Bar, spoke as follows:

MAY IT PLEASE YOUR HONORS:

I have the honor to represent the Cumberland Bar Association at the memorial services held today in honor of our late brother, Justice FREDERICK ALTON POWERS. Judge POWERS will long be remembered as a citizen of sterling quality, as an able and effective attorney at the Bar, as a Judge of high attainments and as a personal friend. I knew him first when he was an undergraduate in the class of 1875 in Bowdoin College. He was one of the youngest as well as one of the most prominent and respected members of his class. Upon his graduation from the college before he had attained his majority, he entered at once, and as a matter of course, upon the study of his chosen profession. He came of intellectual and legal stock. His elder brother, Llewellyn Powers, Governor of Maine, was long one of the leaders at the Aroostook Bar. Another brother, Don A. H. Powers of the Bowdoin Class of 1874, was an able lawyer and was Speaker of the Maine House of Representatives. I will leave it to other speakers here to tell with greater fullness of his home life and his personal characteristics. My mention of him is more especially of his quality as a public man, known to the State at large. He retained his scholarly tastes and in 1906 his college conferred upon him the degree of Doctor of Laws. In 1908 he became a member of the Board of Overseers, and afterwards one of the Trustees, which position he held at the time of his decease. I can give personal testimony to his loyal efficiency there.

After service in both branches of the Maine Legislature he was elected Attorney General for the State, and conducted that office for four years with distinguished ability, both as law adviser to the departments, and in the trial of capital and other important cases. His chief title to honorable fame however rests upon his career as a Justice of the highest court of our State. He was a model Judge. He had the judicial quality. In the trials of causes he was always courteous but prompt and incisive. In his charges to the jury he was lucid and plain. He had a quick comprehension of the points at issue, and no one needed to mistake his meaning. His opinions

as they appear in the reports, will remain as enduring testimonials to his mental grasp of the law in its broadest sense and of his power of analysis and statement.

The character and career of Judge POWERS are in large degree both a product of and a compliment to the judicial system of Maine. The high standing and quality of the Judges who have been included in the membership of our court of last resort is and long has been a matter of general comment. This fact has not been of accidental origin. The matter of selection involves the reputation of the official to whom the Constitution gives the power of appointment. No matter who the Governor may be he cannot escape the responsibility which is connected with the nominations that he makes. The permanent reputation of the individual members of the Bench also is, by the system of reporting, brought into the limelight. Each one knows that he is recording there not only the product of his official obligation, but that he is at the same time writing his own professional and mental biography. All of our American courts have done their part well, but none have exceeded those of our own commonwealth. Our people have always had pride and confidence in the quality of the court. Even in disputed political questions which occasionally come within its province, the decision is both obeyed and respected.

We do not always consider sufficiently how largely the success of constitutional government in America has been due to the judiciary. Without an authoritative construction of governmental powers to meet constantly changing conditions those constitutions would have been but temporary devices. The legal departments have carefully abstained from intruding upon the legislative province, but their decisions have been the great factor in the direction of stability and adherence to the ancient landmarks.

In this high order of public service Judge POWERS, our brother and good friend, took a most honorable part, and while his departure from life is a source of profound regret, the sorrow is chastened by the thought that his memory will abide with all as an enduring and cherished possession. His departure seems premature but of him it may well be said, "That life is long which answers life's great end."

Hon. PATRICK H. GILLIN of the Penobscot Bar, added the following tribute:

MAY IT PLEASE THE COURT:

Though thirty-seven years have buried themselves in the whirlpool of life's struggles, joys and sorrows, it seems but like the span of twilight before the shades of night descend since in my native town of Houlton the distinguished gentleman, lawyer and jurist, FREDERICK A. POWERS, in honor of whose memory these exercises are being held, moved my admission to the bar. He was then chairman of the examining committee before which I appeared. The courteous consideration he then and always extended to me, burns brightly on memory's page, undimmed by the passage of a single shadow. He was at that time an acknowledged leader of the Bar of his county and in the trial of causes without a peer in the State.

It was my good fortune to hear him try and argue many cases, in one or two of which I was the opposing counsel, while he was Attorney General of the State. When he made a telling point whether through the evidence or analysis of it to the court and jury, he never elaborated on it, but left it to attract and hold the attention.

His arrangement of facts in arguing causes was always natural, ingenious and highly appropriate, seeking thereby to make plain the great leading principal in the proposition under discussion to which purpose all his efforts were referable and subsidiary.

As the Justice of the court his opinions are marked by a closeness and continuity of thought, couched in plain Anglo-Saxon words. They are lucid, clear, logical and convincing as to the justice of the decision arrived at.

Those who have seen him in action and felt the force of his striking personality whether at the Bar or on the Bench can testify as to the perfection of his arguments, the comprehensiveness of his reasonings and the power of his sarcasm.

His character and life labors have been most fittingly depicted at length by the learned gentlemen of the Bar who have preceded me. I wish to offer my simple testimony of our departed brother as he appeared to me on behalf of my learned brethren of the Penobscot Bar.

The frequency of these time-honored exercises and the departure from the Bench to their eternal sleep of all the learned members of this court, who adorned its prerogative when I became a member of our great profession, thus resigning to your learning and untiring labor the perpetuation of justice and condemnation of wrong-doing in the peoples' interest, reminds us that,

> "Life is but a day at most
> Sprung from night in the darkness lost."

Shall we meet them on the other shore, as our barks swing from the swirling stream of life into the placid river of death into the unknown "From beyond whose bourne, no traveller returns." The faith of man in immortality since the dawn of civilization says, yes.

Plato and Aristotles taught, Socrates affirmed, Cicero proclaimed and the greatest of them all, the matchless Athenian endorsed the principal, that, that which sees and feels, thinks and deliberates is immortal and cannot die. Down through the ages through century piled on top of century, like the day star glimmering through the dark watches of the night the master minds of the pagan world enunciated their belief in everlasting life. One hundred years after the Messiah's coming the learned and spotless Tacitus, though himself a pagan, in concluding his life of Agricola thus defines the ancient faith when he wrote; those inspiring lines:

"If in another world there is a pious mansion for the blessed; if, as the wisest men have thought, the soul is not extinguished with the body; may you enjoy a state of eternal felicity! From that station behold your disconsolate family exalt our minds from fond regret and unavailing grief to the contemplation of your virtues. Those we must not lament; it were impiety to sully them with a tear. To cherish their memory, to embalm them with our praises, and, if our frail condition will permit, to emulate your bright example, will be the truest mark of our respect, the best tribute your family can offer. Your wife will thus preserve the memory of the best of husbands, and thus your daughter will prove her filial piety, by dwelling constantly on your words and actions, they will have an illustrious character before their eyes, and not content with the bare image of your mortal frame, they will have what is more valuable,

the form and features of your mind. I do not mean by this to censure the custom of preserving in brass or marble the shape and stature of eminent men; but busts and statutes, like their originals, are frail and perishable. The soul is formed of finer elements, and its inward form is not to be expressed by the hand of an artist with unconscious matter: our manners and our morals may in some degree trace the resemblance."

These verifications of the life beyond bids us send to the sorrowing wife and family of our departed brother the joyful promise sanctified by the sacrifice of a God-man that the soul, the inexplicable power of human reason can never die, and that in the realms beyond across the threshold of which the finite mind of man cannot penetrate, they will once more be united with their loved one.

"Over the river, they beckon to me,
Loved ones who've crossed to the farther side;
The flap of their snowy robes, I see, and
Their voices are drowned in the rippling tide.
Over the river, the mystic river,
The angel of death is beckoning to me."

Response for the Court by Chief Justice LESLIE C. CORNISH.

BRETHREN OF THE BAR:

All too frequently of late have memorial services, such as this, been held in honor of active or retired members of our Bench. It seems almost incredible that this marks the eighth within my term of service of six years as Chief Justice. They have followed in rapid succession, for Chief Justice Savage, Justices Madigan, Haley, King and Symonds, Chief Justices Emery and Whitehouse, and now Justice FREDERICK A. POWERS. The mere grouping of these names startles us with the persistent frequency with which the ever to be expected but never welcome, messenger has pursued this tribunal, until now, retired Justice Bird alone remains of all our former members.

As the immediate successor of Judge POWERS, assuming sixteen years ago the judicial robe which he then voluntarily laid aside, I cannot rid myself of a peculiarly personal feeling in responding to these resolutions of the Bar. It almost seems as if I had been trying

to carry on his work, as if my term of service had been but a continuation of his own, and now upon me falls the sad duty of saying the last farewell.

No better illustration of the possibility of achievement on the part of a bright, diligent, courageous and ambitious boy could well be conceived than the man in whose honor we are met today. True, he was favored by circumstance; birthplace in the country; absence of wealth; the compelling necessity to labor and to save; a large family of ambitious brothers and sisters; and above all, a mother, who, beginning her married life in a log cabin, reared and guided her childern to usefulness and distinction. It was indeed one of the most remarkable families of which Maine can boast, and she has had many. To Arba and Naomi Powers, pioneer settlers of Pittsfield, were born and by them were reared to maturity ten children, eight boys and two girls. Of these eight boys, six became well known and successful members of the legal profession in this and other states. The oldest was Llewellyn, Member of Congress and Governor of Maine; Gorham was Judge of a District Court in Minnesota; while the youngest was Frederick, legislator, Attorney General, and Justice of the Supreme Court of Maine.

Frederick was born in Pittsfield on June 19, 1855, fitted for college at the Maine Central Institute, and was a member of the Class of 1875 at Bowdoin College. Llewellyn, his senior by sixteen years, had long before settled in the County of Aroostook and had already established himself in a wide and lucrative practice. After leaving college Frederick began the study of law with him at Houlton, was admitted to the Aroostook Bar in 1876 at the age of twenty-one and was at once taken into partnership under the firm name of Powers & Powers. The opportunity was unusual for a young man of his natural equipment. Aroostook County forty-seven years ago was a frontier and somewhat remote section of our State, with unsurpassed natural advantages, many of which were awaiting development, and peopled by a class of able and resolute men eager to develop them. Among those hardy citizens the young attorney cast his lot and thenceforth made his home. He entered upon his professional career with courage, confidence and enthusiasm. He early took an active part in trials in court, shrank from no responsibility and extended his acquaintance to every part of the County. He soon came to be known as he was, an able, resourceful, and honorable

practitioner, and his reputation broadened with the years. He served in the House of Representatives from 1885 to 1889; in the State Senate in 1891-2. He was elected Attorney General in 1893 and served with distinction until 1897. In all these public offices his work was of a high character and his reputation for ability and competent service became state-wide. Near the close of the 19th Century Chief Justice Peters, after twenty-seven years of conspicuous, judicial service, tendered his resignation to take effect on January 1st, 1900. His nephew, Andrew P. Wiswell, was promptly appointed Chief Justice in his stead, and FREDERICK A. POWERS was appointed Associate Justice to fill the vacancy. He was then forty-four years of age, in the full vigor of physical and mental strength. The Governor was Llewellyn Powers and under some conditions the appointment of a brother to the Supreme Bench would be subject to criticism. Not so in this instance, however. The selection met with the heartiest approval, both from the legal profession and from the public at large. His marked qualifications and fitness for the position were then recognized and subsequently abundantly proved. To add to the uniqueness of the event another brother, Don A. H. Powers was a member of the Executive Council which confirmed the nomination. It is safe to say that never before in the history of our State, where an appointment was made to high official position, were these three parts, the Governor, the appointing power, an Executive Councilor of the confirming power, and the recipient of the high honor, taken by three brothers. Just after midnight of January 1, 1900, the new Chief Justice and the new Associate Justice took their oaths of office before the Governor and Council and in the presence of a few intimate friends, some of whom are living today and will remember the occasion.

The bench upon which Judge POWERS took his seat consisted of Wiswell, Emery, Whitehouse, Haskell, Strout, Savage, Fogler, and himself, names and personalities always tenderly remembered. Of the Justices with whom Judge Powers sat during his entire term all are gone except our beloved Senior Associate, Justice Spear. Into this group of strong men Judge POWERS fitted admirably. His legal training and experience had been broad and enriching and his business judgment was of a high order. He combined in a rare degree strong intellectuality and sound common sense. He could follow the philosopher in his thinking, but he never left the ground

of facts and lost himself in the clouds. This combination rendered him a helpful associate. At nisi prius he controlled the Court with dignity and ease. He ruled promptly and decisively. He was at all times master of the situation and his firm hand was felt in the very atmosphere of the court room. His charges to the jury were plain, direct and enlightening, and litigants before him secured their legal rights, no more, no less.

In the Law Court his work was of the same strong and uniform character. In fact, the man everywhere, and at all times, impressed himself upon his efforts, whether spoken or written. There was little variability. His sound and sane philosophy of law and of justice found expression in his written opinions. His first published opinion is *Davies* v. *Eastern Steamboat Company*, 94 Maine, 379, a case involving the duty of a common carrier to deliver a telegram to a passenger, and the last was *Chase* v. *Cochrane*, 102 Maine, 433, a case of trespass quare clausum. In all, he delivered eighty-eight opinions, of which perhaps the most familiar are *Pulsifer* v. *Greene*, 96 Maine, 438, involving the double liability of stockholders in Maine on a foreign judgment; *Penobscot Log Driving Company* v. *Reservoir Dam Company*, 99 Maine, 452, concerning the taking and appraisal of property under the right of eminent domain; and *Marsh* v. *Paper Company*, 101 Maine, 489, involving the question of negligence in driving logs. The characteristics of his opinions are their conciseness, their clearness, their strength, and their convincing simplicity. They are remarkably free from dicta, holding to the straight and narrow path.

A little more than seven years of conscientious, unremitting and fruitful service Judge POWERS rendered to the State. He was reappointed at the end of his first term in January, 1907, but shortly after, on March 25, 1907, he submitted his resignation to Governor Cobb, and it was reluctantly accepted. The Governor had previously attempted to dissuade him from taking the step, but without avail. Judge POWERS' health was then not robust and under the strain of Court work it was not improving. This was doubtless the dominant reason for his retirement, but coupled with this I think was the deep loss which he felt in the death of Chief Justice Wiswell which had occurred the previous December. The old associations beginning in college, revived by service together in the Legislature

and again revived by service on the bench, had been rudely shattered and the judicial life had thereby lost much of its interest and charm for him.

It is indeed a misfortune that Judge POWERS could not have given the remainder of his active years to judicial labor. He laid down his robes at fifty-two, a little more than the average age of all the Justices of the Court since 1820 at the time of their appointment. But these seven years were rich with accomplishment and the people of this State owe a deep debt of gratitude to his memory, as a public servant. His name and fame are secure.

Apart from the legal side, Judge POWERS had many marked characteristics. His was forceful personality. Were I to mention, without elaborating, his outstanding points I should say, intellectual power of a high order, independence of thought and of action, self-reliance, conservatism, stability, strong convictions, loyalty to family and friends, and a fine sense of honor.

He was a prodigious reader and loved the best in literature. He was devoted especially to history and philosophy. Like many others, he knew and appreciated the treasures of the Bible. His acquaintance with the political and constitutional history of our country was broad and accurate, and being possessed of an unusually retentive memory the past was always at his command.

He loved his college which he served as Trustee for many years and which in turn honored him with the degree of Doctor of Laws.

He loved his friends but he permitted himself to choose who his friends should be. They could not be thrust upon him by others. They must be of his own selection. His acquaintances were legion; his intimates were few, but to those few he clung and they to him, with all the steadfastness of which man is capable.

He loved nature and the silences of the deep woods. Every autumn found him on his hunting trip and before the camp fire with the back log glowing, with a few of his close companions, enjoying life to the full. The cares of office and of business were forgotten and the realities of life were at the front.

But, best of all, he loved the beautiful home which he, himself, had built, where warm-hearted hospitality stood always at the door to welcome the coming guest. Especially was the latch-string out to members of the Court, whose terms in Houlton were rendered doubly pleasant by the cheer and comfort and cordial greeting always

found within his walls. Upon the tenderer relations of that home and family life it is not proper here to trespass. They are too sacred for public gaze.

Relief from enforced work by retirement from the Bench in 1907 restored Judge POWERS in a large measure to renewed health and strength, but not fully. He never cared to resume practice, but devoted himself to his private business affairs, which were many; to the bank of which he was President, and to his wild land interests which were extensive. He had ample time for leisure and he improved it. The past few winters he has spent in Florida to escape the rigor of our Northern climate and there in his St. Petersburg home, on February 13, last, he passed away, and an able lawyer, distinguished jurist, honored citizen, loving husband and father, and a true and genuine man, entered into rest. It was the end of a successful and honored life, and to him as to all was fulfilled the sweet promise that "Evening brings us home."

The appreciative resolutions offered by the Committee and seconded by the heartfelt remarks of members of the Bar are most gratefully accepted and approved by the Court and will be entered upon our records. As a further tribute of respect to the memory of Justice POWERS this Court will now adjourn for the day.

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ADVERSE POSSESSION.

AGENT.

AUTOMOBILE.

BALLOT.

A ballot should not be rejected on the ground of fraudulent marking when its appearance is consistent with any honest action or intention of the voter. The burden to show fraud is on the one who claims it. Doubts should be resolved in favor of the voter, unless the fraudulent purpose clearly appears.

Yet marks of every sort and character cannot be allowed. If so, the secrecy of the Australian ballot and the avoidance of bribery at elections sought to be secured thereby would be circumvented. *Frothingham* v. *Woodside*, 525.

BANKRUPTCY.

A trustee in bankruptcy can recover only such property as the bankrupt could have controlled and collected personally at the time when the rights of the bankrupt passed to his trustee. Under the circumstances of this case, Foster could not prevail in this suit, hence his trustee cannot.

Otis v. *Insurance Co.*, 239.

The liability of the sureties on a bond given by the principal to dissolve an attachment of personal property under R. S., Chap. 86, Sec. 79, is not affected by an adjudication in bankruptcy of the principal within four months after the date of the bond. *Marks* v. *Outlet Clothing Co.*, 406.

Under the Bankrupt Act the confirmation of a composition discharges the bankrupt from his debts other than those agreed to be paid by the composition and those not affected by the discharge.

A discharge releases the bankrupt from all his provable debts—except such as have not been duly scheduled in time for proof and allowance—unless such creditor has notice or actual knowledge of the proceedings in bankruptcy.

Actual knowledge of the proceedings contemplated by this section is a knowledge in time to avail a creditor of the benefits of the law, in time to give him an equal opportunity with other creditors; not a knowledge that may come so late as to deprive him of participation in the administration of the affairs of the estate or to deprive him of dividends.

Plaintiff's actual knowledge in the case at bar came to him in ample season to protect his rights and to give him an equal opportunity with other creditors.

Gurewitz v. *Wise*, 444.

BILLS AND NOTES.

The holder of a negotiable instrument in due course may sue thereon in his own name, provided it is complete and regular upon its face, and taken in good faith and for value, without notice of any infirmity or defect in title, before it is due and without notice if dishonored. An antecedent or pre-existing debt constitutes value, and the holder who takes commerical paper before maturity

In an action of forcible entry and detainer where the only issue is that of title and the plaintiff relies upon a purchase of the property at a sheriff's sale, upon him rests the burden of showing that all of the proceedings leading up to and including the sale were conducted in accordance with the provisions and requirements of the statute. *Ames* v. *Young*, 331.

Where a tax deed is set up by the defendant in a real action under Sec. 62, Chap. 10, R. S., any alleged irregularities in the assessment must be proved by the plaintiff but the defendant must show that the advertising and selling was in strict compliance with the statutes; recitals in deeds cannot be accepted as evidence, there being no presumption in favor of the regularity of the treasurer's acts. *Stowell* v. *Blanchard*, 368.

The burden of proof of payment of any particular obligation rests upon the party asserting such. Where there is but one obligation or transaction between the parties requiring payment of money, a strong and almost conclusive presumption arises, in case of a mere payment, that such payment was made on account of such single obligation, but if there are two or more such obligations or transactions, no such presumption arises. *Church* v. *Church*, 459.

CHECKS.

See *Guild* v. *Eastern Trust and Banking Co.*, 514.

CONTRACT—INTERPRETATION OF.

If one of the parties to a contract request the other party to defer his performance of the conditions of the contract, and such other party acts upon such suggestion or request in good faith he is entitled to a corresponding extension of time beyond that specified in the contract, and if the party making such request by his own acts places the other party in a position where he is prevented from completing the contract within the specified time, he is estopped from setting up as a defense non-performance within the specified time.
Sylvester et als. v. *Worthley*, 94.

CONTRACT BY TELEGRAPH

Where an offer is accepted by telegram before a telegram revoking it has been sent, and the acceptance is received before the revocation of the offer is received, there is a complete contract. *Morneault* v. *Cohen*, 543.

CONTRIBUTORY NEGLIGENCE.

CORPORATION—DISSOLUTION.

DECEIT.

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DEED.

The issues in this case between the parties to the bill in equity are of fact only, with the burden upon the plaintiff to establish his contention in contradiction of the terms of his deed.

The quantum and quality of the evidence falls far short of the standard necessary to sustain in charge of forgery, or to overturn a deed upon the charge of fraud. The evidence must be clear and convincing, precise and indubitable.

Morneault v. *Sanfacon*, 76.

Where nothing to the contrary appears from the contract the good title to which the purchaser is entitled must generally be made out by the vendor himself or by his legal representatives. As a rule the purchaser is not bound to accept a good title from a third person. *Dalton* v. *Callahan*, 178.

When the purchaser contracts for a conveyance from the vendor he is entitled to insist upon a perfect title of record in the vendor at the time of the delivery of the deed to him. *Dalton* v. *Callahan*, 178.

Under the contract the purchaser is entitled to a deed containing the personal covenants of his vendor, and with a perfect title of record in him at the time of delivery. He can refuse to accept the warranty of a third party, for the value of the covenants may depend upon the responsibility of the covenantor.

Dalton v. *Callahan*, 178.

The continuity of holding by recorded deeds not broken by a reasonable time intervening between the execution and the recording of a deed. The rule for the interpretation of deeds is the expressed intention of the parties gathered from the whole instrument, but the intention must be effectively expressed, not merely surmised. Privity, such as will authorize the taking of possessions, exists between two successive holders where the latter takes under the earlier by descent. *Campbell* v. *Whitehouse*, 409.

DEMURRER.

When a demurrer is filed, joined and ruled upon in the Supreme Judicial Court and exceptions taken the case under Sec. 36, Chap. 87, R. S., must be marked "Law" and go to the Law Court upon the questions raised by the demurrer, without further proceedings at nisi prius, until decision is received back from the Law Court. *Tripp* v. *Motor Corporation*, 59.

DONATIO CAUSA MORTIS.

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

DUE PROCESS OF LAW.

EMANCIPATION.

EQUITY JURISDICTION.

ESTOPPEL.

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See *Albee* v. *LaRoux*, 273.
See *Rand* v. *Michaud*, 65.

FERTILIZER.

See *Rogers* v. *Kendall*, 248.

FIRE INSURANCE REFERENCE.

Under the Standard Policy of insurance in this State the award of referees goes to the amount of damage only, and does not furnish a basis for action. In the event of suit, it must be on the policy, and if liability established, the award, if valid, is conclusive as to damage. In absence of fraud, the amount actually due though less than the amount claimed in the account annexed may be recovered. An award to be conclusive must be made by disinterested and impartial referees, after a notice to the parties in interest and a full opportunity to be heard given. To establish a waiver it must be shown that the party knew and appreciated his rights. *Oakes* v. *Insurance Co.*, 361.

FORCIBLE ENTRY AND DETAINER.

In an action of forcible entry and detainer where the only issue is that of title and the plaintiff relies upon the purchase of the property at a sheriff's sale, upon him rests the burden of showing that all the proceedings leading up to and including the sale were conducted in accordance with the provisions and requirements of the statute. *Ames* v. *Young*, 331.

FRAUD.

See *Morneault* v. *Sanfacon*, 76.

GIFT CAUSA MORTIS.

The delivery of notes by a person in expectation of death to another person, with instructions, in the event of death, that such notes are to be cancelled, absolutely surrendering all title and control over such notes, subject only to revocation in the event donor should recover, constitutes a valid gift causa mortis to such person in trust for the makers of the notes. *Briggs* v. *Childs et als.*, 175.

INDICTMENT.

In an indictment "felonious assault" being an offense at common law and having a fixed and accepted meaning independent of statute, is sufficient in and of itself. It is unnecessary to allege all the elements recited in the statute, as they are implied in the word "assault" at common law.

State v. *Mahoney*, 483.

INHERITANCE TAX.

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JUDICIAL DISCRETION.

JURY TRIAL.

LACHES.

LANDLORD AND TENANT.

LITTORAL PROPRIETORS.

The rights of a littoral proprietor on Ponds over ten acres in extent are not effected by raising the water by means of a dam at the outlet, to the original height of the bed of the outlet channel, where such channel has been lowered.
Ray v. *De Nemours Co.*, 350.

MANDAMUS.

Exceptions do not lie to either the granting or withholding of a writ of mandamus, it being a discretionary writ and not a writ of right, unless the ruling is based upon a question of law or upon a clear abuse of discretion on the part of the Justice in passing upon the facts. *Day et als.* v. *Booth*, 91.

MARRIAGE PROMISE.

See *Guild* v. *Eastern Trust and Banking Co.*, 514.

MEASURE OF DAMAGES.

If the purchaser of goods refuses to accept and pay for them the owner may at once resell them for the most he can get for them and charge the first purchaser with the difference between the contract price and the price actually obtained.

If the goods have been resold by the vendor within a reasonable time after the breach of contract by the purchaser, the measure of damages will be the difference between the price agreed to be given and the price realized on the resale, with the costs and expenses of resale.
Morneault v. *Cohen*, 543.

MISCONDUCT OF A JUROR.

See *McGuffie* v. *Hooper*, 118.

NEGLIGENCE.

In the instant case there was clearly sufficient evidence to warrant the jury in finding the defendant's servant negligent. But the plaintiff's intestate was also negligent. He was negligent in jumping from the moving trolley car. He was negligent in crossing a street directly in front of a rapid-moving automobile. But when he was struck he had safely passed these perils and had reached the grass ground on the opposite side of the street beyond the part of

the road devoted to travel by vehicles. The automobile swerved to its left and fatally injured the plaintiff's intestate when he had reached a point outside the travelled way.

The defendant says that this was due not to his negligence, but to his care. He was trying, he says, to save the intestate from the consequences of his own negligence by going around him. But the jury may have found that the accident was due to the defendant's recklessness in trying to make a curve in the road without slacking speed. *Rent, Admr.* v. *Portland Candy Co.*, 25.

The negligence of the owner of the automobile, one of the plaintiffs, precluded him from having the verdict for defendant set aside. The plaintiff in the other case, an invited passenger, to whom negligence of the owner and driver of the automobile cannot be imputed, nevertheless cannot have the verdict for defendant disturbed in absence of proof of negligence of defendant.

Smith v. *Elliott*, 126.

Negligence of defendant, and the contributory negligence and assumption of risk on the part of the plaintiff are questions of fact for the jury, and the verdict though large is not so grossly extravagant for such grievous injuries as to require revision by the court. *Prince* v. *M. C. R. R. Co.*, 130.

The plaintiff was not a volunteer acting outside the scope of his employment and duty, and was not guilty of contributory negligence.

Prince v. *M. C. R. R. Co.*, 130.

While a State is not responsible for the malfeasance, or wrongs, or negligence, or omissions of duty of its subordinate officers or agents employed in the public service, it may by legislative enactment, remove such immunity, by laying aside the protection furnished by the common law, and become subject to the same liabilities as though it were an individual. *Jones Co.* v. *State*, 214.

The "look and listen" rule of law is well established and reasonable, as relates to steam railroad crossings, but is not applicable to either street railway crossings, or ordinary street crossings. *Shaw* v. *Bolton*, 232.

A landlord is liable for damages for injuries sustained by a lawful traveler on a public highway, by ice or snow falling from the roof of a building on such highway, if the building is let to different persons occupying different parts thereof, whether as lessees or tenants at will; otherwise when the whole building is let to one tenant or lessee. If it does not appear that the tenant or lessee might not, by reasonable care, have prevented the accident, he is liable.

Meyers v. *Pepperell Mfg. Co.*, 265.

Where there is no direct evidence of negligence it may be proved and established by legal inferences and presumptions drawn from undisputed facts and circumstances, under the doctrine of "res ipsa loquitur."

Jerrard Co. v. *Eastman Car Co.*, 380.

On the question of negligence in driving an automobile the real test is the application of the familiar rule as to what an ordinarily prudent man would, or would not do, under like circumstances. The sounding of the horn under some circumstances might be necessary in the fulfillment of one's duty, while under other circumstances it might of itself be evidence of negligence.

Clifford v. *Hines*, 389.

A railroad company having maintained at a crossing an "automatic signal of the silent type" in obedience to an order by the Public Utilities Commission, is not liable merely by reason of failure to maintain other or different safeguards. A lookout on a shifting train may assume that a driver of a team or car approaching a crossing will recognize the right of way of the railroad and stop for the train to pass. *Labbe* v. *M. C. R. R. Company*, 403.

NEW TRIAL.

A verdict of guilty to stand if the evidence consistently compels such a conclusion, being inconsistent with any reasonable hypothesis of the respondent's innocence.

State v. *Dore*, 120.

On the issue involved the evidence was sufficient to warrant a verdict for the plaintiff if the jury had so found. Exception to a nonsuit sustained.

Inh. of Limington v. *Inh. of Alfred*, 171.

NEW TRIAL FOR MISCONDUCT OF JUROR.

In order for misconduct of a jury or of a juror to be sufficient cause for a new trial when the facts constituting the alleged misconduct were not brought to the attention of the trial Judge until after verdict, it must affirmatively appear that neither the party complaining nor his counsel had any knowledge of such misconduct before the verdict. *McGuffie* v. *Hooper*, 118.

NONSUIT.

It is reversible error to order a nonsuit where the question involved is as to whether there was a completed oral contract, being a question of fact for the jury, and where there is sufficient evidence supporting such contract to sustain a verdict for plaintiff, should one be so rendered by a jury, and also if there was a sufficient memorandum of such contract signed by the party to be charged to remove it from the statute of frauds. *Upton & Co.* v. *Colbath*, 188.

An action is maintainable under R. S., Chap. 87, Sec. 159, to recover damages in case of a judgment obtained by perjury, but a defendant who authorizes the court to assume that the plaintiff's testimony is true for the purpose of passing

on a motion of a nonsuit and agrees that if a nonsuit is refused, final judgment may be entered for the plaintiff for the amount of his claim, does not present a case within the intendment of the statute. *Cole* v. *Chellis*, 262.

A nonsuit ordered on the ground of a defective and insufficient declaration will not be set aside inasmuch as a judgment upon such defective declaration could not be sustained. *Richards* v. *Tolman*, 272.

ORAL CONTRACT FOR SALE OF LAND.

The purchaser under an oral contract for the sale of land cannot recover payments already made, if chargeable with non-performance, the seller not being in fault; but if the seller refuses to perform the contract, the purchaser not being in fault can recover the payments he has made. *Purves* v. *Martin*, 73.

PAUPER SETTLEMENT.

A legitimate child of a former marriage does not follow the pauper settlement of its mother acquired by another marriage, when its father had a pauper settlement in this State, but retains that of its father.
Inh. of Presque Isle v. *Inh. of Caribou*, 269.

A woman having a pauper settlement by virtue of marriage loses that settlement by another marriage to a man having a pauper settlement in this State and acquires that of her husband of the later marriage.
Presque Isle v. *Caribou*, 269.

A divorced father of a child may emancipate such child notwithstanding that the care and custody of such child in the divorce proceedings were decreed to the father, as such a decree does not impose upon him a greater duty than the law imposes upon him in his parental relation. Emancipated minors take the settlement of their father, if he has one in the State, at the time of emancipation.
Inh. of Liberty v. *Inh. of Levant*, 300.

It is essential to the establishment of a home in a town that there should be personal presence, and also an intent to remain, continued for five years necessary to establish a settlement, without being absent during such five years with an intent not to return. *Inh. of Ellsworth* v. *Inh. of Bar Harbor*, 356.

PERJURY.

An action is maintainable under R. S., Chap. 87, Sec. 159, to recover damages in case of a judgment obtained by perjury, but a defendant who authorizes the court to assume that the plaintiff's testimony is true for the purpose of passing

on a motion for a nonsuit and agrees that if a nonsuit is refused, final judgment may be entered for the plaintiff for the amount of his claim, does not present a case within the intendment of the statute. *Cole* v. *Chellis*, 262.

PLEADING.

Where a special remedy is created by statute for enforcing a created right it is subject always to the conditions and limitations which legislative wisdom incidently defines.

One woman suing another woman, by virtue of a statutory provision, for alienating her husband's affections, must allege and prove, as an essential prerequisite for laying a claim to the remedy provided, that the action was "brought . . . . within three years after the discovery of the offense." *Pray* v. *Millett*, 40.

If negligence is not alleged in the declaration it is not an issue. Yet, if evidence of negligence, sufficient to support a verdict, is admitted without objection, a verdict based upon such evidence may be allowed to stand. The declaration being amendable upon seasonable objection, the case having been tried as if amendment had been made, the amendment is considered as made. *Burner* v. *Jordan Family Laundry*, 47.

In the instant case no promise or undertaking or its equivalent being alleged in the declaration the demurrer should have been sustained. A promise to repay was as essential an allegation of fact for recovery by the plaintiff as that of breach and rescission. Without such allegation or its equivalent an action of assumpsit cannot be maintained. *Tripp* v. *Motor Corporation*, 59.

When a demurrer is filed, joined and ruled upon in the Supreme Judicial Court and exceptions taken the case under Sec. 36, Chap. 87, R. S., must be marked "Law" and go to the Law Court upon the questions raised by the demurrer, without further proceedings at nisi prius, until decision is received back from the Law Court. *Tripp* v. *Motor Corporation*, 59.

For the plaintiff to amend or the defendant to plead over before having the validity of his exceptions determined would be a waiver of his exceptions. *Tripp* v. *Motor Corporation*, 59.

The conferring upon the presiding Justice by Chapter 73, Public Laws, 1859, of the right to allow amendments or the defendant to plead anew before exceptions are filed and allowed to his rulings on a demurrer was not intended to change the course of proceedings on demurrer as determined by Chapter 211, Public Laws, 1856. *Tripp* v. *Motor Corporation*, 59.

PRESCRIPTIVE TITLE.

One entering upon land claiming title, though under a parol grant only, and holds open, exclusive, adverse, and uninterrupted possession thereof for twenty years, acquires title. An occupation of land under a parol gift from the owner is an occupation as of right. Possession under a claim of title, with or without deed, is adverse. *Nevells* v. *Carter et als.*, 81.

A claim of prescriptive title not sustained, to an one third interest in common and undivided in the real estate of libellee, under the plea of nul disseizin by libellant, who acquired such interest in the real estate of libellee by virtue of a decree of divorce for fault of libellee made more than twenty years prior to the bringing of the writ of entry by libellant, there having been no decree in the divorce proceedings as to property rights. *Smith* v. *Libby*, 156.

Title to personal property may be acquired by long continued possession of such a character as to bar remedies for recovery, provided such possession is not permissive. *Morey* v. *Haggerty*, 212.

Prescriptive right for the public to use land as a highway does not permit the use of the locus as a landing or parking place for an aeroplane for one's own private gain. *Anderton* v. *Watkins*, 346.

PRIVILEGED COMMUNICATION.

Words uttered by a United States Post Office Inspector in directing the dismissal of a post office employee are privileged. But the privilege is qualified. To be available as a defense it must appear that the words if defamatory were spoken in good faith, without actual malice and with reasonable grounds for believing their truth. *Hodgkins* v. *Gallagher*, 112.

PROMISE TO MARRY.

1. A promise in consideration of marriage is by reason of the Statute of Frauds unenforceable. So also is a promise in consideration of an engagement of marriage.
2. A promise to marry is not within the Statute of Frauds. It is not promises of marriage but promises "made in consideration of marriage" that must be in writing. The statute concerns itself not with the subject of the promise, but with the consideration for it.
3. Promises of marriage are nearly always, though not necessarily mutual. If mutual they are literally within the terms of the statute because the promise of each party is made in consideration of the reciprocal promise of the other

party. But centuries of judicial interpretation have established the principle so firmly that every lawyer and every layman knows that mutual promises of marriage do not have to be in writing in order to be binding.

4. An oral money promise in consideration of a marriage promise is invalid. But a written money promise, like a check, made in consideration of an oral marriage promise is a perfectly good and enforceable contract.

5. A promise to marry need not be express. It may be implied. Spoken words may be presumed from circumstances. Moreover, any contract not required to be in writing may be complete without words. A contract requires a meeting of minds not of words. It demands mental not vocal accord.

6. A check for seventy-five thousand dollars in consideration of a marriage promise is not rendered invalid by reason of the fact that the parties contemplated a still larger payment to be made which larger payment cannot be enforced because not evidenced by writing.

7. The testator on the day of his death delivered to the plaintiff his check for seventy-five thousand dollars saying "if I live till Monday I will fix up the rest." The bank refused payment owing to the testator's decease. This suit was brought against his estate. The evidence tended to show that three months before, the testator had promised to put five hundred thousand dollars in the plaintiff's name if she would marry him to which she assented.

Held:

That the jury would have been justified in finding that the check was given in consideration of the plaintiff's implied renewal or continuance of her promise to marry and therefore is valid and enforceable.

Guild v. *Eastern Trust and Banking Co.*, 514.

RAPE.

On motion in arrest of judgment after conviction it is

Held:

1. That the crime of rape against a female over fourteen years of age contains three essential elements: the unlawful carnal knowledge, force, and lack of consent.

2. The unlawful carnal knowledge and the lack of consent are sufficiently set forth in this indictment; but the allegation of force is not to be found.

3. The word "feloniously" is of general signification and means with criminal intent. At common law it is a technical word employed in indictments charging a felony, and it is not equivalent to the words of the statute "by force."

4. The allegation of assault in the first part cannot be brought forward to supply the defect. That allegation might afford a jury the right to bring in a verdict of guilty of assault and battery, but there is no sufficient allegation that the carnal knowledge was accomplished by force, and that is indispensable.

REAL ACTIONS.

RECEIVER.

REFERENCE.

REFORMATION OF DEEDS.

REMOVAL OF ACTIONS.

Furthermore, if the right of removal in such proceedings existed it would follow that there should be also the same right of appeal as in actions in the Municipal Court, but this court has decided that no appeal lies.

The reasoning as to the delay caused by appeal applies with equal force to the delay caused by removal. The spirit of the proceeding forbids both.

Head, Guardian v. *Fuller*, 15.

REPLEVIN.

In a replevin the party having the better title prevails, as it may be a question of relative rather than absolute rights. *Bath Motor Mart* v. *Miller et al.*, 29.

RES ADJUDICATA.

In the instant case the clean cut issue, upon the pleadings, is whether the plaintiff's declaration and the evidence present a case of res adjudicata. The defendant introduced no evidence, but relied upon the charge of the presiding Justice in a former case, introduced by the plaintiff as an exhibit, as sufficient to reveal a clear case of res adjudicata.

The contention is well founded. Res adjudicata is a rule of law established for the purpose of putting an end to litigation and to prevent the trying of a case piece meal. *Arsenault* v. *Brown Co.*, 52.

It is not necessary to pass upon the legal effect of the retention by the plaintiff of the check sent to him by the defendant, as the whole matter was res adjudicata except as to the $300 and res adjudicata as to that so far as the amount was concerned. *Orino* v. *Beliveau*, 168.

A decree of the Judge of Probate ordering an administrator to file his account, is not barred, on the ground of res adjudicata, by a former decree ordering him to file an account which was not fully complied with.

Eusebe Senechal, Appellant, 314.

SEQUESTRATION OF ASSETS.

In proceedings for the sequestration and equitable distribution of the assets of a corporation, generally speaking, where there is no statute otherwise controlling, creditors, whose rights accrue while the fund is in the control of the court may share in the distribution. Claims presented in time and are capable of being made certain within the time fixed by the court should be allowed. Claims which are not then certain should be disallowed. Under "Lease and License Agreement" contracts where it is provided lessee is to pay for repairs necessary to put the machinery in suitable condition to lease, such claims are allowable,

SLANDER.

STATUTE OF FRAUDS.

STATUTE OF LIMITATION.

SUCCESSION TAX.

TRUSTS.

Beneficiaries under a trust instrument, after the trust ceases, and their contingent interest in the trust estate has ceased, cannot in their behalf have an accounting by the trustee. *Cutting* v. *Haskell*, 454.

The court, under R. S., Chap. 73, Secs. 10 and 11, may, in an equitable proceeding, grant authority to the trustees of a trust created by will, to disregard the conditions of the trust, to best conserve the purpose of the testator in creating the trust, resulting from changed conditions. *Mann* v. *Mann*, 468.

The net income of a trust estate goes to the persons designated in the will, the distribution thereof being deferred by the occurrence of certain events as provided in the will, and no part thereof becomes a part of the principal. If any part of said income is used in carrying out the provisions of the will, such part so used is to be restored from the principal to the income, at the time such income becomes distributable under the terms of the will.
Blair v. *Blair*, 500.

TRUSTEE PROCESS.

The principal defendant in a trustee suit has a legal interest in the adjudication of the alleged trustee's liability to be charged and in a subsequent suit brought by such principal defendant he is estopped by the previous judgment, followed by a delivery or payment by the trustee of the goods, effects and credits for which he was charged. *Otis* v. *Insurance Co.*, 239.

TAXATION.

With the expediency, wisdom or popularity of the proposed public work the court is not concerned. These are matters solely for the legislative branch of the government. The only questions to be considered are whether the act of Legislature violates the Constitution and whether the proceedings of the Board are, or are not in accordance with the act.

It is well settled that the powers of the Legislature are absolute except as limited by the constitution either expressly or by necessary implication.

The constitution, of course, does not require taxation to be exactly proportionate to benefits. Such a requirement would paralyze the taxing power.

Suffice it to say that a law imposing upon a taxing district a burden of taxation "indefensibly unfair," "a plain abuse," "a flagrant misuse of legislative power" or to use the milder but substantially equivalent language of the Maine Court "unreasonably disproportionate to benefits" would be held unconstitutional and acts under it enjoined. *Crabtree* v. *Ayer*, 18.

TAXES—ASSESSMENT OF.

Under Sec. 10, Chap. 4, R. S., the records of the assessment of taxes may be amended in accordance with the fact, if under oath, and the word "Assessors" may be substituted for the word "Selectmen" after their signatures, if the same persons hold both official positions. The commitment of a supplemental list of taxes to the collector, to which the powers of the original warrant has not been extended, does not prevent the town from maintaining in its own name an action for such taxes, such a proceeding being independent of the collector. The allegation that the tax was assessed by a supplemental assessment not necessary. *Inh. of Athens* v. *Whittier*, 86.

The owner of logs on which a tax has been assessed in order to be entitled to an abatement must show that the logs were, on the first day of April of the year of assessment, actually or constructively employed in some place other than that where the tax was assessed, either in the mechanic arts or in trade; and further show that such owners on the first day of April occupied in such other place for such employment either a store, shop, storehouse, wharf, mill or landing place. *Machias Lumber Co.* v. *Inh. of Machias*, 304.

TAX TITLE.

A valid title based upon the non-payment of a tax cannot be acquired by a party seeking to maintain such a title who was under an obligation to pay such tax.
Failure by the plaintiff to pay a tax which defendant is under a legal obligation to pay is not laches of which defendant can take advantage.
Boyd, Executrix v. *Jensen*, 31.

Where a tax deed is set up by the defendant in a real action under Sec. 62, Chap. 10, R. S., any alleged irregularities in the assessment must be proved by the plaintiff but the defendant must show that the advertising and selling was in strict compliance with the statutes; recitals in deeds cannot be accepted as evidence, there being no presumption in favor of the regularity of the Treasurer's acts. *Stowell* v. *Blanchard*, 368.

TITLE—SHERIFF'S SALE.

In an action of forcible entry and detainer where the only issue is that of title and the plaintiff relies upon a purchase of the property at a sheriff's sale, upon him rest the burden of showing that all of the proceedings leading up to and including the sale were conducted in accordance with the provisions and requirements of the statute. *Ames* v. *Young*, 331.

TRESPASS.

A plaintiff in trespass relying on title under a release deed, must show either title in his grantor, or actual possession. If, however, he or his grantor acquired title by warranty deed, he may maintain trespass against one showing no title, as he is then in constructive possession. *Anderton* v. *Watkins*, 346.

VENDOR.

In the absence of anything in the agreement to that effect there is no law which required that a vendor should have a good title, free from incumbrances, at the time when the agreement is entered into, and during the time between that and the arrival of the time when the agreement is to be performed.
Dalton v. *Callahan*, 178.

VERDICT.

Though not alleged in the declaration, if evidence of negligence, sufficient to support a verdict, is admitted without objection, a verdict based upon such evidence may be allowed to stand. *Burner* v. *Jordan Family Laundry*, 47.

A verdict for plaintiff not disturbed, all questions of fact involved being within the province of the jury, and the instructions of the court on the common law principles of negligence having been full and accurate.
Radski v. *Railway Company*, 480.

WAIVER.

For the plaintiff to amend or the defendant to plead over before having the validity of his exceptions determined would be a waiver of his exceptions.
Tripp v. *Motor Corporation*, 59.

All defects are waived except such as are raised by bill of exceptions.
State v. *Chorosky*, 283.

To establish a waiver it must be shown that the party knew and appreciated his rights. *Oakes* v. *Insurance Co.*, 361.

When a party consents to a reference of his case he waives his rights to trial, and agrees to be bound by the judgment of the referee both as to law and facts, and the report of a disinterested referee when accepted by the court at nisi prius must stand. If, however, material matters in issue were not passed upon by the referee, the aggrieved party may seek a remedy by exceptions.
Kennebec Housing Co. v. *Barton*, 374.

WARRANT.

WARRANTY.

WAYS.

WILLS.

The language "I give, bequeath and devise to . . . . all my estate, real, personal and mixed" devises an unqualified fee to devisee, notwithstanding such language may be followed by language clearly showing an intent that a remainder, if any, is to go to another person. *Everett F. Clements, Appl't*, 164.

A, a partner with B, devised and bequeathed to B all his interest in the partnership property, provided B should pay to the wife of A seven thousand dollars. The wife of A died before the testator, neither leaving descendants. Such circumstances created neither a condition precedent, nor subsequent, nor a charge upon the devise, but did create a devise with a payment of said sum as an exception therefrom. *Huard* v. *Hegarty*, 206.

A person holding a life estate is entitled to the entire income of the property during the time it is so held unless a different intention clearly appears in the will. *Fidelity Trust Co.* v. *McDowell*, 465.

The net income of a trust estate goes to the persons designated in the will, the distribution thereof being deferred by the occurrence of certain events as provided in the will, and no part thereof becomes a part of the principal. If any part of the said income is used in carrying out the provisions of the will, such part so used is to be restored from the principal to the income, at the time such income becomes distributable under the terms of the will.
Blair v. *Blair*, 500.

WORDS AND PHRASES.

WORKMEN'S COMPENSATION ACT.

A claimant in order to be entitled to compensation must show that at the time of the injury he was engaged in the kind of work at the place specified in the

WRIT OF ENTRY.

APPENDIX

STATUTES AND CONSTITUTIONS CITED, EXPOUNDED, ETC.

CONSTITUTION OF UNITED STATES.

CONSTITUTION OF MAINE.

STATUTES OF UNITED STATES.

CYC.

SPECIAL LAWS OF MAINE.

STATUTES OF MAINE.

REVISED STATUTES.

ERRATA.

Substitute "Berry" for "Gerry" in line 21, page 323.

Substitute "133" for "123," in line 16, page 329.

Insert "not" between "shall" and "defeat" in line 20, page 364.

Substitute "Chap. 10" for "Chap. 9" in line 27, page 370.

Substitute "sustained" for "overruled" in line 4, from bottom, page 444.

Substitute "Chap. 51" for "Chap. 81" in line 16, page 427.