MAINE REPORTS

123

CASES ARGUED AND DETERMINED

IN THE

SUPREME JUDICIAL COURT

OF

MAINE

JUNE 1, 1923—JUNE 1, 1924

FREEMAN D. DEARTH

REPORTER

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JUSTICES

OF THE

SUPREME JUDICIAL COURT

DURING THE TIME OF THESE REPORTS

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HON. ALBERT M. SPEAR[1]
HON. GEORGE M. HANSON[3]
HON. WARREN C. PHILBROOK
HON. CHARLES J. DUNN
HON. JOHN A. MORRILL
HON. SCOTT WILSON
HON. LUERE B. DEASY
HON. GUY H. STURGIS[2]
HON. CHARLES P. BARNES[4]

[1]Hon. Albert M. Spear, resigned July 7, 1923
[2]Hon. Guy H. Sturgis, appointed August 14, 1923
Hon. Albert M. Spear, appointed Active Retired Justice, July 24, 1923
Hon. George E. Bird, appointed Active Retired Justice, October 23, 1923
[3]Hon. George M. Hanson, died April 4, 1924
[4]Hon. Charles P. Barnes appointed April 17, 1924

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REPORTER OF DECISIONS

FREEMAN D. DEARTH*

*Reappointed December 21, 1923

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

ARTHUR WHITMAN *vs.* MARK ALLEN.

Oxford. Opinion June 6, 1923.

Technical questions of pleading are waived, unless the contrary appears, on report. Contracts of a minor, at common law except for necessaries, are voidable on his part. An infant seeking to avoid a contract must restore the specific property received under the contract, or account for it unless he has wasted, consumed or destroyed it, and property taken in exchange for the original property is under the same obligation. Burden of proof is on the minor to show a legal reason for non-restoration.

1. When a case is submitted to the Law Court on report, all technical questions of pleading are deemed to be waived unless the contrary appears.
2. At common law the contracts of a minor except for necessaries are voidable on his part and can be rescinded or disaffirmed by him, either during his minority or within a reasonable time thereafter.
3. R. S., Chap. 114, Sec. 2, relating to ratification in writing applies to actions against a minor, not to those brought by him, and is not involved here.
4. When an infant who seeks to avoid an exchange or sale of personal property has in his possession the specific property which he received under the contract, or any part of it, he must restore it or account for it unless he has wasted, consumed or destroyed it, rendering restoration impossible.
5. The doctrine of restoration should be extended so as to include not only the specific property received by the minor but in case he has exchanged that original property for other property, the latter must take the place of the original and come under the same obligation.
6. The burden of proof rests on the minor, if he would excuse or explain his failure to restore, to show a legal reason for such non-restoration.

On report. An action of assumpsit on account annexed to recover the value of personal property given in exchange for other personal property by the plaintiff when a minor, and the value of personal property mortgaged to secure a loan by the defendant to the plaintiff when a minor, without restoring or offering to restore the property received by him in exchange, and the money received as a loan secured by the mortgage in the second transaction, having disaffirmed both transactions after becoming twenty-one years of age by bringing the suit, relying upon infancy. The defendant pleaded the general issue under which he contended that the action could not be maintained because plaintiff had not restored the property received by him. At the conclusion of the evidence by agreement of the parties the case was reported to the Law Court. Judgment for plaintiff for $100.

The case is fully stated in the opinion.

Alton C. Wheeler, for plaintiff.

Henry H. Hastings and Frederick R. Dyer, for defendant.

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

CORNISH, C. J. The case here presented on report is that of a minor who had made two separate and independent trades with the same party, one an exchange of personal property and the other a mortgage of personal property as security for money borrowed. After attaining his majority the minor disaffirmed both trades by bringing this suit to recover the value of the property transferred to the defendant without restoring or offering to restore or to be accountable for the property received by him in exchange in the first instance, or the money received in the second. His action is based upon his infancy. Another claim, that of plaintiff's mental incapacity, was raised and pressed, but the evidence fails to substantiate it and that issue may be disregarded, leaving only the question of infancy for consideration.

It might be questioned whether the plaintiff's rights, if any, could technically be established in this form of action which is assumpsit with an account annexed for the value of the goods exchanged and with a common count for goods sold and delivered. There is force in the defendant's contention that if the contracts were voidable by

reason of infancy, title never vested in the defendant or if it vested it was a conditional vesting subject to being divested, and, upon disaffirmance, the plaintiff's remedy would be by replevin if the property were still in the defendant's possession, or by trover if he had disposed of it.

But when a case is submitted to the Law Court on report, all technical questions of pleading are deemed to be waived unless the contrary appears. *Pillsbury* v. *Brown*, 82 Maine, 450; *Elm City Club* v. *Howes*, 92 Maine, 211; *Rush* v. *Buckley*, 100 Maine, 322; *Robbins* v. *Railway Co.*, 100 Maine, 496. The contrary does not appear here, the certificate of the presiding Justice being in the usual form. We may, therefore, consider and determine the rights of the parties independent of technical pleading and view the action as equitable in its nature, the defendant in equity and good conscience being asked to account for the value of the property transferred to him under a voidable contract since disaffirmed.

The essential facts are these: The plaintiff was born on October 17, 1899, and attained his majority on October 17, 1920. During the Summer and Fall of 1919 he was living in Woodstock and was engaged in the business of buying, butchering and selling cattle, sheep and hogs, conveying many of them to Auburn. The defendant is a retail merchant at Bryant's Pond, having resided there many years. He had known the plaintiff well and had given him credit at various times for goods purchased at his store.

In August, 1919, the plaintiff bought a second-hand Ford truck known in this case as the red truck from Ripley and Fletcher at the agreed price of $600, paying $100 in cash and giving his father's note for the balance, which note the father subsequently paid. In the early part of October, 1919, he took this truck after a season of very hard usage to a garage in Bethel for repairs. Later in the same month he went to the defendant and solicited him for an exchange of the red truck, still in the garage, for a lighter truck owned by the defendant. This lighter truck with its repairs stood the defendant about $450 or $500. They made an exchange, the defendant giving the plaintiff in addition to his light truck a store account against him amounting to about $50. The defendant paid a substantial repair bill on the red truck, so that the trade would seem to be a fair one on both sides, the plaintiff's truck in its unrepaired condition

being worth no more than the defendant's truck plus the discharged store account. The plaintiff exchanged the light truck the next day with one Stevens for a horse.

On the evening of October 18, 1919, a second transaction took place. The plaintiff solicited the defendant for a loan of $200 giving his Holmes note for that amount secured by a Ford touring car then in a garage for repairs. This car he had obtained from his father at an agreed price, before being damaged, of $350 but had never paid for it. The defendant made the loan, giving the plaintiff $100 in cash and a check for $100 and taking the Holmes note and the car. Defendant also paid the repair bills on this car amounting to $125 of which amount $96.89 had been incurred on Whitman's credit before the trade, and the balance on Allen's credit after the trade. Allen took the car home, commenced but did not complete foreclosure proceedings, used it for about a year and then sold it to one Littlehale.

We will consider the legal rights of the parties in these two transactions separately.

FIRST TRANSACTION.

The single legal problem in the first exchange is whether the plaintiff can recover in this action the full value of the red truck and not account for or give credit for the value of what he received, the small truck and the store account a part of which was for necessaries.

At common law the minor was conceived to be a person needing legal protection because of his inexperience and improvidence. From these he must be saved. Hence it was held that the contracts of a minor except for necessaries were voidable on his part and could be rescinded or disaffirmed by him either during his minority or within a reasonable time thereafter.

Our statute has gone a step further and in an action against a minor requires the ratification, if one is claimed, to be in writing, viz.: "No action shall be maintained on any contract made by a minor unless he, or some person lawfully authorized, ratified it in writing after he arrived at the age of twenty-one years, except for necessaries or real estate of which he has received the title and retains the benefit." R. S., Chap. 114, Sec. 2, originally Public Laws, 1845, Chapter 166. This statute applies only in suits brought against

a minor, where he is acting on the defensive. It has no application where one acts on the offensive and seeks to recover the consideration paid by him on a contract made during minority. *Hilton* v. *Shepherd*, 92 Maine, 160. It, therefore, is beside the pending case and we may decide this cause upon general legal principles.

As to the obligation to return or account for the consideration received by the minor, upon his repudiation of an executed contract there is a diversity of authority.

New Hampshire has adopted a broad rule, namely, that a person seeking to avoid an executed contract on the ground of infancy must account for what he has received under it, by restoring or paying the value of whatever remains in specie within his control and allowing for the benefit derived from whatever cannot be restored in specie. *Hall* v. *Butterfield*, 59 N. H., 354; *Bartlett* v. *Basley*, 59 N. H., 408; *Stack* v. *Cavanaugh*, 67 N. H., 149; *Woolbridge* v. *Lavoie*, 79 N. H., 21.

Minnesota has adopted a somewhat similar rule, which is stated as follows: "If the party dealing with the infant is guilty of actual fraud or bad faith, the infant is allowed to recover back what he has paid without making restitution except as to the extent to which he retains in specie that which he has received. Such a case would be a contract essentially improvident calculated to facilitate squandering the infant's estate. But if the contract was free from any fraud or bad faith and otherwise reasonable, fair and a prudent contract for the infant the latter may recover back what he has parted with but must restore what he has received in the way of benefits. The one dealing with an infant is charged with the burden of proving that the contract was in all respects fair and reasonable, not tainted with fraud, undue influence, or overreaching on his part." *Berglund* v. *American Multigraph Sales Co.*, 135 Minn., 67, 160 N. W., 191; *Braught* v. *Graves-May Co.*, 92 Minn., 116, 99 N. W., 417. The reason given for these rules is that minors should not be permitted to use the shield of infancy as a cover, or turn it into a sword with which to injure others dealing with them in good faith.

The overwhelming weight of authority, however, holds to a somewhat narrower rule which is, that if an infant when he seeks to avoid a sale of property by himself has in his possession the specific property which came to him under the contract, or any part of it, he must return it or account for it as a prerequisite to the recovery of the

amount paid by him, unless he has wasted, consumed or destroyed it rendering restoration impossible. The reason on which this rule is based is well stated in a recent case: "To say that he (the minor) shall not have the protection by disaffirmance with which the policy of the law seeks to guard him, unless he has had sufficient prudence to retain the consideration of the contract he wishes to avoid, would in many instances deprive him, because of his indiscretion, of the very defense which the law intended that he should have against the results of his indiscretion." *McGuckian* v. *Carpenter*, 53 R. I., 34. Or as stated more concisely in an early case in this State: "If he had received property during infancy and had spent, consumed or destroyed it, to require him to restore it or the value of it, upon avoiding the contract, would be to deprive him of the very protection which it is the policy of the law to afford him." *Boody* v. *McKenney*, 23 Maine, 517, cited with approval in *Nielson* v. *International Text Book Co.*, 106 Maine, 104. The Rhode Island case, *McGuckian* v. *Carpenter*, supra, is reported in 16 A. L. R. with an extended annotation giving the large number of States in which this rule prevails. Among these it counts Maine, citing as authority therefor *Nielson* v. *International Text Book Co.*, 106 Maine, 104, supra.

Professor Williston in his recent monumental work on Contracts, after stating the various rules with a large number of citations, has this to say by way of approval of the Minnesota and New Hampshire rules: "In Minnesota and New Hampshire the ordinary rule prevailing in regard to necessaries has been extended so far as to hold an infant bound by his contracts, where he fails to restore what he has received under them, to the extent of the benefit actually derived by him from what he has received from the other party to the transaction. This seems to offer a flexible rule which will prevent imposition upon the infant, and also tend to prevent the infant from imposing to any serious degree upon others." Williston Contracts, Volume 1, Section 238.

In our opinion the Minnesota and New Hampshire doctrine is in actual practice in most instances the more equitable, while the almost universal rule is the more logical. This prevailing rule, however, can be administered in an equitable manner if we fully comprehend and appreciate its spirit and meaning, and extend the doctrine of restoration so that it may include not only the specific property received by the minor but in case the minor has exchanged

that original property for other property the latter may take the place of the original and come under the same obligation.

To illustrate the working of this extended rule: Suppose a minor exchanges personal property with an adult and then squanders the property he received in exchange. On attaining majority he disaffirms the contract and seeks to recover the value of the goods he parted with. He can do this because his improvidence in wasting the fruits of his trade imposes no more burden of restoration than does the squandering of money received on a loan for which a note is given. It is simply the result of the improvidence of infancy which the law has always in mind. If, however, the minor may not have the specific property received by him, has neither wasted, consumed nor destroyed it, but has parted with it for a valuable consideration and has its value or any part of it either in money or bank deposits or securities, or in other property, why should not the duty as to accountability attach to the substitute or equivalent as firmly as to the original, and why should not the minor account for it on avoiding the contract? The same reason that impresses the original impresses the substitute. No question of improvidence or immature folly is involved. It carries out precisely the same principles of fair dealing as the required restitution of the specific property. That principle compels the infant to account for benefits actually received and still possessed, and it can make no difference in what form they may happen to exist. The minor is not harmed by the extended rule any more than by the accepted rule. In fact it is the generally accepted rule a little more widely applied. All the rights to which the minor is entitled are fully protected and at the same time justice is done to the other contracting party. To hold otherwise would be morally wrong and what is morally wrong ought not to be legally right.

A leading Federal Case recognized the general principle but the point was raised that the money received by the infant did not exist in specie and therefore could not be restored but had been expended in improvements, and the Supreme Court of the United States disposed of this contention in no uncertain language. "And within the meaning of the rule that upon the infant's disaffirmance of his contract, the other party is entitled to recover the consideration paid by him which remains in the infant's hands or under his control, it may well be held—and gross injustice will be done in this case if it

be not so held—that the money borrowed from Mrs. Utermetile is in every just sense in the hands of Mrs. MacGreal. To say that the consideration paid to Mrs. MacGreal for the deed of trust of 1889 is not in her hands when the money has been put into her property in conformity with the disaffirmed contract, and notwithstanding such property is still held and enjoyed by her, is to sacrifice substance to form and to make the privilege of infancy a sword to be used to the injury of others although the law intends it simply as a shield to protect the infant from injustice and wrong." *MacGreal* v. *Taylor*, 167 U. S., 681, 701.

The Maine cases have acknowledged the generally prevailing rule, but this precise question as to restoration of substituted or equivalent property has not been passed upon.

In *Boody* v. *McKenney*, 23 Maine, 517, the decision turned upon affirmance or disaffirmance.

In *Robinson* v. *Weeks*, 56 Maine, 102, the certificate of stock for which the minor had paid the $200 sought to be recovered had never been delivered to him and therefore could not be restored.

In *Towle* v. *Dresser*, 73 Maine, 252, the consideration was returned and the point decided was that disaffirmance could take place during minority as well as after attaining majority.

In *Hilton* v. *Shepherd*, 92 Maine, 160, and *Lamkin and Foster* v. *Le Doux*, 101 Maine, 581, the vital issue was ratification.

In *Nielson* v. *International Text Book Co.*, 106 Maine, 104, suit was brought by a minor to recover money paid in advance on a contract whereby the defendant was to furnish him with a correspondence course in electrical engineering. The plaintiff returned the books received by him, but the instruction received could not be restored. The court sustained the action holding that restoration of the tangible had been made, of the intangible could not be made, and the legal requirements had been satisfied.

The case at bar calls for the application of what we conceive to be the true rule. The trade was fair and equitable and free from all fraud, imposition or overreaching on the part of the defendant. The only evidence of fraud is the false representation made by the plaintiff to the defendant that he was of age and had a right to trade. Such a false statement on the minor's part is held not to create an estoppel. *Merriam* v. *Cunningham*, 11 Cush., 40; *Knudson* v. *General Motorcycle Sales Co.*, 230 Mass., 54; *Wieland* v. *Kobick*,

110 Ill., 16; *Ridgeway* v. *Herbert*, 150 Mo., 1040; *Whitcomb* v. *Joslyn*, 51 Vt., 79. But there are well considered cases to the contrary, 14 R. C. L., Page 242 and cases cited.

It appears from the evidence that the plaintiff received full consideration for the truck he exchanged. That consideration consisted of a receipted bill for goods, many of which were necessaries for which he would be legally liable in any event, and the contract for all of which he now affirms because he admits on the stand that he was owing the account. That receipted bill, or the receipt for the bill, he must still have in his possession and he could restore it.

The light truck the plaintiff exchanged with a third party the next day after his trade with the defendant, for a horse, and so far as the evidence discloses his ownership continued and he still has the horse. We think the burden of proof rests on the plaintiff, if he would excuse or explain his failure to restore, to show the reason for such failure. The sequence of events requires it. The plaintiff sues to recover property disposed of during minority under a contract never affirmed. The defendant admits the infancy but proves that he transferred to the plaintiff valuable consideration therefor, either in the form of specific articles or in money. He is not obliged to follow the transaction further. The plaintiff knows what became of that consideration and can testify to it. The defendant is not supposed to know. The law says that the plaintiff must restore the specific benefits received by him or their substitutes or equivalents if still in his possession or control. If he does not restore, it is his duty to explain the reason therefor. In the absence of such explanatory evidence he must be charged with the value of what he received or of its substitute, that is, the value still in his possession in another form. There has been restoration in this case neither of the receipted bill nor of the horse, and no excuse is offered. We, therefore, find no basis for recovery in this action based upon the first transaction, because the consideration and benefits received are still held by the plaintiff either in the original or the substituted form, and are of equal value with the truck for whose value he sues.

SECOND TRANSACTION.

On the second transaction the plaintiff received the sum of two hundred dollars, one hundred by check and one hundred in cash.

He now seeks to recover the value of the touring car which in its disabled condition we find from the evidence to have been worth $200. What did the plaintiff do with the consideration which he received? He testified that he gave the check to a third party in payment of garage bills, and of course that could not be restored. His evidence affords an excuse for non-restoration. What became of the one hundred dollars in cash? On this he gives no explanation. However, it does appear that when he became of age in October 17, 1920, he had from $300 to $500 in money. This may have included the $100 in cash received from the defendant. The plaintiff has not shown that it did not, and, as we have already stated, the burden was on him to show facts justifying a legal reason for non-restoration. He has not done so. We, therefore, think that under the rule he should be charged with this one hundred dollars to be allowed in offset to his claim of $200, the value of his car exchanged with the defendant, leaving a balance of $100 in his favor.

The entry will therefore be,

Judgment for plaintiff for $100 with interest from date of the writ and costs.

JAMES B. DRAKE & SONS *vs.* PERCY L. NICKERSON.

Sagadahoc. Opinion June 6, 1923.

Non-payment of premiums for insurance on property mortgaged under a Holmes note is not a breach of the agreement unless the mortgagor has failed to perform his agreement to insure, or such insurance was effected by mortgagee by mutual agreement with mortgagor. A tender in extinguishment of a right absolutely need not be preserved by producing the money in court.

A failure to pay the premiums on insurance policies was not a breach of a Holmes note agreement to provide insurance, even where the underwriter's agent extending credit for the premiums afterward became the holder of the note.

The owner of a chattel mortgage may not effect insurance and insist upon reimbursement for its cost unless the mortgagor has failed or neglected to perform his covenant to insure, or, apart from any failure or neglect to perform, the insurance was effected by the mortgagee with privity between himself and the mortgagor.

Where the effect of a tender is the extinguishment of a right absolutely, it is not essential that the tender be kept good by bringing the money into court.

On report. An action of trover to recover the value of a motor truck which defendant purchased of a trustee in bankruptcy of a mortgagor of the truck, the mortgagee having foreclosed the mortgage, but the trustee having seasonably made a tender to the mortgagee of the amount due on the note and all other legal charges, which was refused, the mortgagee contending that the tender should include premiums for insurance procured on the truck without privity with the mortgagor, who had not failed to perform his covenants as to insurance. Judgment for the defendant.

The case is stated in the opinion.

John F. A. Merrill, for plaintiff.

Arthur J. Dunton, for defendant.

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

DUNN, J. A Bath man gave a Holmes note, equivalent in effect to a chattel mortgage, in partial payment for the purchase price of a

truck. As a part of the same contract he promised that he would keep the truck insured for the payee's benefit. His policies of insurance, in this respect and otherwise, were issued from the plaintiff's agency, to which he continued to be indebted for the premiums.

In mortgaging his right to redeem from the Holmes note, as security for the payment of his note to a bank, no obligation to insure was incurred.

When the Holmes note had been substantially reduced in amount it was indorsed to this plaintiff corporation.

Thereafterwards, in rough chronological sequence of events, the maker of the notes was adjudged a bankrupt by the United States District Court. In the bankruptcy proceedings the bankrupt listed the present plaintiff as an unsecured creditor. It there made proof upon an open account for sundry insurance premiums and on notes of hand which had been given to it for other premiums. Later this plaintiff bought the bank's note and mortgage. Payment was tendered to it by the trustee of the bankrupt's estate, first of the Holmes note, and more recently of the note which the bank had had. Each tender included the charges of a begun but yet incomplete foreclosure. The tenders were declined on the ground that neither was large enough. Next, the bankruptcy trustee sold the truck. And now the purchasers from him are defending in trover against the plaintiff as the owner of the Holmes note and the chattel mortgage.

Whether there was a valid sale in bankruptcy, and whether that question may be raised collaterally, is inconsequential. Inquiry goes to the plaintiff's title to and right of possession of the truck.

Section 3 of Chapter 96 of the latest revision of the general statutes incorporates itself into every chattel mortgage. These are the material words of that statute:

"When the condition of a mortgage of personal property is broken, the mortgagor, or person lawfully claiming under him, may redeem it at any time before . . . . the right of redemption is foreclosed, ... by paying or tendering to the mortgagee, or the person holding the mortgage by assignment thereof, (duly recorded), the sum due thereon, or by performing, or offering to perform the conditions thereof, when not for the payment of money, with all reasonable charges incurred; and the property, if not immediately restored, may be replevied, or damages for withholding it recovered in an action on the case."

Thus the Legislature has created a legal right of redemption, in the mortgagor or his assignee, attaching after breach of the condition of the mortgage. This right continues, in virtue of section 4 of the same chapter, up to sixty days of the giving and recording by the holder of the mortgage, in a prescribed manner, of notice of his intention to foreclose or bar the power of redeeming. So, compliance with the condition subsequent of a chattel mortgage, by one entitled to make a redemption, though after breach of the condition of the expressly stated terms of the mortgage but within the time which the statute defines, immediately terminates the vital existence of the mortgage and takes the title to the property from the mortgagee instanter. The mortgagor, or he who stands in his stead, is thereupon invested with a right of property as complete and absolute as though the mortgage never had been given. Tender of compliance begets like result. *Loggie* v. *Chandler*, 95 Maine, 220; *Weeks* v. *Baker*, 152 Mass., 20. On the other hand, failure to pay or to tender payment of the sum due, or to perform or to offer to perform the other thing, as the case may require, within the statute's limit, by a competent person, forever precludes redemption.

The right to redeem from a chattel mortgage is a right of property passing to the trustee of the estate of a bankrupt mortgagor. The term "property," in the sense of its use in the bankruptcy act, as has been happily said, "is of the broadest signification, embracing everything that has exchangeable value, or goes to make up a man's wealth—every interest or estate which the law regards of sufficient value for judicial recognition." *Earle* v. *Maxwell*, 86 S. C., 1, 67 S. E., 962, 138 A. S. R., 1012.

Concerning an agreement, asserted to have been orally entered into between the maker of the Holmes note and its now indorsee, that, on indorsement and transfer, that note should be inclusive in its surety of the insurance premiums and premium notes, little need be said beyond mentioning that the proposition of the making of any such agreement is not sustained. The same persons who, in listing and proving the claim in the bankruptcy court, set forth inferentially that the scope of the note was not enlarged, would show otherwise by their testimonies in this court. In the absence of consistent explanation, and in the presence of evidence at variance with the pretensions made, that which was done in the bankruptcy court is the convincer.

Whether, separate from the claimed oral agreement, the tenders should have included the cost of certain other policies of insurance, is the nub of this controversy. If the maker of the Holmes note had failed or refused to fulfill his promise or covenant to insure, the payee of that instrument, or its successor in title, could properly have procured the insurance to be written and insisted, under and as a part of the note, upon reimbursement for its cost. 27 Cyc., 1262. But he did not fail or refuse. He duly provided insurance. His delinquency was in neglecting to pay expected attention to the credits extended to him for the premiums.

When the tender for that note was made, there was due a balance of the principal, plus accrued and unpaid interest to the time of the indorsement to the plaintiff, as was accurately computed and accordingly paid at the time of the transfer of the note, plus interest on the principal after that to the time of the tender. All these, and the reasonable charges of the foreclosure, and even more, the tender included. And, if the plaintiff would not have its money for a debt when the money was lawfully tendered, it cannot now complain that its own folly cost it the loss, not of the debt, but of the security for that debt. Co. Lit. 207a; *Weeks* v. *Baker*, supra.

The chattel mortgage did not contain a covenant to insure. Nor apart from this was insurance procured by the mortgagee with privity between himself and the mortgagor. An earlier mortgage to the bank stipulated insurance, but that mortgage never had relation to this case. Further, were it possible at any time to so relate it, the relationship came to an end when the bank discharged the mortgage of record as having been fully performed, before transferring the later mortgage to the plaintiff. On the note which the chattel mortgage secured, there was due an amount equal to the sum of the unpaid principal and interest, which amount the tender comprised. Additionally the charges of foreclosure, the reasonableness of which was accepted, were included. There was no warrant, for there was neither insurance requirement in the mortgage nor subsequent request by the mortgagor for insurance, for the mortgagee to charge the mortgagor with premiums. *Pierce* v. *Faunce*, 53 Maine, 351; *Stinchfield* v. *Milliken*, 71 Maine, 567; *Snow* v. *Pressey*, 85 Maine, 408. The tender was adequate.

Contention that the moneys tendered should have been brought into court is unsupported by authority. Where the effect of a

tender is the extinguishment of a right absolutely, it is not essential that the tender be kept good. *Weeks* v. *Baker*, supra; 11 C. J., 682; 26 R. C. L., 659. The distinction between the destruction of one right without putting an end to another, as, to illustrate, the extinction of mortgage security for the payment of a debt and the unimpairment of the debt itself, is apparent upon mere suggestion. In cases where tender and refusal do not destroy a right, as where thereby a debt is not discharged, the adversary must be given opportunity to accept in court that which he at first refused, if a plea of tender be relied upon. In the case in hand both the accompanying security of the Holmes note and the chattel mortgage were extinct when the plaintiff brought its action.

Judgment for defendant.

ANSEL N. SPENCER *vs.* DENNIS BOUCHARD.

Penobscot. Opinion June 6, 1923.

A deed conveying one half of grantor's interest cannot by oral testimony be made to embrace the whole. The probating of a foreign will cannot be attacked collaterally for want of jurisdiction, in absence of fraud, in attempting to show testatrix was a resident of this state at her decease. Legal title to real estate may be acquired by adverse possession under an oral grant.

A deed which in terms purports to convey one half of the grantor's interest in certain premises cannot be construed through the aid of oral testimony or otherwise to convey the whole premises.

A decree of the Probate Court in Maine admitting a will to probate as a foreign will cannot be collaterally attacked for want of jurisdiction by attempting to show that the testatrix was a resident of this State at the time of her decease, no fraud being shown.

An oral grant may ripen into a legal title by adverse possession under certain circumstances, but the circumstances here prohibit such a ripening in the defendant's grantor, who was a co-owner in reversion of a certain undivided interest and also a tenant for life in another undivided portion.

On report. This is a writ of entry to recover certain premises in Milford, consisting of a house and about eighteen acres of land, and

mesne profits. Plea, the general issue and a brief statement setting up adverse possession and estoppel. At the conclusion of the testimony, by agreement of the parties, the case was reported to the Law Court. Judgment for plaintiff.

The case is fully stated in the opinion.

Howard M. Cook, for plaintiff.

George H. Worster and George H. Morse, for defendant.

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

CORNISH, C. J. This is an action in a plea of land, reported upon so much of the evidence contained in the record as may be legally competent and admissible, wherein the plaintiff demands of the defendant certain real estate situated in Milford. The declaration contains two counts. In the first the plaintiff alleges seisin of the premises as of fee, in the second seisin as of an estate for life.

The defendant pleaded the general issue and by way of brief statement alleged that he, and those under whom he claimed, had been in actual, continuous possession of the whole of the demanded premises for more than twenty years next prior to the date of the plaintiff's writ, to wit, from and including the fourteenth day of April, A. D., 1897, to September 18, 1920, a period of slightly more than twenty-three years, claiming to hold said premises by adverse, open, peaceable, notorious and exclusive possession. Further, by way of brief statement, the defendant alleged that the plaintiff has not and never had any title to the demanded premises, nor to any part thereof, but that if he ever had any such title he is estopped by his own acts and conduct from setting up or claiming any title to the same or to any part thereof.

Three issues, therefore, are presented, viz., the plaintiff's title, adverse possession by the defendant and those under whom he claims for more than twenty years next prior to the date of the writ, and estoppel arising from plaintiff's conduct and acts.

PLAINTIFF'S TITLE.

It is well-settled law in this State that in a writ of entry to recover land the burden is upon the plaintiff to show a legal title. *Day* v.

Philbrook, 89 Maine, 462. He must recover, if at all, upon the strength of his own title and not upon the weakness of that of the defendant. Proof of both the right of entry at the time of the commencement of the action, and of such an estate in the premises as he has alleged, is necessary before he can recover although the defendant shows no title in himself. *Powers* v. *Hambleton*, 106 Maine, 217; *Wyman* v. *Porter*, 108 Maine, 110. An equitable title or estate will not sustain a writ of entry, for whatever may be the equitable interests of the demandant in the demanded land, or whatever interest or title he might acquire therein through appropriate equity proceedings, he cannot recover judgment in a real action unless at the date of his writ he then had vested in himself the legal title and immediate right of possession, *Low* v. *Marco*, 53 Maine, 45; *Merritt* v. *Bucknam*, 77 Maine, 253.

PLAINTIFF'S INTEREST IN FEE.

The plaintiff claims an undivided interest in fee, and also a life interest under the will of Mercy A. Townsend. We will consider first the plaintiff's undivided interest in fee as proved by the deeds.

It is admitted by both parties that Jane Spencer formerly owned the premises in dispute. She obtained title through two deeds, one undivided half by each deed. The first is one of warranty, dated February 20, 1869, from James O. Foss and Augusta A. Foss and conveys "one undivided half" of the premises. The second is dated February 19, 1869, from Cyrus Knapp, guardian of Carrie S. Foss and Victoria S. Foss, minors, is a guardian's deed containing the usual covenants as to observance of rules and directions of law concerning sale of real estate of minors, and also conveys "one undivided half" of the premises. On August 13, 1891, Jane Spencer gave a warranty deed of "one undivided half" of the premises to her two daughters Mercy A. Townsend and Adeline Noyes. This deed states that the property referred to is the same "conveyed to me by James A. Foss by deed recorded in Penobscot Registry of Deeds, Vol. 386, Page 365, reference to be had thereto for further description." It should here be noted that although the deed says "James A. Foss" yet reference to the Foss deed, and to the record thereof, clearly shows a mere clerical error on the part of the scrivener and that James O. Foss was intended.

The plaintiff at this point strenuously urges that the deed from Jane Spencer to her two daughters Mercy A. Townsend and Adeline Noyes, was intended to convey and did convey not an undivided half but all the premises. In view of the explicit language of the deed we cannot so construe it. The description in the deed is as follows: "A certain lot or parcel of land with the buildings thereon, situated in said Milford and described as follows: "Being an undivided half of a strip of land off the north side of a lot of land occupied in 1869 by James A. Foss and previously occupied by James Foss as a homestead. Said strip of land is eighteen rods wide measuring from the north side of said lot and extends from the Penobscot River to Otter Stream, holding the width of eighteen rods throughout, and contains sixteen acres more or less. Being the same property conveyed to me by James A. Foss by deed recorded . . . ." Not only does the deed in express terms declare that one undivided half is conveyed but it goes on further and describes the portion granted as the same conveyed to the grantor by the deed of James A. (O.) Foss, and that deed conveyed to her only one undivided half. The description in the two deeds is practically identical, and can neither be ignored nor distorted.

In *Hubbard* v. *Greeley*, 84 Maine, 340, this court was requested to construe a deed which contained the words "undivided half" as conveying the whole of the land, but the request was denied, the court saying "We have the words 'undivided half' in the deed and we cannot doubt that they were put there for a purpose, and that that purpose was to describe the interest conveyed." In *Hines* v. *Robinson*, 57 Maine, 324, it was held "Where the language of a conveyance is intelligible and consistent we cannot let in parol evidence to show the intention of the parties and to limit its extent by construction in a way which would violate any of its calls. Their intention must be ascertained from the writing itself, which, in such cases, is the best and only legal evidence of it. . . . . A deed, which through the ignorance or heedlessness of the scrivener, misrepresents the bargain between the parties, may doubtless be reformed in equity, but until that is done it must be allowed to have, in a suit at law, all its legitimate effect according to its terms."

In the case at bar, a real action, which must be governed by rules of construction applicable to such actions, we can see no reason or authority to adopt the construction asked by the plaintiff, and must

hold that the deed from Mrs. Spencer to Mrs. Noyes and Mrs. Townsend vested in the grantees only one undivided half of the premises in dispute, or one fourth in each. The title at this point then stands as follows: In Jane Spencer, one half; in Mercy A. Townsend, one quarter and in Adeline Noyes, one quarter.

The next change in the title occurred on November 30, 1891, when Adeline Noyes conveyed by quitclaim deed to her sister Mrs. Townsend "the undivided half of any all my right title and interest in and to a certain lot" &c., describing the premises in question. Here again the grantor expressly conveyed not her whole but only one undivided half of her interest in the premises, and for the reasons already given, and under the authorities before cited, in construing the deed from Jane Spencer to Mercy A. Townsend and Adeline Noyes, we must hold in this action at law that Adeline Noyes conveyed only one half of her one quarter, or one eighth, and retained the other one eighth. At this stage, therefore, (1891) the record title stands as follows: In Jane Spencer one half, in Adeline Noyes one eighth, in Mercy A. Townsend one quarter from Jane Spencer and one eighth from Mrs. Noyes, or three eighths.

The next change took place on November 16, 1895, when the mother Jane Spencer died intestate, leaving no husband, but five children, Adeline Noyes, Lafayette Spencer, Elmina Caverly, Bowman Spencer and Mercy A. Townsend, each of whom inherited one fifth of the mother's one half, or one tenth. This leaves the title as follows: in Adeline one eighth by deed from her mother after having conveyed one eighth to Mercy, plus one tenth by descent from her mother, or nine fortieths in all; in Mercy three eighths plus one tenth or nineteen fortieths; in Lafayette Spencer one tenth or four fortieths; in Elmina Caverly one tenth or four fortieths; in Bowman Spencer one tenth or four fortieths, which accounts for the entire ownership immediately after the mother's death.

The next change occurred in 1897, when on March 14, Mercy A. Townsend, then a widow without children, died, and her share, nineteen fortieths, subject to the life estates created by her will which we shall discuss later, descended in equal shares to her four brothers and sisters, Lafayette, Adeline, Elmina and Bowman, each taking one fourth of her nineteen fortieths, or nineteen one hundred and sixtieths.

The title, disregarding the life estate, was then held as follows:

In Adeline Noyes, nine fortieths, plus nineteen one hundred and sixtieths, or fifty-five one hundred and sixtieths;

In Lafayette Spencer, four fortieths, plus nineteen one hundred and sixtieths, or thirty-five one hundred and sixtieths;

In Elmina Caverly the same; in Bowman Spencer, the same.

The next change. Lafayette Spencer died July 26, 1900, intestate, never married, and his thirty-five one hundred and sixtieths passed by descent in equal shares to Adeline, Elmina and Bowman, or thirty-five four hundred and eightieths to each.

This leaves the title as follows:

In Adeline Noyes, fifty-five one hundred and sixtieths, plus thirty-five four hundred and eightieths, or two hundred four hundred and eightieths.

In Elmina and Bowman one hundred and forty four hundred and eightieths each.

This accounts for the entire ownership.

As we are seeking to ascertain only the extent of the plaintiff's title it is unnecessary to trace these reversionary interests further, except to note that Elmina Caverly died intestate in 1911, leaving a husband and two sons. These three on June 14, 1918, conveyed Elmina's share to the plaintiff, Ansel N. Spencer. This Elmina Caverly interest consisted of one tenth in fee from Jane, one third of one tenth, or one thirtieth from Lafayette, also in fee, a total of four thirtieths, or two fifteenths, and also a reversion in seventy-six four hundred and eightieths.

This prolonged arithmetical computation therefore shows that the plaintiff is the owner of one hundred and forty four hundred and eightieths in fee, two fifteenths or sixty-four four hundred and eightieths in presenti and seventy-six four hundred and eightieths in futuro.

PLAINTIFF'S LIFE INTEREST.

In addition to his interest in fee, the plaintiff claims a life estate in a portion of the premises. This came to Ansel through the will of Mercy A. Townsend. The provision in the will is as follows: "Third, I give devise and bequeath to my brother Bowman Spencer of Milford, Maine, my farm and house situated in Milford, Maine,

during his natural life, and to pay taxes and insurance on said property, and at his death to go to my nephew Ansel N. Spencer during his natural life." Bowman having died prior to the commencement of this action, the plaintiff's life estate in the nineteen fortieths owned by Mrs. Townsend at the time of her decease came into being and for that life estate he is entitled to judgment so far as the record title shows. In her will Mrs. Townsend apparently devised a life estate in the whole farm, but she could devise a life estate in no greater interest than she owned, and that was nineteen fortieths as we have seen.

The defendant, however, attacks this devise of a life estate under the Townsend will, and claims that no interest passed thereby because of lack of jurisdiction in the Probate Court in Maine.

It appears that this will, in which she declared her residence to be New York City, was made and executed there on July 24, 1896. The executor named in the will was a New York attorney, one A. M. Card. In the early part of the following year Mrs. Townsend came to Milford, Maine, being then in failing health, and died in Milford on the fourteenth day of March, 1897, having been in that town from the date of her coming from New York until the date of her decease. No husband survived her. About a month after the death of Mrs. Townsend, namely, April 12, 1897, Card presented her will, with petition for probate, in the Surrogate Court for New York as a domestic will. Later he died, having taken no further steps in the procedure of proving the will and having the same allowed. According to the plaintiff's testimony Mrs. Townsend had told him she had made a will and "if anything happened to her to let Lawyer Card know." The plaintiff further testified that immediately after Mrs. Townsend's death knowledge of that fact was communicated to Mr. Card who sent a copy of the will, or as plaintiff says "we all received a copy of the will that was in his possession, each branch of the family." Nothing further was done by any one in the Surrogate Court until July 25, 1919, a period of more than twenty-two years, when, upon petition of plaintiff, and after the death of Bowman, Card's petition for probate was dismissed. On September 11, 1919, the plaintiff filed in the same Surrogate Court his petition for the probate of the will, the petition was amended December 17, 1919, and on March 3, 1920, the will was there allowed as a domestic will. On the twenty-fifth day of May, 1920, by petition of the plaintiff, the

will was allowed, filed and recorded, as a foreign will, in the Probate Court for the County of Penobscot, and on July first, 1920, an abstract thereof was recorded in the Registry of Deeds for that County. From the decree allowing the will as a foreign will no appeal was taken. Under its provisions, Bowman Spencer having died, the plaintiff claims a life estate, but as we have just seen he can rightly claim only a life estate in nineteen fortieths of the premises the extent of the interest owned by Mercy at her death.

The defendant contends that the will bestows no title or benefit upon the plaintiff because, as he says, Mrs. Townsend had her domicile in Maine at the time of her death and therefore the Probate Court in Maine was without jurisdiction to allow her will as a foreign will, and, further, because her residence (a jurisdictional fact) was not stated in the petition for probate in the Maine Court of Probate.

The effect of these objections is to make a collateral attack upon the decree of the Probate Court admitting Mrs. Townsend's will to probate as a foreign will, from which decree no appeal had been taken.

We think this attack is groundless. R. S., Chap. 67, Sec. 16, provides: "When a case is originally within the jurisdiction of the probate court in two or more Counties, the one which first commences proceedings therein, retains the same exclusively throughout; and the jurisdiction assumed in any case, except in cases of fraud, so far as it depends on the residence of any person, or the locality or amount of property, shall not be contested in any proceeding whatever, except on an appeal from the probate court in the original case, or when the want of jurisdiction appears on the same record."

An examination of this statute in its earlier stages, and the decisions of our court, throw much light upon its purport and effect. From the revision of 1857, to and including that of 1916, the section is in its present form. But in the earlier revision of 1841 we find in Chap. 105, Sec. 4, the provision "He (the Judge of Probate) shall have jurisdiction of all matters relating to the settlement of such estates, and to such persons under guardianship, and to whatever else by the provisions of law may come under his cognizance and jurisdiction; and, when a case shall be originally within the jurisdiction of the probate court in two or more counties, the court which shall first take cognizance thereof, by the commencement of proceedings, shall retain the same throughout, exclusively." But in the same chapter,

and in an entirely different section, namely, Section 22, is this provision: "The jurisdiction assumed in any case by a judge of probate, except in cases of fraud, so far as it depends on the place of residence of any person, or the locality or amount of property to be administered upon, shall not be contested in any suit or proceeding whatever, except on an appeal from the probate court in the original case, or when the want of jurisdiction appears on the same record." Thus it will be seen that the provisions which are combined in the revision of 1916, Chap. 67, Sec. 16, were entirely distinct, originally, and that the provisions of Chap. 105, Sec. 22, revision of 1841, are very broad and comprehensive.

An early and leading case, in which these statute provisions were discussed by this court, is *Record* v. *Howard*, 58 Maine, 225, decided in 1870. In that case administration was granted in 1858 upon representation that the deceased was a resident of Turner, in the County of Androscoggin, at the time of her death, which fact, the record says, was "made fully to appear." Although right of appeal existed none was taken or claimed. The settlement of the estate was allowed to proceed for over six years, and until the administrator's fourth and final account had been settled, and an order for final distribution applied for, when, for the first time, objection was made that the deceased, at the time of her death, did not reside in Androscoggin County, but was an inhabitant of the State of Ohio. This court there held, referring to the statute now before us, that no appeal having been taken from the decree of the Judge of Probate granting administration, and no fraud being shown, and no want of jurisdiction being apparent upon the face of the record, the objection came too late. After discussing the early provisions of law before the adoption of this statute, which was a transcript from the Massachusetts statute, and the uncertainty of titles which might arise under the earlier law which was different than that provided by the statute, our court said: "We cannot doubt the wisdom of this change, for questions of domicile are among the most vexatious and difficult that courts of justice have to deal with; and a rule of law that would never allow such a question to be definitely settled, but would allow every fresh litigant to open it anew, and, if he should happen to succeed, thereby overturn a long course of administration, and defeat titles to real estate of more than twenty years' standing

(as was done in *Holyoke* v. *Haskins*, 5 Pick., 20) is better calculated to defeat than promote the ends of justice." The conclusion of the court in the case from which we have just quoted is as follows: "The jurisdiction assumed by the probate court was original and not ancillary. It was assumed upon a representation (then satisfactorily proved) that the deceased at the time of her death was a citizen of this State. The record so states. No appeal having been taken, and no suggestion of fraud being made, we think the question of domicile must be regarded as conclusively settled for all purposes connected with the administration of the estate. To hold otherwise would subject the settlement of the estate to all the inconveniences which it was plainly the object of the statute to avoid."

The case to which we have been referring is one where original jurisdiction was assumed. The case at bar is one where ancillary jurisdiction was assumed. But we can perceive no reason why the legal principles involved are not equally applicable to both.

In cases cited by the defendant from other jurisdictions it does not appear that they were in any way governed by a statute similar to that in our own State. In those cases cited from our own courts we think each will show that "the want of jurisdiction appears on the same record."

Under the second objection raised by the defendant, touching the question of jurisdiction of the Maine Probate Court, it should be observed that R. S., Chap. 68, Sec. 14, providing that wills proved and allowed in another State or Country, according to the laws thereof, may be allowed and recorded in this State, and providing procedure in such cases, does not require, as one step in the procedure, that the residence of the deceased should be stated in the petition; moreover, the petition in this case, which the defendant declares is faulty to a degree sufficient to render all the proceedings in the Maine Probate Court void, is one which literally follows the form approved by the Supreme Judicial Court in 1895 and which, so far as we know, has been followed in our Probate Courts from that time to the present.

We, therefore, hold that the decree of the Penobscot Probate Court must stand and that under it the plaintiff holds a life estate in nineteen fortieths of the demanded premises.

So much for the plaintiff's title.

DEFENDANT'S ALLEGED TITLE BY ADVERSE POSSESSION.

The defendant claims title to the entire tract by virtue of a warranty deed with certain conditions as to support, from Bowman Spencer to his son George Spencer, dated January 10, 1918, and a warranty deed from George Spencer to the defendant dated April 3, 1919.

The source of Bowman's title he states in his deed to be: "The premises hereby conveyed having been occupied by me for twenty-eight years and claimed by me under an oral grant to me of the premises by Mercy A. Townsend for a valuable consideration to her passing."

An oral grant may ripen into a legal title by adverse possession under certain circumstances, as was held in the very recent case of *Nevells* v. *Carter*, 122 Maine, 81. But the circumstances here prohibit such a ripening.

We have already computed the interest of Bowman Spencer in these premises to be one hundred and forty four hundred and eightieths undivided. As to that amount he was tenant in common in reversion with his co-owners, and while a cotenant may be disseized if the facts justify it, no such facts appear here.

Moreover, Bowman had a life interest in the nineteen fortieths owned by Mrs. Townsend. No principle is better settled than that a person having title, the right of possession and possession, is presumed to hold by title and right of possession, to hold by right and not by wrong, *Bird* v. *Bird*, 40 Maine, 398; *Hudson* v. *Coe*, 79 Maine, 83, and that a life tenant in possession cannot gain title by adverse possession against the reversioners. *Pratt* v. *Churchill*, 42 Maine, 471.

The defense of adverse possession is without foundation.

ESTOPPEL.

The defendant urges that the plaintiff is estopped from making any claim (a) by not having the will recorded more promptly; (b) by failure to claim title when improvements were being made. But the plaintiff had no right of possession as life tenant until the life tenancy of Bowman had terminated. Knowledge of the provisions of the will, as to Bowman, might well excuse this plaintiff

from action until, as he believed, his rights as a life tenant had ripened. Moreover, if Bowman was occupying as a life tenant under the will he was not holding adversely and could hold no betterments. *Pratt* v. *Churchill*, 42 Maine, 471. Therefore, there was no occasion for the plaintiff to act because the life tenant was making improvements. The claim of estoppel is without merit.

JUDGMENT.

In his writ the plaintiff in the first count claims an estate in fee in the whole, and in the second count a life estate in the whole. Under R. S., Chap. 109, Sec. 10, "the demandant may recover a specific part or undivided portion of the premises to which he proves title although less than he demanded."

The plaintiff has proved in himself ownership of two fifteenths in fee, in presenti; seventy-six four hundred and eightieths in fee in reversion, and a life estate in nineteen fortieths. No interest in remainder can be recovered in this action, but the plaintiff is entitled to judgment for his life interest and his in presenti interest in fee.

MESNE PROFITS.

The testimony shows that the rental value of the premises is about nine dollars per month. The defendant took possession April 3d, 1919, and the writ is dated seventeen and one half months later. This would mean a rental sum of one hundred fifty-seven dollars and fifty cents. As the plaintiff, by his life tenancy is entitled to immediate possession of nineteen fortieths, and also to two fifteenths of the premises in fee, we award to him as his proportional part of this rental value, the sum of one hundred fourteen dollars and ninety-seven cents.

Judgment for plaintiff as tenant for life in nineteen undivided fortieths, and in fee for two undivided fifteenths and for mesne profits computed as $114.97 with interest from date of the writ and costs.

STEPHEN C. FOSTER'S CASE.

Cumberland. Opinion June 6, 1923.

An agreement for compensation, duly approved, is in effect a judgment and final as to facts agreed upon. Compensation may be granted for loss of earning capacity after the expiration of the compensable period.

In the instant case the agreement specified all three injuries and the agreed compensation was based upon all, including the injury to the thumb.

The agreement, being duly approved, has the force of a judgment, and is final and binding to the extent of the facts agreed upon and the conditions covered by them as a basis for the compensation to be paid.

The claimant under the agreement having once received compensation for the very injury which in the present petition he alleges as the basis for recovery a second compensation cannot now be allowed. That claim is res adjudicata.

However, the employee may be entitled to compensation for actual loss of earning capacity after the specified period of fifty-five weeks. That avenue of relief is still open to him under Section 16, and under the liberal construction which the act calls for to obviate delay, this case may be remanded to the Commission and the claimant be given leave to amend his petition and to prove, if he can, that he is entitled to compensation for total or partial incapacity after such specified period, in accordance with the principles and practice laid down in *Morin's Case*, 122 Maine, 338.

On appeal. An appeal from a decree in accordance with the awarding by the Industrial Accident Commission of compensation on a petition to determine the extent of permanent impairment to the thumb of claimant. Under an agreement compensation of sixteen dollars per week for fifty-five weeks was paid and after the expiration of the compensable period this petition was filed on which compensation of sixteen dollars a week was awarded for a further term of sixteen and two thirds weeks. Appeal sustained. Decree reversed. Case remanded to the Industrial Accident Commission.

The case is fully stated in the opinion.

Petitioner was without counsel.

Hinckley & Hinckley, for respondents.

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

CORNISH, C. J. Workmen's Compensation Case. Stephen C. Foster, a carpenter, was injured on September 24, 1921, while in the employ of F. W. Cunningham and Sons by an accident admittedly arising out of and in the course of his employment. The injury consisted of the loss of three fourths of the index finger, one half of the middle finger and the laceration of the end of the thumb of the left hand. An agreement for compensation was entered into between the employer and employee on October 12, 1921, on the basis of sixteen dollars per week for fifty-five weeks beginning October 1, 1921. This agreement was approved by the Commissioner of Labor on November 2, 1921.

The terms of the agreement were complied with and the claimant was paid the agreed amount in full, the compensable period ending on October 20, 1922.

On October 26, 1922, the claimant filed the pending petition to determine the extent of permanent impairment to the thumb, the language of the petition after describing the accident which had caused the loss of parts of two fingers and the laceration of the thumb, being as follows: "which has resulted in a permanent impairment to the usefulness of the thumb of the left hand, is of very little use in my work being stiff one half the length."

It is agreed that there exists a permanent impairment to the usefulness and physical functions of the left thumb amounting to thirty-three and one third per cent. The Chairman of the Industrial Commission sustained the petition and awarded compensation in the sum of sixteen dollars a week for the further term of sixteen and two thirds weeks, commencing at the expiration of the former compensable period of fifty-five weeks, and added further that in the event that the claimant was either totally or partially incapacitated for work subsequent to the end of the period of sixteen and two thirds weeks of specific compensation herein ordered paid, he be paid further compensation for such subsequent incapacity.

The insurance carrier treating this petition as one for review argues that it must be dismissed because it was not brought before the end of the compensable period of fifty-five weeks as required by Section 36 of the Workmen's Compensation Act. If this is a petition for review the point is well taken.

The pending petition is not an original petition for compensation under Section 30, because the agreement took the place of that. Nor can it be sustained as a petition for review because it was not brought within the required time. Nor does it purport to be a petition for compensation for loss of earning capacity, either partial or total, after the period of fifty-five weeks specified in the agreement, (Section 16) but it asks for the determination of the extent of permanent impairment to the thumb and compensation therefor.

This issue is practically res judicata. The original report of the accident made by the employer to the Commission in answer to the questions as to part of person injured and nature of the injury replied: "Left hand"; "First two fingers off. Thumb cut." On this representation of injuries to three different members, the agreement of settlement between the parties was made. That agreement again specifies the three injuries under the request to "describe nature of accident and the injury for which compensation is being paid" as follows: "Lost $\frac{3}{4}$ of index finger and $\frac{1}{2}$ of middle finger and tore end of thumb of left hand." The agreed compensation of sixteen dollars per week for fifty-five weeks was therefore predicated on those three injuries and the claimant agreed to accept for all those injuries, including injury to the thumb, that measure of compensation. The agreement having been approved now has the force of a judgment, and is final and binding to the extent of the facts agreed upon and the conditions covered by them as a basis for the compensation to be paid. *Maxwell's Case*, 119 Maine, 504, 507; *Morin's Case*, 122 Maine, 338, 343. The form of approval by the Commission, "Subject to review by the Workmen's Compensation Act" does not affect the situation, and 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." *Milton's Case*, 122 Maine, 437, 439.

In short the claimant under his agreement has once received compensation for the very injury which he now alleges as the basis of recovery. A second compensation cannot be permitted.

However, the employee may be entitled to compensation for actual loss of earning capacity after the specified period of fifty-five weeks. That avenue of relief is still open to him under Section 16, and under the liberal construction which the act calls for to obviate delay, this case may be remanded to the Commission and the claimant be given

leave to amend his petition and to prove, if he can, that he is entitled to compensation for total or partial incapacity after such specified period, in accordance with the principles and practice laid down in *Morin's Case,* 122 Maine, 338, supra.

Appeal sustained.
Decree reversed.
Case remanded to the Industrial Accident Commission for further proceedings in accordance with this opinion.

EMELINE A. MITCHELL *vs.* MORRIS REITCHICK AND TRUSTEE.

HENRY B. MITCHELL *vs.* SAME.

York. Opinion June 8, 1923.

Ordinary care only is required of a driver of an automobile on a public way, which has accidently caught afire, to prevent the fire from communicating to and damaging other property.

The duty of a person driving an automobile along a public way, on discovering an accidental fire to be burning it, to prevent such fire from spreading and doing damage to other property, is measured by the standard of ordinary care.

On motion for new trial. These are two actions of tort, tried together, to recover damages for the destruction of the dwelling house of plaintiffs by fire communicated from the burning automobile of defendant. On November 16, 1921, the defendant was driving his automobile along a public way through North Kennebunkport; when near the dwelling house of plaintiffs a fire developed in the rear part of his car. He immediately steered his car over to the right side of the road and stopped about forty-five feet away from the aforesaid house. The fire, soon getting beyond control, was communicated to the dwelling house and completely destroyed it. The general issue was pleaded. The jury rendered a verdict for plaintiff,

in each case, and defendant filed a general motion for a new trial. Motions sustained. Verdicts set aside. New trials granted.

The case is fully stated in the opinion.

Emery & Waterhouse, for plaintiffs.

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

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

DUNN, J. These two tort actions were tried together. The plaintiffs' positions differed only in this, one owned a life estate in the dwelling house which fire, communicated from the defendant's burning automobile, virtually destroyed; the other was the owner of the reversionary interest in that property.

Defendant had an automobile of the kind called limousine. As he was driving along a Kennebunkport highway, on a November day in 1921, a passerby called his attention to something wrong with the car. On promptly stopping it and getting out, at a point about forty-five feet distant from the aforesaid house, he found a rear seat cushion on fire. Defendant went afoot to the house for a pail of water. On coming back the automobile itself was ablaze. The heat was shattering the glass in the doors, and soon sparks from the car's cloth lining, carried by a brisk wind on to the plaintiff's house, set that house afire. The plaintiffs have verdicts, recovered against defenses made under pleas of the general issue, for damages from the burning of the house. Usual form motions have been argued by the defendant.

The gist of each declaration was negligence. Not that the intervention of the defendant's agency had blamable relation to the origin of the fire, nor that he was at fault in stopping the car where and as he did, for, although he was charged with awareness of what would result, yet he was not in such respect accused of a neglect of duty, nor was culpability imputed for not sooner taking measures to put out the fire, but actionable negligence was alleged in that, after he had discovered the fire, he did not at once comply with a request to remove the automobile. This proposition is not sustainable.

Automobiles are not inherently dangerous. The basis of liability for any injury which may come from the presence of an automobile on a public way is not the same as that underlying responsibility for damage done by dynamite, or gunpowder, or like instrumentality.

Automobiles are ordinary vehicles of business and pleasure. *Towle* v. *Morse*, 103 Maine, 250. And, subject to statutory provisions, and to the observance by their drivers of care commensurate in degree with the danger which their use involves, they may be upon the highroads and the byways on an equality with horse drawn and other vehicles. *State* v. *Mayo*, 106 Maine, 62; *Gurney* v. *Piel*, 105 Maine, 501.

In arriving at the conclusion that an ordinarily prudent man, mindful of his own conduct and of the rights of other persons, would have done otherwise than this defendant did, the jury must be held to have missed the narrow theory to which the plaintiffs limited asserted liability and on which the trial was had.

The defendant's automobile, weighing upward of three thousand pounds, stood, its engine throttled, on a nearly level roadway. In the words of one of these plaintiffs, it "was all afire, the hind end," when the request for the removal was made. Not more than fifteen minutes elapsed, counting from the stopping of the automobile on the road, before its rear was totally burned, and meanwhile the house had caught. Witnesses varyingly estimated that the car's tank, which was at the back, contained from six to twenty gallons of gasoline. Defendant, following his own judgment and heeding the counsel of bystanders, neither entered the flaming vehicle nor approached it while danger lurked of bodily harm from the inflammable and explosive gasoline. He did, however, have the car drawn away while fire still smouldered in its front.

When measured, in critical and calculating scrutiny, by the law's generous standard for gauging man's liability for his doings or omissions, namely, that which the circumstances demanded of a reasonably prudent man thinking not of himself alone, this defendant's conduct was not wanting. No maxim of the law, not even the familiar one that a man must so use his own property as not to unduly interfere with others in the use of theirs, which the plaintiffs urge as applicable in the given situation, would have had this defendant put himself amid imminent peril of harm if indeed not fatality, merely because an accidental fire destroying his own property menaced that of another. Maxims yield to justice.

Besides, when he was asked to move it, the defendant was not using his property. Use was incompatible with safety. He had used the automobile, in a proper condition and in a proper way, but

the fire, for which he was not responsible, caused him to quit. And that fire, fanned and blown about by heaven's winds, laid waste to the plaintiffs' house and thus made destruction the more. Certainly the defendant, on discovering the fire, was not bound to exercise greater than ordinary care to prevent it from spreading.

The record does not show any negligence or misconduct in the defendant. It does show an unfortunate loss for which there was no liability. It follows, then, ineluctably, that the verdicts are plainly and palpably wrong.

Motions sustained.
Verdicts set aside.
New trials granted.

GEORGE S. HOSKINS *vs.* JOSEPH A. WOLVERTON et al.

Aroostook. Opinion June 8, 1923.

The Statute of Frauds, R. S., Chap. 114, Sec. 12, not available to defendant as a defense, inasmuch as the first contract was mutually rescinded by the contracting parties by the substitution of a subsequent contract within a year of date of action.

Revised Statutes, Chapter 114, Section 12, if it be inclusive of oral trades for selling real estate by agents, was inapplicable. And for this reason: the initial or first agreement, from which the defendants would reckon time, was rescinded, by mutual consent of the contracting parties, by the substitution of a subsequent contract, inconsistent with the first, and completely covering the subject matter of the earlier agreement, which later contract formed the basis of this action before a year from the day of its making was gone.

On exceptions. An action of assumpsit on account annexed to recover commission as a broker, under an oral contract of agency, in effecting a sale of a farm for defendants. Defendants contended that under the Statute of Frauds the action could not be maintained because the time for the termination of the contract was not definitely stated, and more than a year had elapsed since the making of the

contract before action was brought. Plaintiff contended that the first contract was rescinded by a subsequent contract mutually entered into by the contracting parties which was made within a year of the date of the action. The presiding Justice ruled in favor of plaintiff's contention and defendants excepted. Exceptions overruled.

The case is sufficiently stated in the opinion.

Willard S. Lewin, for plaintiff.

H. M. Briggs, Doherty & Tompkins and Shaw & Cowan, for defendants.

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

DUNN, J. One of these defendants owned an Aroostook farm. The other defendant, without disclosing that he was but a representative of the first, listed the farm for sale with this plaintiff as a broker. The contract of listing, which was not evidenced by writing, stipulated that any commission accruing for selling would be from a price in excess of that which was defined as net to the vendor. There was conflict in the testimony touching whether the contract's terms were definite or indefinite respecting time; the plaintiff saying that it was indeterminate, and the defense otherwise.

Before a year had gone, this plaintiff chanced to meet him with whom he had directly negotiated, on a street. Plaintiff complained that it had come to his attention that the farm was being offered at the price which the listing contemplated as clear from any broker's charge. The versions of these two men as to what thereupon took place were not fully in accord. Plaintiff testified, it was agreed that, thenceforth, he was to proceed upon the basis that, if success attended his efforts to sell, his commission would be payable from the proceeds of what theretofore would have been regarded as the clear price. The pith of the opposite evidence was, that the owner should be free to sell to whom and as he would, except that if the plaintiff produced a competent purchaser, in such event the owner would demand the price of the original listing, and only if such demand were met was the broker to have a commission.

In less than a year, reckoning from the day of the modified terms, the farm was sold. Plainly, the plaintiff was instrumental in effecting the sale, though he was not present at any interview between the

vendor and the purchaser, nor was he present when the vendor set his price lower than ever previously named, nor was he there when the title to the property was passed.

All these recitals are by way of a background against which to show the single point involved.

The plaintiff brought this action for his commission. The defendants sought to avail themselves of the defense of the statute, included in the latest revision of the statutes as a part of that against frauds and perjuries, which reads in this wise:

"All contracts entered into after the first day of August, nineteen hundred and eleven, for sale or transfer of real estate and all contracts whereby a person, company or corporation becomes an agent for the sale or transfer of real estate, shall become void in one year from the date such contract is entered into unless the time for the termination thereof is definitely stated." R. S., Chap. 114, Sec. 12.

This statute was ruled as unrelated to the controversy. Defendants reserved four exceptions, in differing forms, to that which after all was but a single ruling, but none of the exceptions was well taken.

Of an opinion in a comparatively recent case, it might be said that its language suggests that written contracts alone are within the statute's operation. *Odlin* v. *McAllister*, 112 Maine, 89, 92. But it is unnecessary in the present instance to stop to consider whether the statute is or not inclusive both of oral and written trades. If it be so inclusive, still there was a lack of application in the particular case. On the defendant's showing, as we have seen, the original dealing was definite in respect to termination, and therefore was not afterward made void by the legislature's law. Regardless, however, of the fact about the limit, the not to be resisted reason of the inapplicableness of the statute was, that the initial contract was rescinded, by mutual consent of the contracting parties, by the substitution of a subsequent contract, inconsistent with the first, and completely covering the subject-matter of the earlier agreement. *Paul* v. *Meservey*, 58 Maine, 419.

That there was a rescission was scarcely debatable. The defendant, he who had been active with the broker, in endeavoring to fix the time of a certain conversation relating to the sale of the farm, by a lively turn of thought testified undesignedly, that it was "three or four months after the first time I listed it." Indeed, in fair animadversion, the essential character of the evidence imprinted in the

record concerned not whether there had been a succeeding contract, but what were the terms of that contract. And the jury's verdict for the plaintiff settled that vexed question.

The phrase in which the law was ruled was limpid and exact.

Exceptions overruled.

MIKE ZOOMA'S CASE.

Sagadahoc. Opinion June 12, 1923.

"Status" under the Workmen's Compensation Act as defined and determined in Fennessy's Case, 120 Maine, 251, as being the relation in which the claimant stands toward his employer at the time of the accident, but not comprehending the degree of disability, reaffirmed. An erroneous ruling by the Chairman of the Industrial Accident Commission, as a matter of law, is subject to appeal.

This case shows an erroneous ruling as matter of law, that no evidence would be received which had a bearing upon the status of the party existing prior to the filing of the petition for review. It is the opinion of the court that the appeal should be sustained. The evidence offered was clearly admissible.

On appeal. An appeal from a decree affirming a decision of the Chairman of the Industrial Accident Commission. Claimant was injured on November 2, 1921, while in the employ of the Texas Steamship Company at Bath. The injury consisted of an inguinal hernia on the left side. An agreement was entered into providing for the payment of compensation of fifteen dollars per week during disability, beginning February 19, 1921, indefinite. On June 15, 1921, appellants, then petitioners, filed a petition for review, alleging that disability had ended. On July 15, 1921, a hearing at Bath was held on the petition and appellants sought to introduce evidence to prove that the disability had ended on April 30, preceding the date of the filing of the petition, which evidence was excluded by the Chairman of the Industrial Accident Commission as affecting the

"status" of the parties prior to the application for review. From which ruling appellants took an appeal. Appeal sustained. Decree of sitting Justice reversed.

The case is sufficiently stated in the opinion.

Robert M. Pennell, for appellants.

Arthur J. Dunton, for appellee.

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

DEASY, J., concurring in the result.

WILSON, J., dissenting. SPEAR, J., concurring in the dissenting opinion.

HANSON, J. This is an appeal from the decree of a single Justice affirming the decision of the Chairman of the Industrial Accident Commission in accordance with Sec. 34 of Chap. 238, Public Laws of 1919, amending Chap. 50 of R. S., 1916.

The plaintiff was injured on November 2, 1920, while in the employ of the Texas Steamship Company at Bath, Maine. The usual agreement was entered into providing for the payment of compensation at the rate of fifteen dollars per week during disability, beginning February 19, 1921, indefinite.

This agreement was dated March 24th, 1921, but was not signed by the plaintiff until June 6th, 1921. Compensation was paid from February 19th, 1921, to April 30th, 1921, the period during which defendants claim the plaintiff was actually suffering the disability due to the injury.

A petition for review of agreement was filed June 15th, 1921, by the defendants, alleging that disability had ended.

On July 15th, 1921, a hearing was held at Bath, at which hearing an agreed statement of facts was entered into by the parties, which was made a part of the record of the case. It appears by the agreed statement, "that Mr. Pennell, attorney for defendants, claimed to be prepared to offer evidence to the effect that the disability, due to the accident, had ended on April 30th, 1921. This evidence was excluded by the Chairman of the Industrial Accident Commission

because of the fact that the injured employee claims compensation up to the date on which the petition was filed, therefore the status of the parties was in question."

The decision of the Chairman of the Industrial Accident Commission ordered compensation stopped as of June 15th, the date of the filing of the petition for review of agreement.

The defendants claimed that the compensation should have been ended as of April 30th, and were prepared to offer evidence to prove that plaintiff had recovered as of April 30th, 1921.

The decision of the Chairman of the Industrial Accident Commission concludes as follows: "A hearing was held at Bath on July 15th, 1921, at which place the parties in interest duly appeared. It is found as a matter of fact that the incapacity caused by the injury to Mr. Zooma had ended on the 15th day of June, 1921. The petition to stop compensation is therefore granted. Compensation ordered ended June 15th, 1921."

From the agreed statement, which is signed by the Chairman, it appears that the ground for appeal, which right was reserved in the agreed facts, was to be "that the Chairman ruled that no evidence would be received which had a bearing upon the status of the party existing prior to the date of the filing of the petition for review, to wit, June 15th, 1921."

The parties appeared, but no testimony was introduced. The only evidence offered was excluded. The agreed statement was made, not for the purposes of the case before the Commission, but as the means by which the reasons for the appeal by the defendants, and the reasons for the decision of the Chairman should be brought before the court.

The case, therefore, shows an erroneous ruling as matter of law, that no evidence would be received which had a bearing upon the status of the party existing prior to the filing of the petition for review. It is the opinion of the court that the appeal should be sustained. The evidence offered was clearly admissible.

The questions raised have been recently decided in *Fennessy's Case*, 120 Maine, 251; 113 Atl., 302. The law of that case is decisive and controlling in the instant case. "Status," as that case holds, derivatively relates to relationship. And, as used in the statute, the word means the relation in which an injured person stands toward him who was his employer at the time of the accident. "At

any time before the expiration of two years from the date of the approval of an agreement by the commissioner, or the entry of a decree fixing compensation, and before the expiration of the period for which compensation has been fixed by such agreement or decree, any agreement, award, findings or decree may be from time to time reviewed . . . . upon the application of either party, upon the grounds that the incapacity of the injured employee has *subsequently* ended, increased or diminished." 1919 Laws, Chapter 238. The adverb "subsequently," underlined in quotation in this opinion merely that the reader may more readily observe its controlling position, is the telling word.

Upon the application of either party there may be a review in reference to whether the incapacity of the injured employee has ended, increased or diminished subsequently to the agreement, award, findings or decree. Whether there still be incapacity, or, if yes, whether subsequently to the agreement, the award, the findings or the decree, it has increased or diminished, are the only propositions open on the review. If incapacity is ended compensation may be discontinued. Or compensation may be increased or diminished, as the facts may show, "from the date of the application for review," or such other order may be made "as the justice of the case may require." .But, by way of added emphasis, there shall be "no change of the status existing prior to the application for review." That is, there shall be no change in the relationship between the parties, as that status was fixed by the agreement, the award, the findings or the decree, "prior to the application for review." The matters, important in primary determination, of whether the one person was the employee of the other; whether that other was an assenting employer; whether the employee sustained an industrial hurt under circumstances entitling him to compensation, i. e., the right of the employee to receive compensation, and the time from which the compensation must be paid, and the related details respecting all that was done and transpired, "prior to the application for review," are of unquestionable finality. The increase, the diminution or the discontinuance of compensation is to be from the date of the application for review, or, in significant disjunctive clause, "as the justice of the case may require." It is the spirit and the purpose of a statute which are to be regarded in its interpretation. And a reasonable construction

should be adopted in all cases where there is a doubt or uncertainty in regard to the intention of the lawmakers. *Fennessy's Case*, supra.

Appeal sustained.
Decree of sitting Justice reversed.

Dissent.

WILSON, J. We are unable to concur in the conclusions drawn in the opinion, and since in effect they appear to us to void express prohibitions of the Legislature contained in Section 36 of the Compensation Act, and must materially affect future proceedings under this section, we are constrained to express our views in dissent.

The section under consideration relates to the review of agreements and awards already made and provides: "Any agreement, award, finding or decree may from time to time be reviewed . . . . upon the grounds that the incapacity of the injured employee has subsequently ended, increased or diminished."

No other proceeding in the form of review, as it is denominated, of an agreement entered into or an award made under Sections 30-35 is authorized by the Act, and this proceeding is authorized only *upon the grounds* that the incapacity of the injured employee subsequent to his entering into an agreement or to the award of one of the judicial members of the Commission, has "ended, increased or diminished." Clearly, we think, no other questions are open upon review under this section, except the extent of the employee's disability and whether it has increased, diminished or ended subsequent to date of the agreement or award. This the opinion seems to admit.

Ordinarily proceedings for a review of a judgment reopen the entire matter determined by the judgment, and permit its reversal in whole or in part. Such obviously was not the intent of the Legislature in authorizing the proceedings for review under Section 36. Review under this section must be strictly confined within the limits therein prescribed.

As stated above, and the opinion admits, the only questions open to review under Section 36 are: "Whether there still be incapacity; if yes, whether subsequently to the agreement the award, the findings, or decree, it has increased or diminished." The authority of the judicial members of the Commission upon review is also expressly limited in that they may only discontinue, increase or diminish the

compensation from the date of the application for review, or make such other orders as the justice of the case may require, but no change shall be ordered in the status existing prior to the application for review.

Having first specifically provided that the judicial members of the Commission on review may discontinue, increase or diminish compensation from the date of the application for review, general authority is then given to make such other orders as justice may require: i. e. compensation may be ordered discontinued, increased or diminished not only from the date of the application for review, but from the time of the hearing thereon, or from any time between these dates if justice so required; or be diminished from the date of the application, and discontinued from a later date; or if a change in the degree of disability was shown, under such general authority an indefinite agreement may be made definite in its duration, or *vice versa* or any other order be made as to the future, that justice may require; but in no event shall any change be ordered in the status existing prior to the application for review. Except for this limitation upon the general authority, no doubt compensation, as contended in the opinion, might be ordered discontinued from any time prior to the application for review.

The opinion suggests that this last clause of limitation was added by way of emphasis only. We think it was clearly intended as a limitation upon the apparent general authority given in the clause immediately preceding, and that from the whole context of Section 36,—the limitation of the grounds of review and the clauses expressly limiting the authority of the Chairman and Associate legal member, it was clearly the purpose and intent of the Legislature that the judicial members of the Commission should have no authority to make any order on review affecting the rights of the injured employee to compensation prior to the date of the application for review.

The limitation prohibiting any change in the status existing prior to the application for review could by no process of reasoning apply to the first grant of power,—to discontinue, increase or diminish the compensation; because this is expressly limited to apply from the date of the application for review and, of course, could in no way affect any prior existing status. It can, therefore, only apply to the general authority to make "such other order as justice may require."

The opinion holds that such limitation prohibiting any change in the "status existing prior to the application for review" has nothing to do with the employee's incapacity and right to compensation, and, therefore, in this case, evidence to show that the plaintiff's incapacity had ceased a month and a half prior to the date of the application for review should have been received, in order that the Chairman, if he found such to be the fact, and justice required, might have ordered compensation to cease as of April 30th, instead of June 14th, the date of the application for review.

We are unable, however, to accept the definition of the word status as outlined in the opinion. As the word is used in Section 36, the degree of incapacity agreed upon in any agreement or determined upon in any award is, we think, clearly a part of the status existing when a review of such agreement or award is sought under this section.

In the first place, as has already been pointed out, the only ground of review is an alleged change in the incapacity of the injured employee. No question as to whether the employer was under the Act, or the injury was a compensable one or the right of the employee to compensation when the agreement or award was made is open upon a petition for review.

To say, therefore, that the "status" as used in this section of the Act only applies to the conditions last named, upon which the right to compensation primarily depends, and does not include the degree of the incapacity of the injured employee as fixed by the agreement or award is to render the clause now under consideration without any force or effect, since no review can be had of any agreement or award as to those matters which the opinion describes as essential to the primary determination of the injured employee's right to compensation. As the opinion states the determination of these matters by agreement or award are final, since they are not open to question on review.

From the very limitation of the grounds of review alone, therefore, it is, we think, clear that the word "status," as used in Section 36, includes not only the conditions above named as essential to the injured employee's right to compensation in the first instance and the basis of every agreement or award, but also the degree of incapacity thereby determined to exist.

Neither derivatively or according to the lexicographers does "status" relate to, or denote, mere relationship, nor are we able to subscribe to the definition that it is "relations in which the injured person stands toward him who was his employer at the time of the accident." It is rather the existence of those conditions essential to the right of the injured employee to receive compensation, including the extent or degree of his disability, as determined and fixed by any agreement, award, finding or decree.

Derivatively "status" means in law a state or condition as fixed by some law, custom or judgment of court, from which state or condition certain rights flow. It may include or imply certain relations or mutual and reciprocal obligations between parties, as the marriage status, the status of citizenship, the status of parent and child, but it is something more than mere relation. When certain relations between parties have been determined or have been fixed by some law, custom or decree of court, then a certain status may be said to exist.

Webster defines "status," as,—"state, condition, position of affairs"; Bouvier, as,—"The condition of persons." In a freqently-cited case as defining this term, the court says: "But the very meaning of the word 'status,' both derivatively and as used in legal proceedings, forbids that it should be applied to mere relations. 'Status' implies relations undoubtedly, but it is not a mere realtion." *De La Montanya* v. *De La Montanya*, 112 Cal., 101, 115; 32 L. R. A., 82, 87. Also see "Status," Words and Phrases.

So when the standing of employer and employee with respect to the Compensation Act have been fixed by an agreement or award, and it has been thus established that the employer was an assenting employer, that the injured employee was a regular employee, that he received an injury from accident arising out of and in the course of his employment, or in other words a compensable injury, and that by reason of such injury he has become totally or partially incapacitated and the degree of his partial incapacity has been determined, the status of the injured employee and his employer has been fixed, which status, once fixed, determines the rights on the one side and the reciprocal obligations on the other. The fixing of the degree of incapacity by an agreement or award is as much a part of the conditions essential to the injured employee's right to compensation as whether the injury he suffered is a compensable one; or in other

words, is as much a part of the status, which cannot be changed on review under Section 36 prior to the application for review, as the finding that his employer was an assenting employer or that he was a regular and not a casual employee.

The opinion seems to include in the prior "status" the "right of the employee to receive compensation," also "the time from which compensation must be paid" and the "related details" and holds the findings by an agreement or decree as to these matters to be of "unquestionable finality." But is not the degree of incapacity, at least, a "related detail" to his right to receive compensation? If there is no disability and consequent incapacity to earn, there can be no compensation, and the amount of compensation is always determined by the extent of the resulting incapacity.

The purpose of these provisions was, no doubt, to compel each party to be vigilant in protecting his rights and make each occasion for any change in any existing agreement or award a matter of record before such change became effective, and then only from the date of the filing, and becoming a part of the records of the Commission, of an application for review.

Finally the opinion bases its conclusions upon *Fennessy's Case*, 120 Maine, 251, as controlling upon the facts in this case at bar. Although joining in the opinion in *Fennessy's Case*, further consideration of its language, when applied to facts in the instant case, leads us now to conclude that it went too far; and without determining whether upon the facts it can now be differentiated from the case before us, at least, any extension of the doctrines therein laid down as controlling on the facts in this case is either unwarranted, or if warranted, such doctrines should be overruled.

The only grounds for the appeal in this case are those stated in what purports to be an agreed statement prepared by the Chairman of the Commission, in which he says that it is mutually agreed between the parties, among other things, that the ground of the appeal is that the Chairman "ruled that no evidence would be received which had a bearing upon the status of the party existing prior to the date of the petition." This ruling, inadvertently, no doubt, the opinion holds to be erroneous and upon this ground sustains the appeal.

This ruling, as stated in the agreed statement, and in the opinion, is clearly correct, even from the viewpoint of the opinion; inasmuch

as it is not contended that any change in the status existing prior to the application for review can be made even under the general authority by which the Chairman may make any order "justice requires." Hence to exclude evidence "bearing on the status of the party existing prior to the date of application for review" could in no way prejudice the plaintiff, since his prior status could in no event by any order of the Chairman be changed.

But this would be too narrow a view on which to decide this case, nor was the above ruling made the basis of the appeal, as the record shows. The agreement further added that the plaintiff's counsel claimed to be prepared to offer evidence to the effect that the disability of the plaintiff ceased on April 30th, 1921, and this evidence was excluded "because the plaintiff claimed compensation up to the date of the application for review and, therefore, the status of the parties was in question."

It is this ruling on which the appeal is based, and which the opinion in effect holds to be erroneous, on the ground that the degree of incapacity fixed by the agreement was not a part of the status.

True, even if it was a part of the status, the evidence would ordinarily be admissible as bearing upon the question of whether the incapacity of the employee had ceased, increased or diminished subsequent to the agreement or award, though any change in the compensation must begin from the date of the application for review. In the case at bar, however, since it is admitted by the plaintiff that his incapacity had wholly ceased on the date of the petition for review, the defendant was in no way prejudiced by the ruling excluding the evidence, and the appeal should be dismissed.

JOHN E. SPENCER'S CASE.

Oxford. Opinion June 12, 1923.

An agreement under the Workmen's Compensation Act, duly approved, as to compensation for an injury, is, in effect, a judgment as to the injury or injuries it purports to cover, and such matters are res adjudicata. But additional compensation may be awarded for an injury not covered by such an agreement on a petition filed within the two years' limitation under Section 39.

In the instant case the original agreement had the legal effect of a judgment on what it purported to cover, but it covered only the injury to the fingers. The thumb was not included. Therefore, the claimant still had the legal right to file the present original petition for injury to his thumb, provided he did so within the two years' limitation specified in Section 39. He was within the limitation, and it makes no difference whether his petition is filed before or after the expiration of the fifty-five weeks specified in the original agreement.

This case is the converse of *Foster's Case*, 123 Maine, 27. In that case the original agreement in terms covered three injuries, and it was held that as to these three the claim was res adjudicata. In the instant case the agreement covered two injuries, and the petition is for a third. Therefore it is not affected by the previous award.

On appeal. An appeal from awarding claimant compensation of $12.27 per week for twenty-five weeks for a fifty per cent. permanent impairment of the thumb on the left hand, said period to begin at the expiration of the fifty-five weeks' period for which a specific compensation of $12.27 per week had been awarded under an agreement, duly approved, for injuries to the index and middle fingers of the left hand. Appeal dismissed. Decree of sitting Justice affirmed.

The case is fully stated in the opinion.

Petitioner was without counsel.

Robert Payson, for respondents.

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

HANSON, J. The claimant was injured on October 29, 1920, his injury consisting of the loss of two fingers and the laceration of the

thumb on the left hand. An agreement of settlement was filed January 9, 1921, and duly approved January 12, 1921, whereby the claimant was awarded $12.27 per week for fifty-five weeks, commencing November 8, 1920, for the injury of the two fingers. The agreement specified the injury for which compensation was thereby awarded as "amputation first and second fingers left hand."

On July 17, 1922, the claimant filed the pending petition to determine the extent of the permanent impairment of the thumb. On this petition the commission awarded a compensation of $12.27 for the further period of twenty-five weeks to begin at the expiration of the period of fifty-five weeks specified in the previous agreement. From this award the pending appeal was taken.

The decision of the commission should stand. The original agreement had the legal effect of a judgment on what it purported to cover, but it covered only the injury to the fingers. The thumb was not included. Therefore the claimant still had the legal right to file the present original petition for injury to his thumb, provided he did so within the two years' limitation specified in Section 39. He was within that limitation, and it makes no difference whether his petition is filed before or after the expiration of the fifty-five weeks specified in the original agreement.

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The entry must be,

Appeal dismissed.
Decree of sitting Justice affirmed.

STATE OF MAINE *vs.* BOSTON AND MAINE RAILROAD COMPANY.

Cumberland. Opinion June 21, 1923.

The mileage and transportation receipts of an electric railway, leased, or owned by, or merged with a steam railroad company should not be added to and included in the mileage and transportation receipts of such steam railroad, for purposes of taxation under statutory provisions for railroad taxation.

In the instant case, before the alleged merger, the mileage in question was street railroad mileage, the railroads being street railroads. They were different in nature, in condition and class from steam railroads. Can a merger, if actually accomplished, constitute an electric street railway a part of a line of commercial steam railroad so to actually include the mileage of the former as an extension of the latter's line or system under the laws of Maine? We find no authority or reason for such inclusion, and therefore hold that it does not.

The electric roads operate as in the beginning, and their business is kept distinct and separate from the business transactions and records of the main line of defendant's railroad.

The roads have a common ownership but no business in common, no interchange of business by cars or motive power, or common use of stations or roadbed.

The merger lacks the physical qualities which would exist in case of a merger of two corporations of like character, condition and class, and which in the case of two steam railroads would leave no question as to whether the mileage would be increased under the law.

On report on an agreed statement. An action of debt to recover a balance of excise taxes alleged to be due from defendant corporation for taxes assessed against it by the State Assessors for the years 1916, 1917 and 1918. The assessors computed the taxes for each of said years upon the basis of the mileage and transportation receipts of the steam railroad alone, excluding all the electric railway mileage operated by defendant. Counsel for defendant contended that in computing such tax the total mileage of the roads, both steam and electric, and the total transportation receipts from both should be taken into account. The case was reported to the Law Court upon an agreed statement of facts. Judgment for the State.

The case is fully stated in the opinion.

Ransford W. Shaw, Attorney General and William H. Fisher, Deputy Attorney General, for the State.

Charles B. Carter, of White, Carter & Skelton, and Thornton Alexander, for defendant.

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

MORRILL, J., dissenting. DUNN, J., concurring in dissenting opinion.

HANSON, J. This is an action of debt to recover a balance of excise taxes claimed to be due the State from the defendant for the years 1916, 1917 and 1918, and comes before the court on report on an agreed statement of facts.

From the agreed facts it appears that on the thirtieth day of June, A. D., 1915, and for twelve months prior thereto, the defendant company operated an average total mileage of steam and electric railroads of two thousand three hundred one and ninety one hundreths (2,301.90) miles, two thousand two hundred fifty-one and sixty-nine one hundredths (2,251.69) miles thereof being operated by steam, and fifty and twenty-one one hundredths (50.21) miles thereof being operated by electricity. An average total railroad mileage so operated during said period within the State of Maine was one hundred fifty-nine and forty-seven one hundredths (159.47) miles, all said mileage being operated by steam, the mileage operated by electricity being outside the State of Maine.

The tax actually assessed by the State Assessors upon the defendant company for the year 1916 was one hundred seventy-six thousand, two hundred fifty dollars and thirty-one cents ($176,250.31). In computing said tax, the State Assessors excluded from their consideration all electric railroad mileage operated by the defendant company and all electric railroad transportation receipts derived therefrom. The defendant company paid to the State the tax according to the defendant company's computation but refused to pay the sum of two thousand nine hundred seven dollars and nine cents ($2,907.09) the difference between the State's method of computation and the defendant company's. It is agreed that if the said

electric mileage and transportation receipts were lawfully excluded by the State from the computation of the tax the sum of two thousand nine hundred seven dollars and nine cents ($2,907.09) is lawfully due from the defendant company to the State, together with interest thereon at the rate of ten per centum (10%) upon one half (½) thereof from July 1, 1916, and upon the remaining one half (½) thereof from October 1, 1916.

A similar difference of computation between the State and the railroad occurred in the tax year 1917 arising from the same cause. This difference amounted to two thousand eight hundred sixty-two dollars and fifty cents ($2,862.50) assessed by the State Assessors over and above the defendant company's computation.

A similar difference arose from the same cause in the year 1918 amounting to three thousand five hundred sixty dollars and nineteen cents ($3,560.19).

The electric mileage excluded from consideration by the State Assessors was originally that of the Concord Horse Railroad at Concord, N. H., constructed as a branch of the Concord & Montreal Railroad and electric mileage at Portsmouth, N. H.

Prior to the commencement of this suit all electrically operated mileage of the Boston and Maine Railroad Company had either been bought by the Boston and Maine Railroad Company and merged into it, or had been built by the Boston and Maine Railroad Company, and was owned, operated and controlled by the Boston and Maine Railroad Company. There is no independent company, corporation or association owning, operating or maintaining said mileage, although in all cases the receipts and disbursements are kept separate upon the books of the Boston and Maine Railroad Company. None of the electric mileage was constructed or designed for either passenger or freight traffic by steam locomotives and there is no interchange of motive power or rolling stock between the steam operated and the electrically-operated mileage.

Some portions of said electric lines are on private rights of way, but the larger part of said electric lines follows and is located within the limits of the streets and highways of the cities and towns through which said electric lines operate.

It is stipulated that "If the basis of computing the aforesaid tax upon the defendant company's mileage as adopted by the State Assessors is incorrect in its exclusion of the mileage operated by

electricity and the transportation receipts derived therefrom, then judgment should be rendered for the defendant with costs. If such basis of computation is correct, then judgment should be rendered for the State in the amount of two thousand seven hundred nine dollars and seven cents ($2,709.07) with interest upon one half (½) thereof at ten (10) per centum from the 1st day of July, 1916, and upon the balance from the 1st day of October, 1916; two thousand eight hundred sixty-two dollars and fifty cents ($2,862.50) with interest at ten (10) per centum, upon one half (½) thereof from the 1st day of July, 1917, and upon one half (½) thereof from the 1st day of October, 1917, three thousand five hundred sixty dollars and nineteen cents ($3,560.19) with interest at ten (10) per centum, upon one half (½) thereof from the 1st day of July, 1918, and upon one half (½) thereof from the 1st day of October, 1918, with costs."

Chapter 91, Public Laws of 1881, the original statute, provided for an excise tax on railroads, a tax to be levied against "every corporation, person or association operating any railroad in this state." At that time there were no electric street railroads in the State.

By Chapter 150 of the Public Laws of 1883, horse railroad corporations and associations were made subject to the provisions of the foregoing, except in the manner of ascertaining the tax.

Further amendments were made in 1887, 1901 and 1909, and are now incorporated in the R. S., of 1916, hereinafter quoted, Sec. 32 of Chap. 9 thereof being an adaptation of Chap. 150, Laws of 1883, relating to horse railroads, and now relating to street railroad corporations or associations.

The statutes involved are quoted at length as follows:

Sec. 26, Chap. 9, Revised Laws of 1916, which was in force at the time the taxes in question were assessed, reads:

"Every corporation, person or association, operating any railroad in the state under lease or otherwise, shall pay to the Treasurer of State for the use of the State, an annual excise tax, for the privilege of exercising its franchises and the franchises of its leased roads in the state, which, with the tax provided for in section four of chapter ten, is in place of all taxes upon such railroad, its property and stock. There shall be apportioned and paid by the state from the taxes received under this and the five following sections and *under section thirty-two*, to the several cities and towns in which, on the first day of April in each year, is held railroad stock *of either such operating or*

operated roads exempted from other taxation, an amount equal to one per cent. on the value of such stock on that day, as determined by the board of State Assessors." . . . .

Section 4 of Chapter 10 provides as follows: "The buildings of every railroad corporation or association, whether within or without the located right of way, and its lands and fixtures outside of its located right of way, are subject to taxation by the cities and towns in which the same are situated, as other property is taxed therein, and shall be regarded as non-resident land."

R. S., Chap. 9, Sec. 27, provides: "The amount of such annual excise tax shall be ascertained as follows: The amount of the gross transportation receipts as returned to the public utilities commission for the year ending on the thirtieth day of June preceding the levying of such tax, shall be divided by the number of miles of railroad operated, to ascertain the average gross receipts per mile; when such average receipts per mile do not exceed fifteen hundred dollars, the tax shall be equal to one half of one per cent of the gross transportation receipts; when the average receipts per mile exceed fifteen hundred dollars and do not exceed nineteen hundred dollars, the tax shall be equal to three quarters of one per cent. of the gross receipts, and so on increasing the rate of tax one quarter of one per cent. for each additional four hundred dollars of average gross receipts per mile or fractional part thereof; provided, that the rate in no event exceed five and one half per cent., and in *case of railroads operated exclusively for the transportation of freight,* said rate shall in no event exceed three per cent. When a railroad lies partly within and partly without the State, or is operated as a part of a line or system extending beyond the state, the tax shall be equal to the same proportion of the gross receipts in the state, as herein provided, and its amount shall be determined as follows: The gross transportation receipts of such railroad, line or system, as the case may be, over its whole extent, within and without the state, shall be divided by the total number of miles operated to obtain the average gross receipts per mile, and the gross receipts in the state shall be taken to be the average gross receipts per mile, multiplied by the number of miles operated within the state."

It will be seen that the distinction between the two classes of railroads is maintained in the latest revision of the statutes. Sections 25 to 31, inclusive, relate to steam railroads. Section 32 relates to

taxation of street railroad corporations, and provides that "Street railroad corporations and associations are subject to the seven preceding sections and to section four of chapter ten, except that the annual excise tax shall be ascertained as follows: When the gross average receipts per mile do not exceed one thousand dollars the tax shall be equal to one fourth of one per cent. on the gross transportation receipts; and for each thousand dollars additional gross receipts per mile, or fractional part thereof, the rate shall be increased one fourth of one per cent., provided that the rate shall in no case exceed four per cent."

The preliminaries are the same for both kinds of railroads, but the vital question, the all-important question, as to ascertaining the amount of taxation is not the same. This is all the more apparent when Section 32 is read in connection with that part of Section 36 which reads as follows: "There shall be apportioned under this and the five following sections *and under section thirty-two,* to the several cities and towns," etc., etc.

If the Legislature did not intend to recognize two classes of railroads, resort would not have been had to subdivisions, and references noted. The presence of which, and the coupling of the sections as noted above for the purpose of distribution to cities and towns, clearly demonstrates such legislative intent.

Between "railroads" (R. S., Chap. 56) and "street railroads" (R. S., Chap. 58), the statute makes and maintains an emphatic distinction. In Chapter 9 relating to taxation the distinction is recognized.

The exact question is this:—The Legislature (having the power to impose a tax upon either basis) used in Chap. 9, Sec. 27, the words "total number of miles operated." What did it mean by this phrase? Miles of what operated? Did it mean miles of railroad plus miles of street railroad operated? Or did it mean miles of railroad? The word "railroad" standing alone does not, as used in the statute, include street railroad. Inasmuch as Section 27 and all that goes before relates exclusively to railroads and not at all to street railroads it is clear that it is the number of miles of "railroad" that the Legislature intended.

If the Boston and Maine Railroad Company had within the State of Maine a line precisely like those owned by it in New Hampshire, to wit, a trolley line both intra-urban and inter-urban, the larger

part of the rails laid in streets and having with the main line no interchange of power or rolling stock, it would be taxed as a street railroad.

We should not treat such a line as a street railroad in Maine and as not a street railroad if located elsewhere.

The principal question presented in the agreed facts follows: "It is agreed that the question whether the aggregate of the amounts (naming the same for the three years) together with interest thereon as stated, are lawfully due from the defendant company to the state depends entirely upon the legality of the exclusion by the State Assessors of the electric mileage and transportation receipts of the defendant company from its total mileage and transportation receipts." And to emphasize the point, the defendant's counsel, in his brief, restates the question: "Did the assessors of the State of Maine properly and legally exclude the electrically operated mileage of the Boston and Maine Railroad Company and the transportation receipts therefrom from the total mileage and total transportation receipts of the Boston and Maine Railroad Company?" It is contended by defendant's counsel that "The Boston and Maine Railroad Company, with but one charter and one franchise is an entity, indivisible, without alienation the component parts cannot be separated for the purposes of taxation."

As was said in the *Delaware Railroad Tax Case*, 18 Wall., 206, 231: "The state may impose taxes upon the corporation as an entity existing under its laws, as well as upon the capital stock of the corporation, or its separate corporate property; and the manner in which its value shall be assessed, and the rate of taxation, however, arbitrary or capricious, are mere matters of legislative discretion. . . . It is true as said by this court in *California* v. *Railroad Co.*, 127 U. S., 1, 41, that the taxation of a corporate franchise has no limitation but the discretion of the taxing power; and its value is not measured like that of property, but may be fixed at any sum that the legislature may choose. It may be arbitrarily laid, without any valuation put upon the franchise. If any hardship or oppression is created by the amount exacted, the remedy must be sought by appeal to the Legislature of the State. It cannot be furnished by the federal tribunals. The tax in the present case would not be affected if the nature of the property in which the whole capital stock is invested were changed, and put into real property or bonds of New York, or of other states. From the very nature of the tax, being laid upon a franchise given

by the State, and revocable at pleasure, it cannot be affected in any way by the character of the property in which its capital stock is invested. The power of the State over its corporate franchise, and the conditions upon which it shall be exercised, is as ample and plenary in the one case as in the other." Beale on Foreign Corporations, Page 665, citing Field, J. in *Home Ins. Co.* v. *New York*, 134 U. S., 594. It is true that the taxation is of the railroad as a unit, and that the measure of liability is determined by its length in miles and its gross earnings per mile of line. The defendant further urges that the electric railway mileage owned by it, and which it is claimed in some degree contributes to its earnings as a unit or line of railroad, should be added to its main line of railroad and included in its mileage for taxation purposes under our statute provisions for such railroad taxation. We are unable to adopt the construction contended for. No sufficient reason has been advanced for such conclusion. There is no statute authorizing the same, and the defendant has not cited an authority from any other jurisdiction so holding. That the Legislatures of the several States through which its trunk line runs have consented to the lease or ownership of the local electric roads named, does not change the character of the electric roads to that of a steam railroad, or increase the length of the same as such. That claim was not set up in the inception of the connection of the one with the others, nor was it the subject of legislative action in passing upon the matter when the consent to acquire the electric railways was granted. The rights granted must be determined by the language of the statute, and our conclusion is that no permissible rule of construction authorizes a finding that the Legislature of Maine intended so to legislate.

The trend of authority is against the theory that the character of a street or inter-urban railway may be changed by fiat. Such a conclusion would lead to the utmost confusion, and tend to unsettle established law and business dependent thereon.

The following quotation answers many questions arising in brief and arguments of counsel. "Generically the word 'railroad' includes all roads upon which the carriages or cars have wheels adapted to run, and which in operation do run upon metallic rails. The term includes tramways used in mining; it includes railroads in which the propelling power is steam, electricity, the horse or mule, and even those upon which push cars are propelled by men. A railroad and

a street railroad are, however, in both their technical and popular import, as distinct and different as a road and a street, or as a bridge and a railroad bridge. The word 'railroad,' as generally used, applies to commercial railways engaged in the transportation of freight and passengers for long distances, and as a general rule, having steam engines for motive power, and making stops at regular stations for the receipt and discharge of freight and passengers. When the word railroad is used in a statute there is no definite rule of construction as to whether it includes street railroads. It may or it may not include them. The meaning of the word must depend upon the context and the general intent of the statute in which it is used. The applicability of such acts is also to be determined by a fair interpretation of the act, taking into consideration the date of its passage and the evil intended to be remedied thereby. So a statute enacted prior to the construction of electric railways which in terms applies to railroads may be held not to apply to electric street or interurban railways." 25 R. C. L., 1120; *Smalley* v. *Riley County,* 86 Kan., 752; 121 Pacific, 1108; Am. Cas., 1913, C. 576. It has also been held that the term "railroads" is not to be interpreted to include street railways when the purpose of the statute was taxation. 25 R. C. L., 1121; *State* v. *Duluth Gas etc. Co.,* 76 Minnesota, 96; 78 N. W., 1032; 57 L. R. A., 63. In *Funk, Adm'r.* v. *St. Paul City R. Co.,* (Minn.), 29 L. R. A., 209, the court say: "It is claimed by appellant's counsel, and not denied by the counsel for the respondents, and such we believe the fact to be, that on February 24, 1887, when the general law of that year was passed, there were no cable or electric street railways in existence in this State. If so, what was the legislative intent in using the word 'railroad' in the law of 1887, to be deduced from the whole or from part of the statute taken together, upon the subject of railroads?

"When the words of a statute are not explicit, the intention is to be collected from the context, from the occasion and necessity of the law, from the mischief felt and the object and remedy in view. . . . What was the mischief felt which resulted in the passage of the law? Was it a danger known or one unknown? Was it a danger then felt or realized, or one that might possibly arise in the future? We must assume that it was dealing with and acting upon existing facts within its knowledge."

The construction which has been placed upon a statute by the officers or governmental department charged with carrying out the provisions of the law is to be accorded due consideration by the courts in construing the statute. 25 R. C. L., 957. In case of doubt as to the meaning of a statute it is well settled that the courts may resort to contemporaneous construction, and it has been said that the best construction of a statute is that which it has received from contemporary authority. . . . . If there is ambiguity in the language, the understanding and application of it when the statute first comes into operation, sanctioned by long acquiescence on the part of the Legislature and judicial tribunals, are the strongest evidence that it has been rightly explained in practice. Idem, Page 1043. Lewis Sutherland Statutory Construction, 472. This court has not heretofore placed a construction upon the Statute of 1881 involved as relating to the question herein raised. There was no ambiguity or obscurity calling for judicial construction. The introduction of street railways came some years later, and the interest and ownership of the defendant in street railroads in connection with its business began later still. It is therefore clear that the legislative intent could not have been to include street railways as within the meaning of Chapter 91 of the Laws of 1881. This is plain from the terms of the statute and the date of its passage. In the absence of ambiguity and uncertainty, the rules of construction can have no application. The legislative intention is plain, from the nature of the case. It cannot be said that the statute was intended to include an agency or enterprise not in existence at the date of its passage. "It is obvious that the language of a statute must be understood in the sense in which it was understood when it was passed, and those who lived at or near the time when it was passed may reasonably be supposed to be better acquainted than their descendants with the circumstances to which it had relation as well as with the sense then attached to the legislative expression. 25 R. C. L., 1043, and cases cited."

"The true rule is that statutes are to be construed as they were understood when they were passed. . . . . If the language used is broad enough to include unknown things which might spring into existence in the future, they would be deemed to come within, and be subject to, the evident meaning of the terms used, but it does not follow, when a newly discovered thing is called by a familiar word,

which comes nearest expressing the new idea, that the thing so styled is really the thing formerly meant by the familiar word. Hence it has been held that a statute passed at a time when there were no cable or electric street railways in existence in the State, and providing that every railroad corporation owning and operating a railroad in the State should be liable for damages sustained by an agent or servant by reason of the negligence of any other servant or agent, but not broad enough in words to include unknown things, is not applicable to a street railway corporation, although its line is operated by cable." 25 R. C. L., 959, citing *Funk* v. *St. Paul City R. Co.*, 61 Minn., 435; 29 L. R. A., 208 note.

Counsel urges as well that the unification of the different railroad corporations in question was in fact and in law a merger, and that the merger accomplished, the right to include the electric mileage for taxation purposes attached. Whether under the laws of other states the merger claimed would be held to constitute the electric roads in question a part of the line or system, has been passed upon as relates to a domestic railroad wherein the distinction between the two classes of railroads here involved is closely drawn in language the force of which is at once recognized, and is conclusive from the very nature of the subject under discussion. "In New Jersey a domestic railroad corporation operating a steam surface railway between two cities, and still occasionally using its railroad tracks upon the highways of one of such cities for steam surface railroad purposes; and which in the same connection owns a power-house, poles, dynamos, cars, and other equipment of an electric passenger railway operated over the same tracks in such city,—is to be assessed and taxed by the State Board of Assessors upon its tracks and franchise, and by the municipality upon the electric line and its equipment as property not used for railroad purposes." *Camden & A. R. Co.* v. *Atlantic City*, 58 N. J. L., 316, 33 Atl., 198.

In the above case, the court say: "Regarded historically, the tracks and occupancy of the roadbed by the Camden & Atlantic Railroad, including the franchise to operate its railroad thereon, must be deemed railroad uses, which the testimony shows are still maintained by occasional freight trains and steam engines. The electric system, however, has no such history, and must be judged in the light of its admitted character, irrespective of its ownership. The power-house and lot of land, the dynamos, poles, wires, and cars

of this trolley line, possess no feature that can distinguish them from any other electric system of street railways. The fact that they are the property of a railroad company, and that they are run over the tracks of such company, while suggestive of certain legal questions, cannot obscure the patent fact that it is a street railway, pure and simple, with which we have to deal, whose passengers are such by independent contract, and whose mechanical operation is that of all of its class. The application of any practical test discloses the independent character of this class of property. Thus, supposing the steam railroad company should sell the disputed property to a street railway company, what railroad purpose would thereupon cease to be subserved?

"Passengers who now take the surface lines to reach the railroad are obliged to pay ordinary car fare. The surface line is not operated in connection with one railroad more than another, not with a carrying company more than with places of amusement or other points of destination.

"On the other hand, supposing the present owner should cease to operate its railroad to Atlantic City, what change would be effected in the purposes to which its electric railway would be put?

"It would carry passengers throughout the city for profit, as it now does, the only conceivable difference being a change in the destination of a certain number of its patrons.

"No other conclusion seems possible than that the tangible property in question was properly taxed by Atlantic City as property not used for railroad purposes." 57 L. R. A., 106.

Until authorized by special act to lease or buy the electric railways, the Boston and Maine R. R. Co. had no legal right to operate such railways. This was not included in their chartered rights. Under enabling statutes it has acquired the electric railways, and may operate the same, as it might operate a hotel, or steamboat, or ferry, or do other authorized acts as accessory to its business, but like the instances mentioned such acquisition cannot be held to add to its mileage as a railroad and extend the line or system of railroad for purposes of taxation. 22 R. C. L., 827; *State* v. *Canadian Pacific R. R.*, 100 Maine, 202. "A railroad company may own and control steamboats for the purpose of transferring its freight and passengers across navigable water on the line and constituting part of its route,

and those lying at the end of its road separating it from ostensible and substantial termini of its route." 32 Cyc., 72-73. Note 45, and cases cited.

"A railroad company may engage in any business authorized by its charter or governing statute, and in any business that is incidental or auxiliary to powers granted, and which may become necessary and expedient in the care and management of its main business." 33 Cyc., 71.

The following citations of settled law are opposed to the claim of defendant:

"A railroad either constitutes a highway, or if a street railway, forms part of one." Baldwin American Railroad Law, 211.

"No state has the power to tax a franchise it has not conferred." *State* v. *Duluth Gas & Water Company,* 76 Minn., 96, and cases cited. Note 6 c.

"A steam railroad operating under a charter authorizing a steam railroad may be extended as a steam railroad, but it cannot be extended as a street railroad." 33 Cyc. 73, citing *Cincinnati Incline Penn R. Co.* v. *Cincinnati,* 7 Ohio, N. P., 541.

"The fact that a railroad becomes an interurban railroad when it leaves the city limits does not prevent it from being a street railroad within such limits." 36 Cyc. 1346, note.

"As no state is under obligation to permit a foreign corporation to carry on business or exercise franchises within its territory, the permission to do so may be granted under such restrictions, or permitted on such conditions, regarding taxation as the state may think proper or prudent to impose." Cooley Taxation, Chapter 3, Page 57.

The permission in this State was in view of a trunk line established and doing business as a steam railroad.

"If a doubt arise as to the intent of the legislature, that doubt must be solved in favor of the state." *Delaware Tax Case,* infra.

"When used by the Legislature, unqualified by any other word, 'railroad' is construed as referring exclusively to ordinary commerical railroads; while, on the other hand, when it is intended to refer to street railroads, they have qualified the words by the prefix 'street'." *State* v. *Duluth Gas & Water Co.,* 78 N. W., 1032, 76 Minn., 96, 57 L. R. A., 63.

"When it is sought to bring a particular line within the statutory scope of either the words 'railroad' or 'railway,' the controlling factor is the legislative intent. In accordance with that intent the line must be included or excluded." 22 R. C. L., 745; *Bloxam* v. *Consumers' Electric Light, etc. R. Co.*, 36 Fla., 519, 18 So., 444; 51 A. S. R., 44; 29 L. R. A., 507.

"Railroad property. The property which is essential to a railroad company to enable it to discharge its functions and duties as a common carrier by rail. 32 Cyc., 1471; *Northern Pacific R. Co.* v. *Walker*, 47 Fed., 681-685. See also 48 Atl., 601; *In re Erie R. Co.* v. *Alford*, 168 U. S., 651, 665."

In *Pacific Express Company* v. *Siebert*, 142 U. S., 351, the court say: "This court has repeatedly laid down the doctrine that diversity of taxation, both with respect to the amount imposed and the various species of property selected either for bearing its burdens or for being exempt from them, is not inconsistent with a perfect uniformity and equality of taxation in the proper sense of those terms; and that a system which imposes the same tax upon every species of property, irrespective of its nature or condition or class, will be destructive of the principle of uniformity and equality in taxation and of a just adaptation of property to its burdens." Citing *Bell's Gap Railroad* v. *Pennsylvania*, 134 U. S., 232, 237. The established rule of construction is that rights, privileges and immunities not expressly granted are reserved. There is no safety in public interests in any other rule. And with special force does the principle upon which the rule rests apply when the right, privilege or immunity claimed calls for an abridgement of the powers of the government, or any restraint upon their exercise. The power of taxation is an attribute of sovereignty, and is essential to every independent government. As this court has said, the whole community is interested in retaining it undiminished, and has a right to insist that its abandonment ought not to be presumed in a case "in which the deliberate purpose of the State to abandon it does not appear." The *Delaware R. R. Tax*, 18 Wall., 225, citing *Providence Bank* v. *Billings*, 4 Peters, 561.

Before the alleged merger, the mileage in question was street railroad mileage, the railroads were street railroads. They were different in nature, in condition and class from steam railroads. Can a merger, if actually accomplished, constitute an electric street railway a part of a line of a commercial steam railroad so to actually

include the mileage of the former as an extension of the latter's line or system under the laws of Maine? We find no authority or reason for such inclusion, and therefore hold that it does not. Here the ownership changed, and extensions were made in the electric mileage, but aside from the fact and acts of purchase, the passing of the necessary documents to accomplish the sale and transfer, no physical change was made by defendant in its own railroad or in the acquired electric railroads in view of the alleged merger. The electric roads operate as in the beginning, and their business is kept distinct and separate from the business transactions and records of the main line of defendant's railroad. The roads have a common ownership but no business in common, no interchange of business by cars or motive power, or common use of stations or roadbed. The merger lacks the practical physical qualities which would exist in case of a merger of two corporations of like character, condition and class, and which in the case of two steam railroads would leave no question as to whether the mileage would be increased under the law. It lacks the combination of effort and aims, of concentration of capital and labor upon the objects and business of the larger corporation in which the other is merged, and which continues in business after it has absorbed the other.

For the reasons stated we hold that there has been no change in the status of the electric roads which in any way changes the liability of the defendant for its excise taxes as heretofore assessed and collected.

The entry will be,

Judgment for the State, the amount to be figured by the clerk in accordance with the stipulation in the agreed statement of facts.

So ordered.

MORRILL, J. Dissenting. As appears by the agreed case, the right of the State to recover in this action "depends entirely upon the legality of the exclusion by the State Assessors of the electric mileage and transportation receipts of the defendant company from its total mileage and transportation receipts." That is the issue concisely stated; it is not disputed that the defendant is liable for an excise tax under R. S., Chap. 9, Sec. 26, to be assessed in the manner

prescribed by the last sentence of R. S., Chap. 9, Sec. 27. The decision must depend upon the construction of that statute as applied to the facts of the case.

I am unable to find any warrant of law for the exclusion of that portion of the "gross transportation receipts" and a part of the mileage, of the defendant which was excluded by the Board of State Assessors in assessing the taxes in question.

The statute was first enacted in 1881, Chapter 91 of the laws of that year; the language applicable to the method of assessing the tax upon a corporation operating a railroad lying "partly within and partly without the state," or which "is operated as a part of a line or system extending beyond the state" is the same in the statute in force today as in the original statute; it has remained unchanged—"The gross transportation receipts of such railroad, line or system, as the case may be, over its whole extent, within and without the state, shall be divided by the total number of miles operated" etc.

I think that the words "railroad, line or system" are to be construed together in connection with the subject matter to which they relate, and that the phrase, "gross transportation receipts of such railroad, line or system, as the case may be, over its whole extent," means precisely what the words would ordinarily imply, and would ordinarily be understood to mean—the gross receipts derived from transportation by rail over the whole extent of such railroad, line or system. This construction is in entire harmony with the opinion of this court in *State* v. *Canadian Pacific Railway Company*, 100 Maine, 202.

The language of the statute, under which the tax in question was assessed, unchanged since its first enactment, is broad and general enough to include any kind of railroad corporation. "Every corporation, person or association, operating any railroad in the state under lease or otherwise, shall pay" etc., is the language of Section 26. "When a railroad lies partly within and partly without the state, or is operated as a part of a line or system extending beyond the state," is the language of Section 27. Clearly this language is comprehensive enough to include the railroad lines excluded by the State Assessors, unless a contrary intent clearly appears; the character of those lines, which will be considered later, emphasizes this conclusion.

The learned Attorney General, however, contends that the Legislature has placed street railroad corporations in a class by themselves, and that this classification justifies the action of the Board of State Assessors in the instant case.

An examination of the history of Section 27 of Chapter 9 shows that it does not lend support to such conclusion, but, if it has any bearing on the question, rather negatives any authority for the action of the State Assessors. The original statute (Public Laws, 1883, Chapter 150) read, "Horse railroad corporations and associations are hereby made subject to the provisions of the act entitled 'An Act relating to the taxation of railroads,' approved March seventeen, one thousand eight hundred and eighty-one, except" etc. It is obvious that the act had two purposes only in view, viz.: To remove any doubt which might exist as to the right to tax under the Act of 1881 the horse railroad corporations of that day which operated in the comparatively restricted areas of city streets, and to fix a rate of taxation which would be just towards corporations of that class. It was a statute of inclusion, not of exclusion. In 1901, with the substitution of electricity as the motive power for the cars of such corporations, the law was amended (Public Laws, 1901, Chapter 156) so as to read in its present form, "Street railroad corporations" etc., but nothing indicates any intended change in its scope. As the law now stands, corporations operating street railroads are completely subject to the provisions of Sections 25 to 31, both inclusive, of Chapter 9, except as to the rate; if a corporation operates a street railroad lying "partly within and partly without the state, or as a part of a line or system extending beyond the state," it is taxed in the manner provided in the last part of Section 27 at the rate named in Section 32. There is no reference in the statute to the taxation of a corporation operating both classes of railroads. The corporation is taxed "for the privilege of exercising its franchises and the franchises of its leased roads in the state"; if it exercises a street railroad franchise in the State, it is taxed at the rate named in Section 32; if it exercises a general, or as sometimes called, commercial, railroad franchise, it is taxed at the rate named in Section 27; in both cases the basis of taxation is the "gross transportation receipts of such railroad, line or system as the case may be, over its whole extent, within and without the state" divided by "the total number of miles operated"; there is no mention of motive power. Here there is no authority for the exclusion of the receipts and mileage which were disregarded in the instant case. This becomes apparent upon a study of the history and character of the lines whose receipts and mileage was excluded.

Those lines are not street railroads as the term is usually understood, but are inter-urban railroads, so called, transporting both persons and property, operated by legislative requirement in one case, and by legislative sanction in the other, as component parts of the Boston & Maine Railroad.

The type is familiar, and the law will be found discussed in *Diebold* v. *Kentucky Traction Company*, 117 Ky., 146; 111 Amer. St. Rep., 230; 77 S. W., 674; construing a statute of Kentucky relating to so-called "trunk railways." Other authorities may be found in 4 A. & E. Anno., Cas. 451, and 28 A. & E. Anno., Cas., 1913C, 583.

We are not concerned here with the perplexing question alluded to in the opinion, whether the franchises of corporations operating railroads of the type excluded in this case are taxable under Section 27 or under Section 32. The tax in question was assessed under the former section, not under the latter, and it is conceded that the defendant is liable to taxation under the former. Nor has the Legislature devised any scheme whereby interstate railroad corporations operating both commercial railroads and street railroads, or railroads, like the lines excluded in this case, combining the characteristics of both, may be taxed upon the basis of the gross receipts and mileage of each class of road. The tax is to be based upon gross transportation receipts of the railroad, line or system over its whole extent divided by its total mileage.

The question is, whether there is any authority of law for the action of the Board of State Assessors in excluding the transportation receipts and mileage of the electrically-operated lines in question from the gross transportation receipts and total mileage of the Boston & Maine Railroad, when assessing a tax under Section 27 upon the defendant as operating an interstate railroad. The difference in motive power is not a factor. With the present day application of electricity to commercial railroads formerly operated wholly by steam such distinction is no longer, if ever, applicable.

Nor is the type of car a factor. Today on many steam operated railroads single or unit cars, generating their own motive power, are in use for transportation of persons and property in sparsely settled sections of country.

If the lines in question were being operated by the defendant corporation as component parts of its railroad, line or system during the years for which the tax was assessed, the question must be answered in the negative.

That the defendant corporation was legally operating the lines in question is not disputed, and abundantly appears from the agreed statement. When the taxes in dispute were assessed, the lines in Concord and vicinity were operated by the defendant under a lease of the Concord & Montreal Railroad dated June 29, 1895; the lines in Portsmouth and vicinity were in part constructed as extensions of the Portsmouth & Dover Railroad, at the time of such extensions leased to the defendant, and were completed by the defendant after the Portsmouth & Dover Railroad was merged with the defendant on January 1, 1900, and have been since owned and operated by the defendant.

That the excluded lines were component parts of the defendant's railroad, line and system clearly appears from the printed case and the documents which are made part of the case.

1. The Concord Street Railway was incorporated by the Legislature of New Hampshire by Act of 1878, Chapter 118, as the Concord Horse Railroad; by Act approved March 25, 1891, its name was changed, and on November 30, 1903, it was merged with the Concord & Montreal Railroad under the authority of New Hampshire Laws of 1903, Chapter 195, approved January 29, 1903.

This act authorizing the acquisition of the Concord Street Railway provided: "If the Concord Street Railway shall be acquired by the Concord & Montreal Railroad, under the provisions of this act, said Concord Street Railway property shall be operated and managed as a part of the Concord & Manchester branch of the Concord & Montreal Railroad."

The act further provided (Section 4) "that any railroad property, including the Concord Street Railway, or any property used in whole or in part for the production of electrical energy under the provisions of this act, shall be treated as permanent additions or permanent improvements to the Concord & Montreal Railroad under the provisions of its lease to the Boston & Maine Railroad, dated June 29, 1895."

In 1901, by petition to the Supreme Court of the State of New Hampshire, the Concord & Montreal Railroad asked for authority to "build an extension and branch or branches to its steam railroad, to be operated by electricity as the motive power," and upon a report of the Board of Railroad Commissioners of New Hampshire dated March 13, 1901, was granted authority under the Public Laws of

New Hampshire, Chapter 156, to extend its electric road from the intersection of Maine and Pleasant Streets in Concord, through Suncook Village and Hooksett Village, to and into the City of Manchester; this additional mileage was built in 1902, partly along the existing right of way of the Suncook Branch of the Concord & Montreal Railroad.

The agreed case further states:

"The Concord and Montreal Railroad at all times herein mentioned is and was leased to and operated by the Boston and Maine Railroad and in 1919 was merged with the Boston and Maine Railroad. The lessee, the Boston and Maine Railroad, in said lease agreed to pay all operating expenses, repairs, contract obligations, insurance, taxes upon said Concord and Montreal Railroad and roads owned and leased by the said Concord and Montreal Railroad, said lease being dated June 29, 1895, and being for a period of ninety-one (91) years and providing for the operation and maintenance of the property mileage of the said Concord and Montreal Railroad and all its owned and leased lines by the said Boston and Maine Railroad, and operated and maintained by the Boston and Maine Railroad, and the said electric mileage at all times herein mentioned was owned by the Concord and Montreal Railroad and is and was operated and maintained by the Boston and Maine Railroad under its lease until consolidation and thereafter as owner; and it is further agreed that there is not now and never has been any separate independent organization of said electric mileage other then as above stated, although for accounting purposes the revenues and disbursements received from and expended upon said mileage are kept separate upon the books of the Boston and Maine Railroad."

It thus appears beyond question, aided by an examination of the map which is part of the case, that when the taxes in question were assessed the defendant corporation was operating as a part of its railroad system, under lease from the Concord & Montreal Railroad, a line of railroad extending from the Village of Penacook, through the city of Concord, and, by the way of Bow Junction in the town of Bow, through the town of Pembroke, the village of Suncook, and the town of Hooksett, to and into the city of Manchester, a main line mileage of 28.71 miles. This mileage, by express requirement of the Laws of New Hampshire (1903 Chap. 195, Sec. 3), was "operated and managed as a part of the Concord & Manchester branch of the Concord & Montreal Railroad."

2. As to the mileage in Portsmouth and vicinity. In 1898, upon petition to the Supreme Court of New Hampshire, representing that the public good required "that it build an extension and branches and additions to its steam railroad, to be operated by electricity as the motive power," the Portsmouth & Dover Railroad was authorized to build a line, "beginning on Noble's Island in said Portsmouth, at the end of the track of said Portsmouth & Dover Railroad where it connects with the track of the Eastern Railroad in New Hampshire," thence running through certain named streets in the city of Portsmouth, and through a part of the town of Rye to a point near the Congregational meeting-house in Rye. Upon later petitions of the Portsmouth & Dover Railroad extensions of this electric road in Portsmouth and Rye were authorized. At the time all these proceedings were taken the Portsmouth & Dover Railroad was under lease to the defendant corporation, and on January 1, 1900, was merged therewith under authority from the States of Maine, New Hampshire and Massachusetts. Later upon similar petition by the Boston & Maine Railroad this electrically-operated railroad was further extended (See *B. & M. Railroad* v. *Mayor & Aldermen of Portsmouth*, 71 N. H., 21) until at the time of the assessments in question the defendant was operating by electricity a railroad beginning as above stated, at the end of the Portsmouth & Dover track where it connects with the track of the Eastern Railroad, now the Boston & Maine Railroad, and thence running through the streets of the city of Portsmouth, and along the shore through the towns of Rye, North Hampton and Hampton, to the Boston & Maine station in North Hampton, and to a connection in the town of Hampton with an electric railroad to Newburyport; the total mileage of main line track is 15.48 miles.

The agreed statement further says:

"As in the case of the other electric mileage, so in this case there is no independent company, corporation or association owning, operating or maintaining said mileage, although in all cases the receipts and disbursements are kept separate upon the books of the Boston & Maine Railroad."

As to all the lines, of which the mileage and transportation receipts were excluded, the case states:

"In all cases the ownership is by virtue of legislative authority and in all cases the owning, operating and maintaining railroads are

and were at the time of the assessment of the taxes in issue, owned, operated and controlled by the Boston & Maine Railroad, and in all cases their profit and loss account constitutes an integral factor in the valuation of the Boston and Maine Railroad stock. In all cases their construction, equipment, maintenance and operation were financed by the sale of stocks and bonds of the steam railroads which at the time of the assessment of the taxes in issue were owned, operated and controlled by the Boston and Maine Railroad.

"All of the electric mileage herein referred to is, and was during each and all of the years mentioned, of the ordinary type of electric railway construction, operated by electricity from overhead trolley wires, and used solely for transportation of persons and property by electrically operated cars."

* * * * * * * *

"Some portions of said electric lines are on private rights of way, but the larger part of said electric lines follows and is located within the limits of the streets and highways of the cities and towns through which said electric lines operate."

This extended examination of the statutes and records as to the acquisition, construction and operation of the excluded lines has seemed necessary that it may clearly appear that those lines are not railroads operating only in city streets, but are inter-urban lines operated by electricity; that the Concord lines are, by express enactment of the New Hampshire Legislature "operated and managed as a part of the Concord & Manchester branch of the Concord & Montreal Railroad," leased to the defendant; that the Portsmouth lines were constructed, under provisions of New Hamsphire laws, as extensions of the Portsmouth & Dover Railroad and, with said Portsmouth & Dover Railroad, were, when said taxes were levied, parts of and merged with and owned by said defendant corporation; and that all these electrically-operated lines were, when the taxes were assessed, operated as parts of the Boston & Maine Railroad System, although, as the case states, there is no interchange of motive power or rolling stock between the steam operated and electrically-operated lines.

The facts clearly bring the Boston & Maine Railroad System within the provisions of Secs. 26 and 27 of Chap. 9 of the R. S.; that

is conceded. But the State claims that the tax is to be based not upon the gross transportation receipts of such system "over its whole extent," but upon a part only, excluding the receipts from electrically-operated lines; and that such part of the gross receipts is to be divided not "by the total number of miles operated" but by the mileage as ascertained by deducting the mileage of the electrically-operated lines.

I can find no authority of law in support of this proposition; on the contrary the case shows that the lines in question are component parts of the Boston & Maine Railroad.

I think that judgment should be entered for defendant.

ALONZO S. WINSHIP *vs.* ROYAL J. COLBATH et al.

Aroostook. Opinion June 23, 1923.

Under a contract providing that one party may terminate the contract when in his judgment the other party is not performing his part of the contract to the satisfaction of the other party, who is to be the sole judge, such termination or abrogation of the contract must be the result of the exercise of his judgment only upon the manner in which the other party is performing his part of the contract, and not for other and different reasons.

In this case the defendant was authorized under a provision in the contract, when he became dissatisfied with the manner in which the contract work was being done, to terminate the contract upon his judgment. And if he exercised his judgment in good faith with reference to the manner in which the work was being done, he undoubtedly had the right to terminate the contract without reference to the question as to whether the work was being done in a reasonably satisfactory manner, or in a manner satisfactory to the judgment of reasonable men. If in good faith he believed that it was not done in a satisfactory manner, he was, under the terms of the contract the sole Judge of the fact.

But under the provisions of the contract, he was forced to exercise his judgment only upon the manner in which the party of the second part or his workmen were doing the work.

If, therefore, he did not exercise his judgment on that question, but terminated the contract for other and entirely different reasons, he was not protected in what he did by the provision under which he claims to have acted.

On motion by defendant for new trial. Two cases tried together. The second case was brought to recover for labor performed, the only question involved being the amount of labor rendered. The first case involved a clause in a written contract providing that the defendant might terminate the contract whenever in his judgment the plaintiff was not doing the work to be done under the contract in a manner satisfactory to him, he to be the sole judge. Both cases were tried to a jury and a verdict for plaintiff was rendered in each case, and defendant filed a motion for a new trial in each case. Motions overruled.

The case is sufficiently stated in the opinion.

Stetson H. Hussey and Charles P. Barnes, for plaintiff.

Winfield S. Brown, for defendants.

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

SPEAR, J. The record before us involves the trial of two cases. The second case was based upon the performance of certain labor, with regard to which there was no dispute except as to the amount of labor performed. Inasmuch as this involved a pure question of fact, we are of the opinion that the verdict found by the jury in this case was clearly justifiable, and should be permitted to stand.

The first case was based upon a written contract, the execution of which was entered upon by the plaintiff, and after certain labor was performed for which the plaintiff seeks to recover in his action the defendant, under a clause providing therefor, abrogated the contract and discharged the plaintiff from further work thereon.

Now the contract provided for its termination by the defendant in the following language: "It is further agreed by and between the parties hereto that if, at any time during the life of this contract, the said Colbath becomes dissatisfied with the manner in which the party of the second part, or the workmen employed by him, are doing the work, he may terminate this contract forthwith, hereby making the said Royal Colbath the sole judge as to whether the work done by the party of the second part or his employees is satisfactory to the said Colbath and Anderson."

It appears from this quotation that the defendant was authorized, when he became dissatisfied with the manner in which the contract work was being done, to terminate the contract upon his own judg-

ment. And if he exercised his judgment in good faith with reference to the manner in which the work was being done, he undoubtedly had the right to terminate the contract without reference to the question as to whether the work was being done in a reasonably satisfactory manner, or in a manner satisfactory to the judgment of reasonable men. If in good faith he believed that it was not done in a satisfactory manner, he was, under the terms of the contract the sole judge of that fact. But under the provisions of the contract, he was forced to exercise his judgment only upon the manner in which the party of the second part or his workmen were doing the work. If therefore, he did not exercise his judgment in that regard, but terminated the contract for other and entirely different reasons, he was not protected in what he did by the provision under which he claims to have acted.

The plaintiff, in his testimony, states the ground upon which Mr. Colbath terminated the contract as follows:

"Q. What did Mr. Colbath say when he first came in?

"A. He came in the shop and walked over to Mr. Boulier and said, 'Ed. I am all done with you.' He walked over to my boy and said, 'I am all done with you.' He says, 'You, Lon, I want to keep to do my job work this winter.' I says, 'Mr. Colbath, is that according to contract?' He says, 'It doesn't make any difference about the contract; you might as well stick it in the stove and burn it up.' I says, 'Mr. Colbath, you can burn your contract; I will keep mine.'

"What else did he say there in the shop that morning about your getting through?

"A. He said on account of hard times he was obliged to close it down.

"Q. Give us your talk as near as you can about hard times?

"A. Well, times being hard he was going to close her down and, he said, 'I will wait until along towards Spring and if times get better he would go at them again.'

"Q. Was he in the shop quite a while on that visit talking with you?

"A. Probably three-quarters of an hour or an hour.

"Q. And you talked back and forth the most of the time?

"A. That is about all that was said, except we might as well go out; he was going to lock the shop; and I made the remark I shouldn't go until I took the tools with me that belonged to me.

"Q. Did you agree then to throw up the contract and go to work for him?

"A. No sir."

Mr. Colbath denies that he terminated the contract upon the grounds or for the reasons stated by the plaintiff. This conflict of testimony, however, presented a pure question of fact for the decision of the jury. If they believed Mr. Winship, then it is apparent that the jury were justified in finding that the defendant did not abrogate the contract upon the grounds upon which he was authorized under the paragraph quoted. He therefore did not legally terminate the contract, and the question of how much the plaintiff was entitled to for his services under the contract was left open. And this was a question of fact as to the amount to which the plaintiff was entitled.

The evidence upon this question was contradictory but was submitted to the jury upon instructions to which no exceptions were taken, and upon the evidence they founded their verdict.

While some uncertainties appear with reference to the amount of the verdict it was nevertheless left to the only tribunal qualified to determine such questions, and we do not feel that the court would be justified in interfering with this verdict.

Motion in each case overruled.

WILLIAM H. COLLINS' CASE,

Penobscot. Opinion July 7, 1923.

Under the Workmen's Compensation Act, a compensation agreed upon and paid for an injury is final and conclusive as to the injury embraced in the agreement, and a further specific compensation for the same injury cannot be decreed; but a compensation for loss of earning capacity subsequent to the period of the specific compensation agreed upon, not included in the agreement, may be granted.

Contracts free from fraud must be respected and enforced as made. This is true of ordinary contracts. With greater reason it is true of compensation agreements which are made by the parties, officially approved, and have the force of judgments.

Compensation having been agreed upon and paid for an injured hand the Chairman cannot by decree require payment of further specific compensation for the same injury.

In the instant case it being apparent that the agreement made did not include compensation for actual loss of earning power after the period of specific compensation agreed upon, the case is to be remanded to the Commission for amendment of petition and determination of loss of earning power.

On appeal. This is an appeal from a decree of a sitting Justice affirming the finding of the Chairman of the Industrial Accident Commission and the awarding additional compensation to William H. Collins for permanent impairment to the left hand. On January 29, 1921, an agreement was entered into by the parties and approved by the Commission, that compensation at the rate of $15.00 per week was to be paid for seventy-five weeks from September 27, 1920, which was paid, and said period of seventy-five weeks had expired before the filing of the petition in this case, on which petition after a hearing the chairman of the commission decreed that the time during which the compensation was to be paid should be extended to one hundred twelve and one half weeks, from which decree an appeal was taken. Appeal sustained. Decree reversed. Case remanded for further proceedings in accordance with opinion.

The case is fully stated in the opinion.

James M. Gillin and William H. Murray, for petitioner.

Robert Payson and W. T. Gardiner, for respondents.

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

DEASY, J. The petitioner, having been injured by an industrial accident, entered into an approved compensation agreement with his employer. The injuries which were the basis of the agreement were, as stated therein, "amputation of left thumb and second finger, injured hand." For these injuries $15 per week for seventy-five weeks was agreed to be paid and was paid. Later, and after the expiration of said period of seventy-five weeks, a petition was presented asking for compensation for permanent impairment to the hand. Upon hearing, the chairman of the commission decreed that the time during which the compensation was to be paid should be extended to one hundred twelve and one half weeks. An appeal was taken. The appeal must be sustained.

Contracts free from fraud must be respected and enforced as made. This is true of ordinary contracts. With greater reason is it true of compensation agreements which are made by the parties, officially approved and have the force of judgments.

Parties indeed have wide latitude in making agreements subject to approval. They may, of course, make agreements contemplating a part only of the injuries suffered, leaving a part for further agreement or decree. Agreements are "final and binding to the extent of the facts agreed upon and the conditions covered by them as a basis for the compensation to be paid." *Foster's Case*, 123 Maine, 27.

In this case the conditions covered as a basis of compensation included "injured hand." The agreement for compensation for injured hand is final and binding. Neither the Commission nor the court has authority to add any further obligation to the contract which the parties have made and the commission approved. No further specific compensation for injured hand can be compelled to be paid through calling that injury to the hand "permanent impairment" of the hand. See *Maxwell's Case*, 119 Maine, 507; *Morin's Case*, 122 Maine, 338; *Walker's Case*, 122 Maine, 388; *Foster's Case*, supra.

It may be that the agreement was an unfortunate one for the petitioner. But the commission cannot relieve parties from the consequence of unwise contracts. They agreed on a settlement for the injured hand. The commission awarded further specific compensation for the same injury. This it was not authorized to do.

The agreement obviously did not contemplate partial incapacity after the specified period of seventy-five weeks, and it does not bar a petition to recover compensation for such partial incapacity. The petition related to compensation for presumed total disability.

The petition in this case being in no sense a petition for review, it is unimportant that it was filed after the expiration of the specified period of seventy-five weeks.

The case should be remanded to the commission. The petitioner should have leave to amend his petition, prove, if he can, loss of earning capacity, and receive compensation measured by such loss. *Foster's Case,* 123 Maine, 27.

Appeal sustained.
Decree reversed.
Case remanded for further proceedings in accordance with opinion.

MARY J. HEXTER

vs.

EQUITABLE FIRE AND MARINE INSURANCE COMPANY.

Penobscot. Opinion July 7, 1923.

An award by appraisers under a fire insurance policy authorized to "appraise the loss or damage stating separately sound value and damage" is not invalidated by unauthorized parenthetical clauses, being mere surplusage, unless such clauses affect those parts of the award which are authorized and valid to the prejudice of the excepting party. The insured is not guilty of laches in not tendering to the insurer the salvaged part of the property, where a valid award is rejected and repudiated by the insurer without reasonably exercising his option to take the salvage.

Unauthorized and invalid parts of an award are to be treated as mere surplusage, unless such parts affect, to the prejudice of the excepting party, the portions of the award which are authorized and valid.

In the instant case the appraisers, by the parenthetical clause, apparently undertook to state the legal rights of the parties; or possibly they attempted to modify such rights. The language employed is ambiguous, but in no event can this unauthorized undertaking by the appraisers have influenced their judgment as to sound value or damage.

The defendant claims further that the plaintiff's case is barred by her neglect to offer or tender to it the salvaged part of the automobile. Not so, however, where as in this case, the insurer fails to seasonably exercise his option (to take the salvage) and rejects and repudiates a valid award.

On exceptions. An action on account annexed, by plaintiff holding a fire insurance policy in defendant company, to recover the amount of an award made by appraisers chosen under the provisions of the policy to determine the loss or damage by fire to an automobile owned by plaintiff. The defendant pleaded the general issue and under a brief statement alleged that the award of the appraisers was not a valid one. Three exceptions were taken by defendant, one to the admission of the award, another to the refusal of the court to direct a verdict for the defendant, and a third to the ruling of the presiding Justice directing a verdict for the plaintiff. Exceptions overruled.

The case is sufficiently stated in the opinion.

Fellows & Fellows, for plaintiff.

William H. Gulliver and John B. Thomes, for defendant.

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

DEASY, J. On November 19, 1921, the plaintiff's automobile, insured against fire by the defendant, was damaged by fire.

The policy in substance requires that, in case of disagreement, appraisers be selected who shall "appraise the loss or damage stating separately sound value and damage."

By written instrument dated June 15, 1922 the parties appointed appraisers agreeing in such instrument that the appraisers should state "separately sound value immediately preceding the fire, and damage" and further that the award should as to such matters be binding. The award of the appraisers is as follows, omitting formal parts. . . . .

"We, the undersigned, having carefully appraised and estimated the damage to the property of Mary J. Hexter in conformity with the foregoing appointment and declaration, hereby report that we have determined the actual damage thereon to be as follows:

"On within described automobile, $2,225.00 (Company to pay $2,225.00 and to have salvage).

"The sound value of said property at the time last preceding the fire, we find to have been as follows, viz.:

"Of within described automobile, $2325.00."

No payment having been made the plaintiff began the present suit.

The Justice of the Superior Court hearing the case ordered a verdict for the plaintiff in the sum of two thousand two hundred twenty-five dollars and interest.

The defendant contends, and bases its exceptions upon the contention, that the parenthetical clause "Company to pay $2225, and to have salvage" invalidates the award.

Unauthorized and invalid parts of an award are to be treated as mere surplusage unless such parts affect, to the prejudice of the excepting party, the portions of the award which are authorized and valid. *Porter* v. *Railroad Co.*, 32 Maine, 551; *Orcutt* v. *Butler*, 42

Maine, 85; *Farrell* v. *Insurance Co.*, 175 Mass., 346; *Second Society* v. *Insurance Co.*, 221 Mass., 518; 2 R. C. L., Page 397; 5 Corpus Juris, Page 155.

The appraisers fixed the sound value of the automobile immediately before the fire at $2325, the damage of $2225 and (inferentially) the salvage at $100.

The appraisal being thus made, the legal rights of the parties are plain.

The insurer had the right at its option, to pay the damage and leave the salvage, or to pay the sound value and take it.

The appraisers by the parenthetical clause apparently undertook to state the legal rights of the parties; or possibly they attempted to modify such rights. The language employed is ambiguous.

But in no event can this unauthorized undertaking by the appraisers have influenced their judgment as to sound value or damage.

The defendant claims further that the plaintiff's case is barred by her neglect to offer or tender to it the salvaged part of the automobile. Not so, however, where as in this case, the insurer fails to seasonably exercise its option, and rejects and repudiates a valid award.

Exceptions overruled.

JOSEPH E. HALL, JR., In Equity *vs.* WILLARD P. HAMILTON et al.

Aroostook. Opinion July 7, 1923.

A tax assessed upon land owned by another at the time of enforcement is, prima facie, a primary obligation upon the land, but the person against whom the tax is assessed may become primarily liable by covenant for title or special covenant to pay the tax, but such obligation is contractual and such person is not subject to arrest on an assigned capias execution to reimburse a subsequent owner of the property for the payment of the tax to relieve it of the lien. An injunction will not issue against such owner of the land holding such assignment of the execution in absence of evidence or admission of threats or intent to employ it illegally.

When a tax is assessed against a person upon land which at the time of enforcement of tax is owned by another, the primary obligation is prima facie upon the land. The person taxed, however, may become primarily liable by covenant for title or special covenant to pay the tax.

Even in cases where the individual taxed is primarily liable his obligation is contractual, and the land owner paying the tax to save his property from the tax lien, cannot take from the tax collector an assignment of the capias execution and enforce his right to reimbursement by arrest.

But though the land owner has taken such assignment of the execution it cannot be assumed that he intends to use it illegally. In the absence of evidence or admission of threats or intent to so employ it, an injunction will not issue.

On appeal. A bill in equity praying that an injunction issue restraining defendants from arresting plaintiff, a judgment debtor, against whom a tax on land had been assessed, upon which tax the judgment in question was founded, which judgment had been assigned by the tax collector to the defendants, who, subsequently to the assessment of the tax, had acquired title to the land on which the tax was assessed and had to pay a balance of the tax to save the property from a tax lien. On February 21, 1922, a hearing was had upon bill, answer, replication and proof, and the sitting Justice made a decree dismissing the bill, and plaintiff took an appeal. Appeal dismissed.

The case is stated in the opinion.

Joseph E. Hall, for complainant.

Willard P. Hamilton, for respondents.

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

DEASY, J. The record in this case consists of the bill in equity, answer, replication, decree dismissing bill and plaintiff's appeal.

No evidence is brought forward. It does not appear that any evidence was adduced before the single Justice who heard the case.

A cause in equity may be set down for hearing on bill and demurrer, or bill and answer. In the former case the bill is taken as true; in the latter the answer is taken as true. R. S., Chap. 82, Sec. 19. S. J. C., Rule 22. Whitehouse Equity, Vol. 1, Sec. 281. *Dascomb* v. *Marston,* 80 Maine, 230.

But in a case like this where the hearing is upon bill, answer and replication without evidence, a situation not provided for by statute or court rule, the only allegations that can be accepted as true are those concerning which the bill and answer are in accord.

Only the first two paragraphs of the bill present agreed facts and obviously such facts do not warrant equitable interference.

From the first paragraph it appears that the defendants have an assignment of an execution running against the body of the plaintiff and that such execution, based upon a judgment in a lien suit for a real estate tax assessed to the plaintiff, runs also against the defendants' land. The assignment is from the tax collector. The second paragraph sets forth no significant facts.

Reading the bill further we find an allegation that the defendants have threatened to arrest the plaintiff upon the execution. This he seeks to have restrained by injunction.

But the making of such threat is denied and there is no evidence and no admission in the case that the defendants have threatened to or intend to make such use of the execution.

It does not appear that the plaintiff is under any obligation to the defendants in respect to the tax; nor is the contrary shown. When land is taxed to a person the primary obligation is prima facie upon the land. Gray, C. J. in *Swan* v. *Emerson,* 129 Mass., 291. The plaintiff in this case may have assumed primary liability by covenants for title or a special covenant to pay the tax. If so, his liability is contractual and not to be enforced by arrest.

The execution in favor of the tax collector properly runs against the body of the person taxed. A tax is not a contract. *Augusta* v. *North,* 57 Maine, 395.

But the defendants claim against the plaintiff is not a tax. It is a claim for reimbursement of the amount of a tax paid. If the plaintiff has covenanted to pay such tax his covenant can be enforced. There is, however, no warrant for using the collector's capias to enforce a contractual obligation to make reimbursement.

But an injunction is not to be had for the asking. He who seeks this process should prove clearly that he is entitled to it. It "should be applied with the utmost caution." *Morse* v. *Water Power Co.*, 42 Maine, 119. "It should be exercised with the greatest discretion and when necessity requires it." *Attorney General* v. *Ins. Co.*, 2 Johns Ch. 378; 16 A. & E. Encyclopedia, 347.

It cannot be assumed that the defendants have threatened or intend to make an unwarranted and illegal use of the execution. In the absence of evidence that any violation of the plaintiff's rights have been threatened, for which the law affords no adequate remedy, the injunction must be denied.

Appeal dismissed.

INHABITANTS OF HARTLAND *vs.* INHABITANTS OF SAINT ALBANS.

Somerset. Opinion July 7, 1923.

Overseers of the poor must furnish to destitute persons relief which is reasonable and proper in their sound and honest discretion, but their power is not unlimited.

In the instant case the finding of the jury that the alleged paupers were in a destitute condition when the supplies were furnished is supported by the evidence.

The exclusion of the pay checks of a brother of John Luce, a boarder in the family, covering a period during several months prior to the falling into distress, unless traced to the family, was correct. They would have no evidentiary value upon the resources of the family unless connected with them.

Overseers of the poor under the statute and under their oath of office must furnish to destitute persons relief which is reasonable and proper. What is reasonable and proper is left in the first instance to their sound and honest discretion. But their power is not unlimited.

In view of all the circumstances the amount furnished here was unconscionably large.

On motion for a new trial and exceptions. This is an action to recover for pauper supplies furnished by plaintiff town to one John Luce and family, who, it is alleged, fell into distress in that town, having their pauper settlement in defendant town. The general issue was pleaded and a verdict of $360.84 was returned for plaintiff. Defendant filed a general motion for a new trial, and also excepted to the exclusion of certain evidence. Exceptions overruled. Motion sustained unless the plaintiffs within thirty days from filing of rescript remit all the verdict in excess of $210.84; otherwise motion overruled.

The case is fully stated in the opinion.

Gower & Shumway, for plaintiffs.

Pattangall & Locke and J. H. Haley, for defendants.

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

CORNISH, C. J. Action for pauper supplies furnished to one John Luce and family who are alleged to have fallen into distress in the plaintiff town and to have their legal pauper settlement in Saint Albans. The case is before the Law Court on defendant's general motion and a single exception.

1. MOTION.

The issue raised by the motion, as stated by the learned counsel for defendants in their brief, is whether the supplies sued for were necessary and were furnished in good faith or without necessity and for the purpose of interrupting the gaining of a settlement in Hartland, which might otherwise have become complete in a week after the first supplies sued for were furnished.

It is admitted that on November 24, 1915, John Luce was living with his family in Saint Albans and that his pauper settlement was then in that town. On November 25, 1915, he moved with his family into Hartland and has resided there since that time. His

residence therefore would have ripened into a pauper settlement in Hartland in five years, or on November 25, 1920, unless legally aided by the town in the meantime. The first of the supplies were furnished on November 18, 1920, a date suspiciously near the completion of five years it must be conceded. But it seems that two and a half years before, on May 24, 1918, Luce made written application to the overseers of the plaintiff town for assistance, and supplies to the amount of about $17 were then furnished. Subsequently Hartland was reimbursed for this either by John or his brother, but that fact would render the supplies no less pauper supplies if the applicant was in actual need and due notice was given. *Lewiston* v. *Harrison*, 69 Maine, 508. If those conditions were met the period of settlement was interrupted in 1918, and in 1920 when the supplies in the pending case were furnished the pauper still belonged to Saint Albans.

Coming to the supplies of November and December, 1920, for which this action was brought, the sharp issues of fact for the jury were the alleged destitute condition of the family and good faith on the part of the Hartland overseers. On the question of destitution the jury sustained the plaintiff's claim, and from a careful study of the evidence, especially of the two women who represented respectively State and local relief organizations and who reported the conditions to the overseers, we think the finding was justified. The defendants take nothing by the general motion on the question of settlement.

EXCEPTION.

This is based upon the exclusion of the pay checks received by Ulysses G. Luce, a brother of the pauper, who boarded in his family and who often assisted the family from his earnings. Those checks covered a period during two, three and six months prior to the furnishing of these supplies. The court held the earnings of Ulysses to be immaterial on the pending issue and said: "The seven dollars a week (the price of board) was one of the resources of the family and if Ulysses saw fit to help his brother, that you can show, to what extent he actually did help his brother out; that might be material. But to put in generally his earnings as far back as May, 1920, I cannot see the materiality of it." Acting on this principle

the court admitted a pay check for $12.80 dated November, 1920, which was shown to have come into the hands of the pauper. The ruling was correct. The question at issue was the destitute condition of John Luce and his family. As bearing upon that his resources at the time and prior thereto might be of evidentiary value. The court admitted all evidence along that line, but properly excluded evidence of earnings by the brother which were not traced to the family. There the connection was broken.

Moreover, its effect if introduced would have been exceedingly meagre when compared with the actual conditions found to exist when aid was applied for. That was the crucial time and that condition was the essential fact upon which the overseers of the poor were bound to act. In view of the overwhelming testimony on that point this ruling, even had it been technically erroneous, would have been harmless.

AMOUNT OF SUPPLIES.

This is unconscionably large. Overseers of the poor under the statute and under their oath of office must furnish to destitute persons relief which is reasonable and proper. R. S., Chap. 29, Sec. 33. *Clinton* v. *Benton*, 49 Maine, 554. What is reasonable and proper must be left in the first instance to their sound and honest discretion. But they have not unlimited power. If they had, great injustice could be done to the town of the settlement, an injustice which that town in many instances could not prevent, as the furnishing town is allowed three months in which to give notice. The facts and conditions in all these cases differ. But consider what was done here by the overseers of Hartland. Application for assistance was made on November 18, 1920. Between that date and December 20, a period of about one month, the charges amount to $318, or about $10 per day. The family consisted of John, his wife and three children, a boy of twenty-one, a girl of eighteen, and another boy of seven, together with the brother Ulysses who paid his board. The groceries and provisions for that short period aggregate $102, the clothing $110, the bedding $66, not to mention sundry miscellaneous claims such as painting and papering the interior of the house. We are constrained to say that in view of all the circumstances this

was grossly extravagant. The total amount paid by Hartland for the support of paupers off the town farm for the entire year was only $500, including this bill.

It is somewhat difficult to scale down this bill to what is reasonable and proper. The jury gave the full amount, excluding the charge for Ulysses, which it was finally agreed could not be collected, and also excluding one or two other small items not properly included in the bill. The verdict was for $360.84. This was manifestly excessive by at least $150.

The entry may therefore be:

Exception overruled.
General motion sustained unless the plaintiff within thirty days from filing of rescript remit all the verdict in excess of $210.84, otherwise motion overruled.

PATRICK GRAY'S CASE.

Kennebec. Opinion July 9, 1923.

An injury, to be compensable under the Workmen's Compensation Act, must arise both "out of" and "in the course of" one's employment. Both elements must be present. An injury to oneself caused by striking another employee, having been aggravated by insulting language and threatening gestures by such second employee, but being the aggressor at the time the blow was delivered, following a cessation of the first altercation, is an injury with no causative connection with the employment, not arising "out of" even if it arose "in the course of" the employment, hence not compensable.

The decree in this case, originating under the statute providing for compensating workmen for accidental injuries, is reversed; the reason being the absence of causative connection between the petitioner's employment and the resulting physical harm; the injury was not a natural incident of his work.

On appeal. The petitioner, while in the employment of the Cushnoc Paper Company at Augusta, as a backtender on a paper machine, had an altercation with another employee. The other employee displayed insolence toward and made menacing gestures at the petitioner and then retreated to a platform. The petitioner followed after and struck him, breaking his own thumb in consequence, for which injury he was awarded compensation under the workman's act. The appeal is sustained.

No counsel appeared for the petitioner.

Andrews, Nelson & Gardiner, for respondent.

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

DUNN, J. Obviously, under the statute providing for compensating workmen for accidental injuries arising both out of and in the course of their employments, an injury which occurs while but one of these conjunctive elements is present, is not to be recompensed.

The paper was breaking, to use expressions of the business, on the machine that the claimant was backtending, and he was trying to remedy that trouble in the absence from the mill of a coemployee called the third hand.

When the latter returned the backtender admonished him to give notice of any future leaving. Whether the backtender, who was known also as the second hand, had the right to so lay injunction against the third hand became the subject-matter of an altercation between the two. Soon, as the dispute continued, the third hand attempted to hector the second hand by saying, apparently with more insolence than courage, that he was unafraid of him. And the other retorted that the vexing one had no need to be in fear. "Then," testified the backtender, referring to the second hand, in words conspicuous of meaning, "he put his dukes up." The backtender struck at the assailer. The blow fell short. But the second hand winced before it, and retreated to and clambered up on a platform. From this supposed vantage ground he twitted the backtender of his lineage, scoffed at his paternity and reproached him for imputed personal habits. Over went the backtender to the platform. How far away and how high the platform was is not shown. But, once on it, the backtender smote the asperser on the jaw, breaking his own thumb as a result.

Compensation was decreed. The decree must be reversed. The reason being that the injury was sustained outside the scope or sphere of the disabled workman's employment.

Whatever, if the third hand had not retired from the first encounter, the case in legal aspect might have been, that retirement left no causative connection between the backtender's employment and the resultant physical harm. Albeit the employment may have afforded opportunity for that which jeers and gibes provoked, yet it was not the origin or cause of the suffered hurt; the injury was not a natural incident of the employee's work.

The phraseology, "arising out of employment," at first blush so simple as to be almost self-defining, has been the occasioner of rather numerous decisions. "The accident must have . . . . been due," says Mr. Justice DEASY in wonted clarity of diction, "to a risk to which the (employee) was exposed . . . . because employed by the defendant." *Mailman's Case,* 118 Maine, 172. "The great weight of authority," writes Mr. Justice PHILBROOK, after discriminating research, "sustains the view that these words "arising out of" mean that there must be some causal relation between the conditions under which the employee worked and the injury which he received." *Westman's Case,* 118 Maine, 133. An injury, upon reference to Massachusetts, arises out of the employment when, after the event, it must appear to have had its origin in a risk connected with the employment, and to have swept along from that source as a rational consequence. *McNicol's Case,* 215 Mass., 497. Injuries arising from employment are such as are made likely by the character of the business or by the method under which it is carried on. *Jacquemin* v. *Turner, etc., Mfg. Co.,* 92 Conn., 382, 103 Atl., 115. An injury is deemed to arise out of employment when there is apparent, on consideration of all the circumstances, the relation of cause and effect between the conditions under which the work is required to be performed and the resulting injury. *Buvia* v. *Oscar Daniels Co.,* 203 Mich., 73, 168 N. W., 1009, 7 A. L. R., 1301; when it is a direct and natural result of a risk reasonably incident to the employment, *Thomas* v. *Proctor, etc., Mfg. Co.,* 104 Kan., 432, 179 Pac., 372, 6 A. L. R., 1145; when it is possible to trace the injury to the nature of the employee's work, or to the risks to which the employer's business expose the employee, *Coronado Company* v. *Pillsbury,* 172 Cal., 682, 158 Pac., 212, L. R. A., 1916-F, 1164; and

when the injury may be seen to have had origin in the nature of the employment, *Baum* v. *Industrial Com.*, 288 Ill., 516, 123 N. E., 625, 6 A. L. R., 1242.

Claimant's injury arose, not out of his employment as a contributing proximate cause, but in broadest view only in the course of that employment. When his antagonist fled, the quarrel ceased. Not content, however, to leave the matter stand, the claimant pursued his vanquished though still insulting foe, and becoming himself the assailant waged action anew.

This was aside from any duty relating to his contract of service as a backtender, either directly or indirectly. It was aside from any risk immediately connected with his work and flowing therefrom down the channel of natural result; apart from any protection of his employer's interests; it was unrelated to his employment even incidentally. It was, in the angle of the existing situation, the claimant's purely personal affair, voluntary and perhaps disciplinary in its inception, certainly painfully disastrous in its ending. Injuries resulting in the course of employment from assaults to gratify feelings of resentment or enmity are not compensable. *Jacquemin* v. *Turner, etc. Mfg. Co.*, supra; *Romerez* v. *Swift & Co.*, (Kan.), 189 Pac., 923.

Appeal sustained.
Decree below reversed.
Petition dismissed.

AMBROSE W. DEAN *vs.* W. S. GIVEN COMPANY.

Waldo. Opinion July 13, 1923.

A part payment, though deferred, of the purchase price of certain potatoes by check drawn by the agent of the buyer and delivered to the agent of the seller, though payable to a third person, if the check is cashed and the proceeds given to the seller with the approval of the payee, removes the contract from the statute of frauds.

The identity of the bargainor, in a contract made by telephone, where, as between the immediate parties, the title to the property sold passed when the bargain was struck, being settled by verdict in the plaintiff's favor, it is,

Held:

That the proceeds of a check drawn by the buyer's agent to the order of a third person, from whom the agent apparently supposed that he had bought the property, but delivered to the seller's agent in intention of a deferred part payment on the particular transaction, left the remedy on the contract, perhaps otherwise within the statute's ban, unaffected by the statute of frauds.

On motion and exceptions. An action of assumpsit on account annexed to recover the balance of the purchase price of certain potatoes bargained and sold by telephone. The plaintiff claimed that, on December 2, 1921, he so bargained and sold to defendant's agent the estimated quantity of one thousand bushels of potatoes at eighty cents the bushel, the potatoes to be delivered by the plaintiff at a railroad station after the buyer should have picked and bagged them in the cellar where they were, commingled with what remained of the rest of the crop. On December 9th, the situation meanwhile remaining unchanged, the plaintiff sent his mother to the defendant's agent for a part payment. That agent drew his check to the order of the father of the plaintiff and delivered it to the plaintiff's mother, taking a receipt therefor. She cashed the check and gave the proceeds to the plaintiff, with the subsequent approval of the payee. On December 12th, nothing further having been done in regard to the transaction, most of the potatoes were destroyed by an accidental

fire. Plaintiff sued for the full purchase price less the fifty dollars already paid. The defendant denied any liability to the plaintiff, set up the statute of frauds by way of brief statement under the general issue, and reserved and perfected exceptions. The verdict was for the plaintiff in full accordance with his demand. Motion and exceptions overruled.

Buzzell & Thornton, for plaintiff.

McLean, Fogg & Southard, for defendant.

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

DUNN, J. Whether the contract for the sale and purchase of the potatoes was between the plaintiff and the defendant, or between the plaintiff's father and the defendant, was decided by the jury, on a closely contested issue, in the plaintiff's favor.

There also was sharp conflict concerning other facts.

The further story, which the verdict declared, was this: Having, as he estimated, one thousand bushels of merchantable potatoes, commingled with what remained of the rest of a crop stored as it was dug, in the cellar of his father's house, the plaintiff phoned the defendant's agent soliciting him to buy. They traded for all the vendible ones. The buyer was to cull and bag the potatoes in the cellar. And the plaintiff was to draw them to a loading station on a railroad line; the price of eighty cents the bushel to pay for both the potatoes and the carting.

In unchanged situation, exactly one week later, the plaintiff's mother, by his request, went to the agent and said, "we wanted some money on the potatoes." The agent filled the blanks in a form of receipt. That document, which the agent conceded had relation to the potatoes, recited, not a mere agreement to buy, but a sale. The receipt was handed to the mother. "He told me to sign it," testified she, "and I said, 'what will I sign, my name, or what will I sign?' he says, 'Charles Dean'." Or, to use her phrase when recalled, "What will I sign here, his or my name, and they says, 'his'." Charles H. Dean was her husband, and the father of their child Ambrose, this plaintiff. She wrote "C. H. Dean" at the foot of the paper without indicating that the signing was by any other person than the bearer of the name. Then the receipt was "accepted" for the principal by his agent. And fifty dollars, the amount for

which it called, was paid to the mother by a check to her husband's order. She cashed the check at a village store. When at home again, she passed the fifty dollars and a duplicate of the receipt to her son. Negotiation of the check eventually had the approval of its payee.

Matters stood thus until, three days later, most of the potatoes were destroyed by an accidental fire. Defendant's agent, after the fire, picked out the potatoes that were fit for market. These were put into bags which he brought. And the bags of potatoes were hauled to the station by teams procured at the plaintiff's direction.

The defendant corporation, insisting that its trading was with the plaintiff's father, utterly denied liability to the plaintiff. This action was for the price of the one thousand bushels, less the fifty dollars paid. The count in the writ—assumpsit on an account annexed—was sufficient for goods sold and delivered or goods bargained and sold. *Kelsey* v. *Irving*, 118 Maine, 307. By brief statement under the general issue, defendant invoked the statute for the prevention of frauds and perjuries. Plaintiff has a full verdict. The evidence for his side, being believed, justified the jury's decision.

The deeper question is, whether the fifth section of the statute of frauds affected enforceability of the contract.

That section reads:

"No contract for the sale of goods, wares or merchandise, for thirty dollars or more, shall be valid, unless the purchaser accepts and receives part of the goods, or gives something in earnest to bind the bargain, or in part payment thereof, or some note or memorandum thereof is made and signed by the party to be charged thereby, or by his agent." R. S., Chap. 114, Sec. 5.

By the rule of the common law, were the statutory provision not intervening, a present sale of definite chattels may be complete, as between the parties, in the absence of delivery, when the terms are agreed on and the bargain struck. Even in the view of the statute, the property passes at once in a sale of the chattels, if such is the intent, although the seller is afterward to make delivery of the goods. *Penley* v. *Bessey*, 87 Maine, 530. "The fact that it was one of the conditions of the sale, that the plaintiff should haul the hay to the depot, ... is not inconsistent with the proposition that it might have . . . . become the property of the defendant, at the barn." *Dyer* v. *Libby*, 61 Maine, 45. Also see *Edwards* v. *Brown*,

98 Maine, 165. The statute implies delivery by superadding acceptance and receipt; the acceptance touching the title to, and the receipt the possession of, the property. *Beedy* v. *Brayman, etc., Co.*, 108 Maine, 200. There is a distinction, it may not be amiss to remark, between a parting with title as between the parties, and an acceptance and receipt relied upon to free the remedy from the statute's ban. Acceptance and receipt may be concurrent with the contract, or, if in pursuance of it, thereafterwards and before the suing of the action. *Bush* v. *Holmes*, 53 Maine, 417; *Bird* v. *Munroe*, 66 Maine, 337; *Ford* v. *Howgate*, 106 Maine, 517; *Beedy* v. *Brayman*, supra. It is not argued here that, prior to the fire, there was an acceptance and receipt. The acceptance of part of the potatoes, after the destruction of a large part of them by fire, may have operated retrospectively, in so far as the statute is concerned, and cast on the buyer the risk of their loss. *Townsend* v. *Hargraves*, 118 Mass., 325. Said Chief Justice Weston, in analogy: "The defendant had no right to take a single log, except upon the basis of the contract, which was entire." *Davis* v. *Moore*, 13 Maine, 424. But there is no need to decide this now.

As regards other methods of satisfying the statute, nothing was paid in earnest; and, unreformed, the note or memorandum was insufficient because, although it was signed by the party to be charged, that is, by the party against which it was sought to be enforced, (*Pendleton* v. *Poland*, 111 Maine, 563), still it did not contain the names of the vendor and his vendee. *Williams* v. *Robinson*, 73 Maine, 186; *Kingsley* v. *Siebrecht*, 92 Maine, 23.

As acceptance and receipt may be later than the contract of purchase, (*Bush* v. *Holmes*, supra; *Bird* v. *Munroe*, supra; *Ford* v. *Howgate*, supra; *Beedy* v. *Brayman*, supra), and as the note or memorandum, which usually is but evidence of the contract, (though sometimes it may be the contract, *Guild* v. *Eastern, etc. Co.*, 122 Maine, 514) may be made afterward (*Bird* v. *Munroe*, supra; *Wade* v. *Curtis*, 96 Maine, 309; *Weymouth* v. *Goodwin*, 105 Maine, 510), but preceding action, so, by parity or reasoning, a part payment may also follow the contract of sale before suit, in substitution of an act for words, on the one continuous transaction. "There is nothing in the statute," runs an opinion delivered in Massachusetts, though decision turned on another hinge, "which fixes or limits the time within which a purchaser is to . . . . . give something . . .

in part payment." *Marsh* v. *Hyde*, 3 Gray, 331. See, supporting that idea, *Thompson* v. *Alger*, 12 Met., 428; Browne, Statute of Frauds, Sec. 343; Williston on Contracts, Sec. 566; *Dallavo* v. *Richardson*, (Mich.), 96 N. W., 20.

It is not difficult, in the case in hand, to maintain the proposition of a deferred part payment. That the plaintiff and the defendant's agent contracted concerning the especial potatoes stands out distinctly. The plaintiff's mother was his agent to receive a payment from the party of the second part. Her request was for money on the potatoes. She may or may not then have known that her son, in advance of the sale to the defendant, had acquired title to the interest that her husband had had in a part of the potatoes. But this was inconsequential. She was her son's agent for the single purpose of receiving a payment. No act of hers alone could constitute her the agent of her husband. Nor could the defendant's agent by his sole act make her a different agent. Nor could the agents in concert make either of themselves the agent of a stranger to the transaction. That the defendant's representative knew full well on what potatoes she asked payment was shown by his own testimony. His doubtfulness was whether the oral bargain over the telephone was with the father or the son. That doubt the jury resolved. And it was the mother's knowledge that she was receiving, as the agent for her son, a payment in part for the potatoes, which, though sold, still lay in the cellar of the family home, awaiting segregation by the buyer. Those potatoes never were confused and erroneously identified in the mind of either agent.

Regardless, therefore, of how the one agent filled in the receipt, and of the manner in which the other signed it, the agents, all the while, within their respective scopes and in mutuality of intention, were concerned with but one contract,—that which the defendant's agent made with the plaintiff. Since it was consistent that a part payment in money should be made, and since the proceeds of the check, despite the irregularity of its drawing, were applied in payment, the conclusion is syllogistic, that there was a part payment in money for the potatoes.

The part payment averted the statute's interdiction. All other questions which were raised in the course of the trial must rate, for this reason, as of unimportance.

Motion overruled.
Exceptions overruled.

CHARLES P. WEBBER et als. vs. HERBERT AUSTIN.

Washington. Opinion July 26, 1923.

A deed conveying a dwelling and "land belonging thereto" embraces such land as is reasonably necessary to be used with the dwelling as such. A deed by an attorney with a written power authorizing him to convey "village property appertaining to the tanneries or necessary to their enjoyment," conveying village property, the legality of which is unquestioned for seventeen years, in absence of testimony pro or con, is supported by a presumption of fact that the land so conveyed did appertain to the tanneries or necessary to their enjoyment. A grantee is not estopped to dispute his grantor's title unless there remains in grantor some right, and there is some duty toward him in grantee. A deed subject to a mortgage and a deed from the mortgagee creates the same situation as a deed from one grantor of the land unmortgaged. Excepted premises not granted premises, hence grantee not estopped to deny title of grantor. Pleadings signed by counsel are presumed to be authorized only so far as they concern the case in which they are filed.

Where a deed describes as conveyed a dwelling and "land belonging thereto" it is a good conveyance notwithstanding the land is not described in writing, delineated on a plan or marked by monuments. The deed in such case includes the building and land used with it and reasonably necessary to be used with it as a dwelling.

Where an attorney having a written power authorizing him to convey "village property appertaining to the tanneries or necessary to their enjoyment" sells and deeds village property, and for seventeen years the legality of his act is unquestioned, in the absence of testimony pro or con, it may reasonably be presumed as a fact that the land so conveyed was land appertaining to the tanneries or necessary to their enjoyment.

To create an estoppel on the part of a grantee to dispute his grantor's title there must be some right remaining in the grantor and some duty towards him in the grantee. A grantee is ordinarily under no such obligation. A man who takes a warranty deed in fee is not estopped from denying the seizin of his grantor, or from alleging his want of title or the existence of incumbrances.

When a man receives a deed subject to a mortgage but otherwise unqualified and also obtains a deed from the mortgagee he is in the same situation as if he had received a similar conveyance of unmortgaged land from one grantor. A grantee so circumstanced is not estopped to dispute his grantor's title.

In the instant case the defendant has proved a better title than that of the plaintiff to a building and lot. As to the remainder of the demanded premises he has mere possession. He is not estopped to dispute the plaintiff's title thereto. He does dispute the title for several reasons, neither of which is valid.

While counsel in signing pleadings are presumed to be authorized so far as concerns the case in which such pleadings are filed, no such presumption exists when the same are sought to be used by other persons in other actions.

On report. A real action to recover land in the village of Grand Lake Stream, in Grand Lake Stream Plantation. Plea, nul disseizin. Title of plaintiffs is based upon two mortgages. Defendant claimed title by deed, and also by adverse possession. At the conclusion of the evidence, by agreement of the parties, the case was reported to the Law Court. Judgment for plaintiffs, as stated in the opinion. No damages.

The case is fully stated in the opinion.

C. B. & E. C. Donworth and Ryder & Simpson, for plaintiffs.

R. J. McGarrigle, F. B. Livingstone and W. R. Pattangall, for defendant.

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

DEASY, J. On report. Real action in which the plaintiff seeks to recover land in the village of Grand Lake Stream described in the declaration thus:—

"A certain tract of land situated on the easterly side of Grand Lake Stream, in the Plantation of Grand Lake Stream, heretofore township number three (3) in the first range of townships north of Bingham Penobscot Purchase, and known as Hinkley township, which tract of land is described as follows: Beginning on the westerly side of Church Street, at a point six hundred fifty (650) feet northerly of Milford road, and running westerly, at a right angle with line of said Church street, ten (10) rods; thence northerly, at a right angle, thirty-five (35) rods; thence easterly, at a right angle, twenty-six (26) rods; thence southerly, at a right angle, twenty-seven and one half ($27\frac{1}{2}$) rods; thence westerly, at a right angle, sixteen (16) rods; thence southerly, at a right angle, by westerly line of Church street, to place of beginning."

The plaintiffs' title is based upon two mortgages from Charles W. Clement, Trustee to John P. Webber, one dated May 7, 1887 for

forty thousand dollars, and the other dated December 13, 1887 for twenty-five thousand dollars, both mortgages having been assigned to the plaintiff Charles P. Webber and by him foreclosed. The other plaintiffs hold under deed from Charles P. Webber. These mortgages contain covenants in the usual form. The description in them includes the locus.

The defendant interposes three grounds of defense: (1) Title by deed. (2) Title by adverse possession. (3) That even if the defendant has acquired no title either by deed or adverse possession the plaintiffs have failed to make out a prima facie case entitling them to prevail over the defendants mere possession admitted by the declaration.

DEFENDANT'S RECORD TITLE.

The essentials of the defendants record title are these: Deed from Charles P. Webber (plaintiff) et al, dated August 14, 1896 running to the International Leather Co. Deed of same date from Charles W. Clement, Trustee, to the same grantee. A series of deeds in some of which the descriptions are ambiguous, but which are undoubtedly sufficient to transmit to the defendant the International Leather Company's title to the locus. The defendant as above indicated holds under a deed from the plaintiff signed by his authorized attorney.

This deed includes large tracts of land in various parts of Washington County. We are concerned only with this part of the description. "Also any and all other buildings of every kind whatsoever, and the several lots of land belonging to the same situated within the limits of the Village of Grand Lake Stream in said town of Hinckley as said limits are delineated in the Atlas aforesaid." (Colby's Atlas).

Whatever buildings and land belonging to the same in the village of Grand Lake Stream were in 1896 owned by Charles P. Webber passed by this deed to the Leather Company, the defendant's predecessor.

It fairly appears from the evidence that in 1896 there was one building, and only one, standing upon the land described in the writ; that this building, known as a camp, still stands and is occuped during a part of each year by an Indian family named Tomah.

From these facts it is obvious that in 1896 the plaintiff Charles P. Webber parted with his title to this camp and the land belonging thereto, by deed to the Leather Company through whom the defendant takes title. The plaintiff of course cannot recover the property which he thus conveyed.

The phrase "land belonging thereto" is vague, but is sufficient to convey a camp lot.

A copy from Colby's Atlas introduced in evidence indicates the camp to be upon Lot 12 in the section between Bates and Lake Streets. The surveyor however testifies that the camp is not in the place thus indicated. The court has no data from which it can describe the lot. But the camp and lot used with it and reasonably necessary to be used with it are owned by the defendant and must be excepted from any land which the plaintiff recovers.

The plaintiff raises this objection to the defendant's record title:— The deed to the Leather Co. was not signed by Charles P. Webber personally, but by his father John P. Webber as his attorney. The deed plainly includes the camp and lot, but the plaintiff says that his father had no right to so include it inasmuch as his power of attorney authorized the sale only of village property appertaining to the tanneries, or necessary to their enjoyment.

But Charles P. Webber allowed many years to pass after the deed was recorded before making the claim that his father had exceeded his authority. So many years indeed were permitted to pass that probably any claim against the estate of his father on account of selling property which (as the son now says) he had no right to sell has been barred by time.

In view of this long delay and the general situation as disclosed by the evidence we think that in the absence of direct testimony pro or con, we may fairly assume that in 1896 the camp and lot were village property appertaining to or necessary to the enjoyment of the tanneries.

ADVERSE POSSESSION.

The defendant urges that the plaintiffs have never had possession of the locus, or any part of it. This is immaterial. The plaintiffs do not claim title by possession, but by deed. There are and have been no buildings upon the land to which possessory title is claimed.

There is no evidence of fencing, cultivation or other use. The defendant utterly fails to show title by adverse possession.

This would end the case and the plaintiffs be entitled to recover the land claimed, except the camp and its curtilage but for the further claim that the plaintiffs have failed to produce evidence sufficient to overcome the defendant's mere possession admitted by the writ.

ESTOPPEL.

But the plaintiffs say that the defendant under the law cannot be permitted to dispute their title. They invoke the legal principle which is in the brief of their learned counsel thus stated:

"A party to an action seeking to sustain a title to real estate derived only from the adverse party will not be heard to deny that such adverse party ever had title."

But this principle does not apply to the pending case for the following among other reasons:

The only real estate to which the defendant has "derived title from the adverse party" is the camp and camp lot. He does not "deny that such adverse party ever had title" to the camp lot. To do so successfully would be to exchange his title by deed for mere possession which is the very feeble tenure under which he holds the rest of the land. To do so would be to "sit on a limb and saw himself off."

To the rest of the land he has only the prima facie right that is presumed from mere possession. If the plaintiffs can show a prior warranty deed or a prior seizin within twenty years, however brief and even without deed, they may lawfully dispossess him. But if they have no title he is not required to surrender possession to them, and the fact that he received a deed of the camp lot from one of them does not estop him from proving, if he can, that the plaintiffs have no title to land of which he received no deed from them.

Again the principle does not apply to transactions like that shown in the present case where the deed is absolute and unqualified, and no duty or obligation on the part of the grantee remains unperformed.

If it did so apply no grantee could maintain a suit upon his grantor's covenant for title. Such a suit is based upon a denial of the grantor's title.

Illustrations of persons to whom the principle properly applies are trustees, tenants, vendees sued for unpaid purchase money and grantees in deeds reserving easements, or imposing restrictions or conditions.

But in a transation like that involved in the present case, a simple and ordinary transaction where land is sold, paid for and transferred by a deed conveying an unconditional fee or even lesser estate, (*Robertson* v. *Pickrell*, U. S. Supreme Court, 27 L. Ed., 1049), the grantee is not estopped to dispute his grantor's title.

Among many supporting authorities are the following:—

"A grantee is not ordinarily estopped to deny his grantor's title." 10 R. C. L., 683.

"It is very generally held that by accepting a deed of conveyance in fee and going into possession a grantor is not estopped to deny the title or seizin of his grantor." 21 Corpus Juris, 1069.

"The vendee holds adversely to all the world and has the same right to deny the title of his vendor as the title of any other party." *Merryman* v. *Bourne*, U. S. Supreme Court, 9 Wall., 592.

"There must be remaining some right in the grantor and some duty towards him in the grantee in relation to the surrender of the estate. A grantee in fee is under no such obligation. A man who takes a warranty deed in fee is not estopped from denying the seizin of his grantor or from alleging his want of title or the existence of incumbrances." *Foster* v. *Dwinel*, 49 Maine, 49.

The plaintiffs' counsel cites another somewhat analagous principle stated in his brief thus: "When both parties claim under the same person neither of them can deny his right and as between them the elder is the better title and must prevail." But this principle is not applicable.

True the plaintiffs' title is claimed under Clement. True, also the defendant has a deed of the camp lot from Clement. Therefore "both parties claim under the same person" to wit, Clement. But the defendant does not deny Clement's title. He claims simply that Clement did not by valid deed convey his title to Webber.

Seeking for some ground of estoppel that will bar the defendant from showing, if he can, any weakness in the plaintiffs' title, the latter invokes this further well-settled and salutary rule: "A grantee is estopped to deny the validity of any mortgage to which his deed recites that the conveyance to him is subject."

The defendant's deed from Clement of the camp lot is made expressly subject to the Webber mortgages. But the defendant did not, and does not deny the validity of the Webber mortgages as incumbrances on the lot thus acquired. Recognizing their validity he procured a deed from the mortgagees on the same day upon which he received his deed from Clement.

When a man receives from both mortgagor and mortgagee unqualified conveyances with no covenant, conditions or duties on his part, he is of course in the same situation as if he had received a similar conveyance of unmortgaged land from one grantor. A grantee so circumstanced is not estopped to dispute his grantor's title. *Foster* v. *Dwinel*, supra. *Merryman* v. *Bourne*, supra.

See *Kentucky Union Co.* v. *Patton*, (Ky.), 69 S. W., 791. *Loeb* v. *Struck*, (Ky.), 42 S. W., 401. *Alcorn* v. *Brandeman*, (Cal.), 78 Pac., 343.

The defendant is not bound by estoppel. We have therefore to inquire into the grounds upon which he bases his challenge of the plaintiffs' prima facie title.

DEFENDANT'S OBJECTIONS TO PLAINTIFFS' TITLE.

(1) That the mortgages from C. W. Clement, Trustee, referred to above as the source of the plaintiffs' title are void because not consented to as required by the terms of the trust. Clement was by the instrument creating the trust empowered to sell, convey and mortgage the trust property or any part of it. But "before making any large sale of property" the instrument provides that the written consent of F. and P. should be obtained. It does not appear that F. and P. or either of them consented to the giving of the Webber mortgages.

It may well be doubted that to give effect to the intent of the parties, the word "sale" as used in the above quoted phrase should be held to include "mortgage." But, however this may be, under the circumstances of this case the required consent may be and should be presumed.

Thirty-five years have passed since the mortgages were given. Thirty years have elapsed since they were foreclosed. About twenty-seven years ago the International Leather Company, a corporation of which Clement was president, received a deed from the Webbers expressly recognizing their title under the mortgages. It does not

appear that either F. or P. or any cestui que trust has ever questioned the validity of the mortgages. If the cestuis should now attempt to defeat the mortgages they would probably be held barred by laches. As between the plaintiffs claiming under the mortgages and the defendant who (as to all but the camp lot) has mere possession it may well be presumed that the consent was given as required. *Freeman* v. *Thayer*, 33 Maine, 76. *Pejepscot Proprietors* v. *Ransom*, 14 Mass., 145. *Pope* v. *Patterson*, (S. C.), 58 S. E., 945.

(2) That the description contained in the mortgages is vague and insufficient. This point is plainly not well taken. The mortgages include the whole township of Hinckley in which the locus lies, subject, however, to certain exceptions. The case shows an express admission that "the exceptions in the deeds are outside the disputed premises."

(3) That the foreclosures are invalidated by errors. The court perceives no fatal errors in the foreclosure proceedings. But in any event such error would be immaterial. A mortgagee does not have to foreclose in order to maintain a real action to recover the mortgaged premises. The mortgagor may show in defense that the mortgage has been paid; or he may move for conditional judgment, but it is not a defense to show that there has been no legal foreclosure or even no foreclosure at all. *Hadley* v. *Hadley*, 80 Maine, 459. *Davis* v. *Poland*, 99 Maine, 348.

(4) The learned counsel for the defendant cites circumstances, only a part of which appear in evidence, tending, as he argues, to prove that the Webber mortgages have been paid and satisfied. Clearly, however, he has not sustained the burden of proving such payment.

(5) That the plaintiffs are estopped to assert title to the locus. In 1891 four years after the Webber Mortgages were given and about a week before their foreclosure, John P. Webber received from Chas. W. Clement, Trustee a warranty deed of Hinckley Township, excepting inter alia the part "that was set off and lotted off into the Village of Grand Lake Stream." Of course the locus is within this exception. This the defendant relies upon as creating an estoppel. But the situation presents none of the features of an estoppel. It is true that under certain circumstances (as stated above) a grantee may be estopped to dispute that the grantor at the time of the conveyance had title to the granted premises. But land excepted is not granted premises. Excepted land is in the same situation as is any

other land which the grantor owns and retains. That land is mentioned in a deed as excepted no more creates an estoppel against the grantee than if it were mentioned as a boundary.

(6) In 1905 one John W. Baker brought a real action against John P. and Charles P. Webber to recover a very large tract of land. In that action a disclaimer was filed, signed by the defendants (Webbers) by their attorneys. By this proceeding "the tract laid out and lotted out as the Village of Grand Lake Stream" was disclaimed. What happened to the case after the disclaimer was filed is not shown.

The parties disagree as to whether this is admissible on behalf of the defendant as an admission by Charles P. Webber. If admissible its only apparent effect is that it in some measure supports the defendant's theory that the Webber mortgages were unauthorized, or if authorized were paid and satisfied.

But the disclaimer is not competent evidence to prove an admission by Webber. While counsel in signing pleadings are presumed to be authorized so far as concerns the case in which such pleadings are filed, no such presumption exists when the pleadings are sought to be used by other persons in other actions. *Dennie* v. *Williams*, 135 Mass., 28. *Farr* v. *Rouillard*, 172 Mass., 303.

The defendant has shown title to the camp and lot by deed from the plaintiff Charles P. Webber. As to the rest of the land involved the defendant has mere possession. The plaintiffs having shown a title through (mortgage) deeds of grant containing covenants of warranty, are entitled to prevail.

Judgment must be rendered for the plaintiffs for the premises described in their writ excepting therefrom the camp now or heretofore occupied by the Tomah family, together with the land used with the camp and reasonably necessary to be used with it as a dwelling.

Judgment for plaintiffs as stated in the opinion.
No damages.

CHARLES P. WEBBER et als. *vs.* WILHELMINA G. MIXTER.

Washington. Opinion July 26, 1923.

The law in this case is the same and the facts substantially the same as in the case, Webber v. *Austin, the preceding case.*

The plaintiffs are entitled to judgment for the demanded premises except the building and lot as described in the opinion.

On report. A real action to recover land in the village of Grand Lake Stream, in the Plantation of Grand Lake Stream. Plea, nul disseizin. At the conclusion of the testimony, by agreement of the parties, the case was reported to the Law Court. Judgment for plaintiffs except the building and lot.

The case is stated in the opinion.

C. B. & E. C. Donworth and Ryder & Simpson, for plaintiffs.

R. J. McGarrigle, F. B. Livingstone and W. R. Pattangall, for defendant.

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

DEASY, J. In its legal aspects this case is precisely like the case of *Webber* v. *Austin* and the facts are in most respects the same.

In 1896 a house was standing upon the disputed lot. This house "with the land belonging to the same" was conveyed by the plaintiff Charles P. Webber to the International Leather Co. The defendant holds under the Leather Co. She has title to the lot thus conveyed. She shows no title to any other land. The case falls far short of proving twenty years of adverse possession.

In this case we think it possible to determine with a reasonable approximation of certainty what is covered by the term "land belonging to the same."

In Colby's Atlas a considerable part of the village of Grand Lake Stream is divided into house lots with generally uniform dimensions of about five by eight rods.

In 1896 a house was standing upon one of these lots (delineated upon the Atlas plan but not numbered) within the area involved in this suit. This house and land belonging thereto passed to the Leather Company by the plaintiffs' deed. The defendant claims under the Leather Co. The plaintiff was familiar with Colby's Atlas. In his deed to the Leather Company he five times referred to it. In conveying the house and land belonging thereto it is fair to presume that he meant the lot upon which the house stood as such lot was shown in the Atlas. But the defendant's deeds and apparently the writ cover only the northern fifty feet of the original lot. From the Atlas and the other evidence in the case we determine that there should be excepted in favor of the defendant, land thus described:

A lot, being a part of the section between Lake and Bates Streets as shown in Colby's Atlas, bounded westerly by Church Street, easterly by a line parallel with Church Street and eight rods easterly from the east line thereof, northerly by the north line of Lot 10 in said section, projected easterly, and southerly by a line parallel with the north line and fifty feet southerly therefrom. The rest of the land the plaintiffs are entitled to recover.

The plaintiffs should therefore have judgment for the land described in their writ, except the part thereof hereinabove described as conveyed by the plaintiff, C. P. Webber and through intermediate conveyances acquired by the defendant.

Judgment for plaintiffs as stated in opinion. No damages.

HENRY ALLEN, GEORGE L. ROBERTS AND CONVERSE D. MOODY

vs.

PERLEY A. HACKETT, JOSHUA E. CHASE AND EDWARD W. HOLBROOK.
FROST P. BAILEY *vs.* CHARLES K. DURGAN.
JOSEPH P. BAILEY et al. *vs.* GILBERT F. DUNNING et al.
MARGARET B. SKILLINGS *vs.* EDWARD M. PIERCE, In Equity.

Cumberland. Opinion August 10, 1923.

A majority of the selectmen may lawfully change the place of holding the annual town meeting. If the place designated is the only place of that name in the town, the omission to state that the place is in the town is not fatal. If an attested copy of the warrant is posted in a public and conspicuous place in the town the statute requirement is met. The acts of a constable de facto in posting an attested copy of the warrant are as valid so far as the public is concerned as though he were an officer de jure. A return by a constable to the town clerk not required. The fixing of the time and place of holding town meetings is left to the discretion of the selectmen. A town meeting called by a justice of the peace without an unreasonable refusal by the selectmen to call a meeting, is illegal.

In this case because for one hundred years annual meetings had been held in a certain building at Harpswell Center, it does not follow that all future annual meetings must be held there.

The majority of the selectmen could and did lawfully change the place of holding the annual meeting.

The warrant calling the meeting at Red Men's Hall was not defective because it did not state that the Red Men's Hall mentioned was located in the town of Harpswell. The record shows that there is but one Red Men's Hall in Harpswell, as there is but one Town House in Harpswell. One is as well known as the other.

There is no legal requirement that an attested copy of the warrant should be posted at the Town House in Harpswell. The statute requirement is met when the attested copy of the warrant is posted in a public and conspicuous place in that town.

Notice of a change of place of holding the annual meeting was not required to be posted at the Town House in Harpswell, or at any other place than that mentioned in the call for the annual meeting at Red Men's Hall.

Selectmen of towns, being agents for the public, and discharging duties of a municipal character, may act by majorities.

It is sufficient for the purposes of this case that the record discloses that the constable appointed by the two selectmen was in any event an officer de facto. His acts as such de facto officer were, in the instance named, valid acts.

The fixing of the time and place of holding town meetings has been and is a statute duty of the selectmen. Many of the statute duties of selectmen are left to their good judgment and discretion, and these include the naming of the time and place of calling town meetings.

A town meeting, called by a justice of the peace, without an unreasonable refusal by the selectmen to call a meeting, is illegal. The evidence discloses that the selectmen never refused, unreasonably or otherwise, to call a town meeting before they called the meeting at Red Men's Hall. There cannot be an unreasonable refusal without a request.

On appeal. Four actions by petition brought under the provisions of Sec. 87, Chap. 7, of the R. S., authorizing any person claiming to be elected to a municipal office to proceed as in equity, and have his right to the office in question determined by the court. These cases depending on the same facts were tried together. The parties are residents of the town of Harpswell and the controversy arose because a majority of the selectmen changed the place of holding the annual town meeting from the Town House at Harpswell Center to the Red Men's Hall at Orr's Island. A hearing was had upon petition, answer and testimony, and the sitting Justice rendered judgment in favor of each of the petitioners with costs and the respondents appealed. Petition sustained with single bill of costs in each case. Decree of single Justice affirmed.

The case is fully stated in the opinion.

David E. Moulton and Carroll W. Morrill, for petitioners.

Emery G. Wilson, for respondents.

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

HANSON, J. These petitions are brought under the provisions of Sec. 87, Chap. 7, R. S., and were tried together with the stipulation and agreement that the evidence taken in the first mentioned case shall be used to determine the decision of the other cases as named above.

The petitioners claim that they were respectively elected to the offices of (1) selectman, assessor and overseer of the poor, (2) treasurer, (3) tax collectors, (4) town clerk, of the town of Harpswell for the current year.

After a full hearing, the single Justice ordered and decreed "that the petitioners, Henry Allen, George L. Roberts and Converse D. Moody, were each elected and are each entitled by law to the respective offices claimed by them in their said petition, and judgment is hereby rendered in favor of each of said petitioners, with costs."

The cases are now before us on appeal.

All the parties are residents of the town of Harpswell. The town is composed of a section of mainland, known as Harpswell Neck, nine and one half miles long, with numerous islands on either side. On the west are several small islands occupied by cottagers and permanent residents. On the east are three large islands,—Great Island adjoining the mainland of Brunswick, Orr's Island adjoining the southerly end of Great Island, and Bailey's Island adjoining the southerly end of Orr's Island,—these three large islands making substantially a second neck of land lying parallel to Harpswell Neck proper. The Town House, so called, is located at Harpswell Center, approximately in the center of Harpswell Neck. Until September, 1922, all town meetings had been held in the Town House. The record discloses that the earliest meeting was there held in 1823.

The petitioners Henry Allen and George L. Roberts, together with Perley A. Hackett, one of the respondents, were duly elected and qualified and acting selectmen of the town of Harpswell for the year 1922. As such officers they met at their office in Harpswell on the twenty-first day of February, 1923, for the purpose of calling the annual town meeting. The record discloses that the subjects of the time and place for holding the annual meeting, together with the various details of the town business, were fully discussed, and the warrant was finally prepared on a typewriter by Mr. Hackett in the form as it appears in the record, signed by Henry Allen and George L. Roberts, two of the three named selectmen. Mr. Hackett, the chairman of the board of selectmen, declined to sign, because unwilling to agree with the others to call the annual meeting at Orr's Island, as provided in the warrant. The majority members proceeded with the warrant to the only constable in the town and requested him to post the same, as provided by law. The constable

declining to act, Messrs. Allen and Roberts, acting officially, appointed a constable, who qualified as such, and immediately posted an attested copy of the warrant and made his return thereon in due form. The annual meeting, thus called, was held at Red Men's Hall at Orr's Island, and the petitioners named were there elected to the various offices now claimed by them.

The respondents introduced a petition "to the Selectmen of the Town of Harpswell," signed by twleve legal voters of the town of Harpswell, and dated February 21, 1923, requesting the selectmen to call a meeting of the inhabitants of said town, qualified to vote in town affairs, "to act on such articles as may properly be brought before said meeting, said meeting to be called at the Town House at Harpswell Center in Cumberland County, State of Maine; March 5th at ten o'clock in the morning, and to continue until the business is completed."

It further appears of record that on February 22 the foregoing petitioners presented to Edwin E. Witherby, a justice of the peace, an application in writing as follows: "The undersigned, ten or more legal voters of the town of Harpswell in said county respectfully represent, that on the 22d day of February, 1923, application in writing by ten or more legal voters in said town, to wit, the same whose names are hereto appended, was made to the selectmen thereof, requesting them to call a meeting of the inhabitants of said Town, qualified to vote in town affairs, to act on the following articles, to wit, That Henry Allen and George Roberts, being a majority of said selectmen, unreasonably refused to call such meeting. Therefore the undersigned hereby request you to issue a warrant for calling a meeting of the inhabitants of said town, qualified as aforesaid, to act upon said articles."

The justice of the peace, on the twenty-third day of February, upon the grounds set out in the application, to wit, that the majority of the selectmen had unreasonably refused to call a town meeting, issued his warrant directed to Gilbert F. Dunning, requiring him in the name of the State of Maine, to warn and notify the inhabitants of Harpswell qualified to vote in town affairs to assemble at the Town House in said town on the fifth day of March, 1923, at ten o'clock in the forenoon, to act on the following articles: Then followed substantially the same articles as appear in the call for the annual meeting issued by the selectmen. Under this warrant a meeting

was held at the Town House on Harpswell Neck on March 5, 1923, and the respondents were thereat elected to the respective offices now claimed by them.

The reasons for appeal, in addition to a general objection to the decree of the single Justice, challenge the legality of the warrant, the posting, and return of the same, the qualification of the constable who posted an attested copy of the warrant, and the regularity of the annual meeting in the following particulars:—

1. Because the meeting was not called and held at the Town House where previous annual meetings had been held.

2. Because the place of holding the annual meeting was changed by a majority of the selectmen without cause or authority for so doing.

3. Because the warrant calling the meeting did not state the place of meeting to be in the town of Harpswell.

4. Because said warrant was not posted at the Town House in Harspwell.

5. Because notice of change in the place of holding the annual meeting was not posted at said Town House.

6. Because the warrant was not posted by a duly appointed and qualified constable of said town of Harpswell.

7. Because no return was made to the town clerk by the constable after posting the warrant.

8. Because said meeting was held at a place far distant from the Town House in Harpswell, without any action having been taken by the inhabitants authorizing such change of place.

The objections will be considered in the order named.

1. Because for one hundred years annual meetings had been held in a certain building at Harpswell Center, it does not follow that all future annual meetings must be held there. There might arise at any time a very good reason why meetings should be held elsewhere in the town. The record of the earliest meeting in the Town House shows less than eighty persons present and voting. At the meeting called at Red Men's Hall in September, 1922, and apparently without objection, at least seven hundred people were present. The testimony discloses that the Town House will accommodate about two hundred, while the Red Men's Hall has a very much larger capacity. In the premises the selectmen might well choose the larger building if in their judgment, and acting in good faith, they

should select the larger hall for the purposes of the annual meeting. The departure from the custom of a hundred years began not in February, 1923, but in September, 1922, when for obvious reasons it was necessary to seek a larger audience room to consider the business interests of the town. Augustus Merriam, called by the respondents, testified that the Town House was not at all times large enough for town purposes, especially since women began to take part in town affairs.

2. The majority of the selectmen could and did lawfully change the place of holding the annual meeting.

3. The warrant calling the meeting at Red Men's Hall was not defective because it did not state that the Red Men's Hall mentioned was located in the town of Harpswell. The record shows that there is but one Red Men's Hall in Harpswell, as there is but one Town House in Harpswell. One is as well known as the other. The notice of the meeting called at Red Men's Hall, without further designation, was as effective as one called at "the town house in said town." In the instant case every person in the town of Harpswell knew several days before March 5th, 1923, that two meetings had been called and would be held. The purpose of the warrant was to notify the inhabitants. That it served that purpose cannot from the record be doubted, and no inhabitant of Harpswell could have been misled.

4. There is no legal requirement that an attested copy of the warrant should be posted at the Town House in Harpswell. The statute requirement is met when the attested copy of the warrant is posted in a public and conspicuous place in that town, as was done in the instant case.

5. Notice of a change of place of holding the annual meeting was not required to be posted at the Town House in Harpswell, or any other place than that mentioned in the call for the annual meeting at Red Men's Hall. The legality of a town meeting for the choice of officers is sufficiently proved by showing that it was notified and warned in due form, by those claiming to act as the legally qualified officers of the preceding year. *Tuttle* v. *Cary*, 7 Maine, 426. In *Stevens* v. *Foss*, 18 Maine, 19, this court held that "the selectmen of towns, being agents for the public, and discharging duties of a municipal character, may act by majorities." Citing *Damon* v. *Granby*, 2 Pick., 345; *Deming* v. *Houlton*, 64 Maine, 262. "Words

giving authority to three or more persons authorize a majority to act, when the enactment does not otherwise determine." R. S., Chap. 1, Sec. 6.

6. The constable who posted an attested copy of the warrant for the annual meeting to be held at Red Men's Hall was appointed by a majority of the selectmen, and qualified by taking the oath of office, and such qualification was duly recorded in the records of the town of Harpswell, and he entered at once upon what he supposed was his duty. He posted an attested copy of the warrant in question, and made a proper return thereon. In addition to the irregularities claimed in relation to his appointment, it is urged that being a mail carrier, in federal employment, he was, under the law, and the regulations of the Post Office Department, ineligible for the office of constable within the State of Maine. It is unnecessary to discuss, and much less to decide, the various questions raised as to the legality of the appointment of the constable in the instant case, nor does the record furnish a safe basis for such action by the court. It is sufficient for the purposes of this case that the record discloses that the constable appointed by the two selectmen was in any event an officer *de facto*. His acts as such *de facto* officer were, in the instance named, valid acts. His acts in that capacity are as valid so far as the public is concerned as the acts of an officer *de jure*. His title cannot be inquired into collaterally. "The precise definition of an officer *de facto*," observes Bigelow, Chief Justice, in *Fitchburg R. R. Company* v. *Grand Junction and Depot Company*, 1 Allen, 557, "is one who comes in by the forms of law and acts under a commission or election apparently valid, but in consequence of some illegality, incapacity, or want of qualification, is incapable of holding the office." Opinion of the Justices, 70 Maine, 560; *Brown* v. *Lunt*, 37 Maine, 428; *Hooper* v. *Goodwin*, 48 Maine, 80; *Stuart* v. *Ellsworth*, 105 Maine, 527. The acts of an officer *de facto* are valid when they concern the public or the rights of third persons, and cannot be indirectly called in question, in a suit to which such officer is not a party. It is only in a suit against him that his right can be questioned. *Hooper* v. *Goodwin*, supra; *Bliss* v. *Day*, 68 Maine, 201; *Stuart* v. *Ellsworth*, 105 Maine, supra.

7. There is no statute requiring a constable to make a return to the town clerk. It is a custom generally observed so to do, but a failure to conform to that custom is not vital, and could not be

harmful in the instant case, as the warrant with the officer's return thereon was at the meeting, and appears of record, and no public interest was defeated by its retention by the constable. It further appears that the town clerk did not attend the town meeting at Red Men's Hall. Every town meeting, except the first meeting, and a meeting called by a justice of the peace, "shall be called by a warrant signed by the selectmen." R. S., Chap. 4, Sec. 2. "The warrant shall state the time and place at which the meeting shall be held, and in distinct articles shall state the business to be acted upon at such meeting, and no other business shall be there acted upon." R. S., Chap. 4, Sec. 5. "The warrant may be directed to any constable of the town, *or any person by name*, directing him to warn and notify all persons qualified to vote at such meeting, to assemble at the time and place appointed." R. S., Chap. 4, Sec. 6.

"Such meeting shall be notified by the person to whom the warrant is directed by posting an attested copy thereof in some public and conspicuous place in said town seven days before the meeting, unless the town has appointed, by vote in legal meeting, a different mode, which any town may do. In either case, the person who notifies the meeting shall make return on the warrant, stating the manner of notice, and the time when it was given." R. S., Chap. 4, Sec. 7. *Blaisdell* v. *Inhabitants of York*, 110 Maine, 514.

The eighth and last reason of appeal, that the selectmen called and held the town meeting at a place "far distant from the town house in Harpswell, without any action having been taken by the inhabitants authorizing such change of place," is in effect included in several of the reasons above dealt with.

The fixing of time and place of holding town meetings has been and is a statute duty of the selectmen. The *mode of calling* a meeting, as has been noted above, may be changed by a vote of the inhabitants in legal town meeting. Many of the statute duties of selectmen are left to their good judgment and discretion, and these include the naming of the time and place of calling town meetings.

The reason advanced as affecting the petitioners residing near the Town House, that Red Men's Hall is far distant therefrom, could very well be, and no doubt has been advanced by residents living on Orr's Island, only in reverse order,—that the Town House is far distant from an available building on that island, and barring the custom of a century, which was voluntarily interrupted before the

town meeting here involved, has equal force, in legal contemplation. The distance mentioned and the distribution of the inhabitants over its unusual territory has from the record, accounted for the election of one selectman from each of the larger islands, and one from Harpswell Neck, and for the appointment of two tax collectors to accommodate the east and west division of the town's larger subdivisions. So that the selectmen are called upon to use both judgment and discretion in the performance of their duties, as the law contemplates they should.

The meeting called by the justice of the peace. A town meeting, called by a justice of the peace, without an unreasonable refusal by the selectmen to call a meeting, is illegal. *Southard* v. *Inhabitants of Bradford*, 53 Maine, 389. The evidence discloses that the selectmen never refused, unreasonably or otherwise, to call a town meeting before they called the meeting at Red Men's Hall. There cannot be an unreasonable refusal without a request. *Sudbury* v. *Stearns*, 21 Pick., 148.

Perley A. Hackett, the chairman of the selectmen for 1922, and respondent in the first-named case, was present at the meeting of the selectmen when the warrant calling the meeting at Red Men's Hall was discussed. He took part in the discussion, and a very prominent part in writing the warrant, as above stated. They were in session the entire day. There was no undue haste. From his own testimony the session was harmonious, the proceedings regular, and the meeting closed with the business for the day accomplished. The meeting occurred on February 21st. On the twenty-second day of February the petition of ten or more voters was presented to him requesting the selectmen to call another town meeting at the same time, but at the Town House. He thereupon called the other selectmen by telephone and informed them of the existence of the petition and asked them "if they wished to take any action, and they said, 'no'."

The respondents rely upon the foregoing facts as the basis of the "unreasonable refusal" set up in their application to the justice of the peace, and urge the same in the brief of counsel. We cannot adopt the view thus urged. The selectmen by formal action had already called the annual meeting for 1923. So far as the record shows, the meeting and the act of issuing the warrant were in accordance with law. That there had been no refusal, unreasonable or

otherwise, before the twenty-second day of February, was brought out clearly by questions of the sitting Justice. Perley A. Hackett was asked by the court, "Q—When was that petition actually presented to you, was it on Wednesday the same day you made the warrant, or on the following day? A—The following day. Q—And although dated on February 21st, it was actually presented to you on the 22d? A—Yes, sir. Q—Up to the time of the presentation of this petition of ten voters, had the board of selectmen, of which you were a member and chairman of the Board, refused to call the town meeting,—I am not now referring to any particular place, whether Red Men's Hall or the town hall or any other place,—had the selectmen refused to call a town meeting? A—No, sir."

In view of this testimony, it clearly appears that there was no such unreasonable refusal to call a town meeting as is contemplated by the statute. This being so, the respondents have no legal standing in the instant case, and are therefore from the evidence without justification in the several claims set up by them.

Petition sustained with single bill of costs in each case.
Decree of single Justice affirmed.

GUSTAVE A. KIMBALL *vs.* FRANK O. THOMPSON et als.

Somerset. Opinion August 27, 1923.

In a suit on a replevin bond, if damages were not determined and recovered in the replevin suit, special or actual damages may be recovered. If the property is restored in damaged condition, or not restored at all, further recovery may be had. Depreciation if property is returned, and value of the property plus decline in market value if not returned, may be recovered. Counsel fees not recoverable. Expense of feeding and caring for cattle replevied not to be deducted from damages. Judgment to be for damages proved, and not for penal sum of the bond.

If damages are not recovered in a replevin suit they may be determined and recovered in a suit on the replevin bond.

Special or actual damage may be shown, to wit, damage caused by loss of profitable use. If no such loss is shown the damage recoverable may be measured by interest on the value of the property from the time it was taken. Decline in market value is also recoverable.

If the replevied property is returned in like good order and condition as when taken the foregoing are the only elements of damage. If, however, the property is restored in damaged condition, or not restored at all, further recovery may be had.

If the property is returned the recovery includes the amount of the depreciation between the taking and return. If not returned the plaintiff recovers the value of the property in assumed good condition plus decline in market value, if any, from the time of taking.

In a suit on a replevin bond counsel fees are not recoverable.

When cattle are replevied and ordered returned the expense of feeding and caring for them cannot be deducted from the damages otherwise recoverable.

Damages in a suit on a replevin bond being full and final, judgment should be for the amount of damages proved and not for the penal sum of the bond.

On report. An action by an attaching officer on a replevin bond. Certain potatoes, cattle, and an automobile were in the possession of the plaintiff as a deputy sheriff under attachments, and on November 15, 1921, they were replevied from him by the defendant, Frank O. Thompson, who had claims by mortgage on the property. The

replevin action was tried at the April term, 1922, and the property replevied was ordered returned. The defendants pleaded by brief statement performance of the conditions of the bond, that is, that the property was returned in like good order and condition as when taken. The question involved was the amount of damages recoverable. Judgment for plaintiff for $1,633.67 with interest on $1,573.74 from April 28th, 1922, and on $12.39 from date of judgment in replevin suit.

The case is fully stated in the opinion.

H. R. Coolidge, for plaintiff.

L. L. Walton, for defendant.

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

DEASY, J. On November 15th, 1921, the defendant, Thompson, having claims by mortgage upon personal property which the plaintiff, a deputy sheriff, had attached in suits against the mortgagors, replevied the attached property. The property consisted of thirteen head of cattle, one automobile and a quantity of potatoes. The replevin suit was tried at the April term, 1922. A nonsuit and return of the property were ordered. After its return, the suits of the attaching creditors having gone to judgment, the property returned was sold on execution. The net proceeds of such sale was but a small fraction of the amount of the judgments. The instant suit is an action of debt on the replevin bond.

The breach is not questioned. The only dispute relates to the amount of damages recoverable. The parties do not agree as to the measure of such damages, and the evidence bearing upon it is in conflict.

The bond is in the form prescribed by law. Statutes of 1821, Chapter 63. By its terms it is to be void if the obligor does three things: (1) Prosecutes the suit to final judgment. This has been done. (2) Pays damages and costs. (3) Returns and restores "the same goods and chattels in like good order and condition as when taken."

Even if the replevied goods are returned in perfect condition the plaintiff is entitled to recover damages for the taking, detention and costs. The amount of damages for taking and detention may be

assessed in the replevin suit. R. S., Chap. 101, Sec. 15. If as in this case it is not so done such damages may be determined and recovered in a suit on the bond. *Smith* v. *Dillingham*, 33 Maine, 387; *Thomas* v. *Spofford*, 46 Maine, 411; *Washington Ice Co.* v. *Webster*, 62 Maine, 363.

Special or actual damage may be proved, i. e., damage caused by loss of profitable use. *Washington Ice Co.* v. *Webster*, supra; *Stevens* v. *Tuite*, 104 Mass., 335.

If no such loss is shown the damage recoverable may be measured by "interest on the value of the property from the time it was taken." *Smith* v. *Dillingham*, supra; *Washington Ice Co.* v. *Webster*, supra.

Another element of damage recoverable is loss caused by decline in market value. Such loss the plaintiff in replevin must bear. *Washington Ice Co.* v. *Webster*, supra.

If the replevied property is returned "in like good order and condition as when taken" the foregoing are the only elements of damage. If, however, the property is restored in a damaged condition or not returned at all further recovery may be had. *Berry* v. *Hoeffner*, 56 Maine, 170; *Tucker* v. *Trust Co.*, (Mass.), 136 N. E., 62.

When in such case the property is *returned* the plaintiff is entitled to recover the amount of its depreciation between the taking and the return, whether caused by deterioration or market conditions. If *not returned* the plaintiff recovers the value of the property in assumed good condition at the date of judgment in the replevin suit and in addition the depreciation, if any, in market value between the time of taking and the said date of judgment. *Maguire* v. *Amusement Co.*, 205 Mass., 73.

Thus the defeated defendant in replevin having, not tortiously indeed but in a broad sense wrongfully, intermeddled with the plaintiff's possessions loses by decline but does not gain through increase in the market value of the property.

The plaintiff claims also the right to recover in this action counsel fees incurred both in the replevin suit and in the action on the bond. But the statute does not contemplate such recovery. The statutory form of bond does not so provide. It stipulates for the payment of "such damages and costs as the defendant shall recover." The term "costs" does not include counsel fees. *Burrage* v. *Bristol*, 210 Mass., 299.

The phrase "damages that the defendant shall recover" does not include such fees. It clearly means "damages for the taking" recoverable by the defendant in the replevin suit. R. S., Chap. 101, Sec. 11. Counsel fees are no more recoverable in a replevin suit than in a suit on a promissory note.

R. S., Chap. 101, Sec. 13 does not authorize recovery of counsel fees. That section relates to the application of money that has been recovered. It does not go into operation in any given case until after recovery. It regulates the settlement between the officer and the execution creditor. It does not apply to the relation between officer and obligor.

Section 18 does not authorize such recovery. This section grants no new rights. It provides simply that existing remedies on the replevin bond shall remain in force, notwithstanding an unavailing resort to writs of return and reprisal. See *Maguire* v. *Amusement Co.*, supra; *Firestone* v. *Aetna Co.*, 123 N. Y. S., 107.

Turning now from general principles to the case at bar. In the replevin writ the property is valued at fifteen hundred dollars. This estimate as against Thompson is prima facie correct. *Barnes* v. *Bartlett*, 15 Pick., 79. But it is not evidence against the plaintiff Kimball for he had no voice or part in making the estimate. *Thomas* v. *Spofford*, supra; *Kafer* v. *Harlow*, 5 Allen, 348; *Caldwell* v. *West*, 21 N. J. L., 411.

The evidence, especially that relating to the quantity of merchantable potatoes taken in November and the condition of those returned in April is conflicting and unconvincing. It would be unprofitable to extend this opinion by an analysis of the testimony. Upon the whole we think that the property taken was at the time of taking worth $1,750. This indeed seems to have been Thompson's final estimate, for when required to give bond in double the value of the property to be replevied he made his bond in the penal sum of $3,500. This figure is also fair to the plaintiff.

What was the value of the property when returned? About ten days after its return the property having been seized on execution was sold at public auction. The return shows that the expense of keeping and selling the property exceeded the gross receipts of the sale. But to reach this result there was included $37.50 received for three cows sold at auction but which were not replevied. On the other side of the account is a charge of $252.45 for care of these three

cows. Making the necessary correction, the net proceeds of the sale of the property which had been replevied and returned was $176.26. This was the result of a public sale of which due notice was given and which the defendants had an opportunity to attend. The amount received may fairly be taken as at least prima facie evidence of the value of the property when returned.

The difference between $1,750, the value of the property taken, and $176.26, the value when returned, is the amount of depreciation for which the defendant is responsible. The difference is $1,573.74.

But the defendants say that from this should be deducted the expense of feeding and caring for the stock when held on the replevin writ. This deduction cannot legally be made. When property is taken in replevin to which, as it turns out, the defendant has the right of possession, no tort has been committed. The proceeding is not tortious because under legal process. But the owner's property has been taken away from him against his will and detained without his consent. Under such circumstances it would be unjust and illogical to compel him to pay for its care and keeping. This is entirely unlike the case of the attachment of A's property for A's debt; it is more nearly analagous to the case where A's property is attached for B's debt.

Again, it is claimed that so far as the depreciation was the result of the freezing or decaying of potatoes it was inevitable, without fault on the part of the defendant, and for this he should not be held responsible.

It is true that it has been held in this jurisdiction that a defendant in a suit on a replevin bond may defend on the ground that the replevied property was destroyed by inevitable causes and without his fault. *Melvin* v. *Winslow*, 10 Maine, 397; *Walker* v. *Osgood*, 53 Maine, 423.

These cases seem to be opposed to the weight of authority in other jurisdictions. 23 R. C. L., Page 906. Without now questioning the rule as established by these Maine cases we hold that he who would invoke it must make out a clear case of vis major. The evidence does not show that case to be within the rule.

The depreciation as above stated is $1,573.74. To this should be added damages for detention. No special damage from loss of use having been shown, the interest on the value from the taking to the return may be adopted as the measure. This is $47.54. There

must be added $12.39, the cost of the replevin suit. The total is $1,633.67. Interest should be allowed on $1,573.74 from the date of return, April 28th, 1922, and on $12.39 from the date of judgment in the replevin suit.

Following the reasoning of Peters, C. J., in *Corson* v. *Dunlap*, 83 Maine, 35, we hold that R. S., Chap. 87, Sec. 51 does not apply. The damages recovered in this case being full and final there is no occasion to have judgment entered for the penal sum of the bond.

Judgment for plaintiff for $1,633.67 with interest on $1,573.74 from April 28th, 1922 and on $12.39 from date of judgment in replevin suit.

SHAWMUT MANUFACTURING COMPANY, Appellant,

vs.

TOWN OF BENTON.

Kennebec. Opinion August 30, 1923.

Contemporaneous and subsequent interpretation by those in interest, where there is uncertainty in the meaning of a town's charter, may assist in construing it, but an erroneous recognition of the location of a town's boundary line, though universal and long continued, must yield to the authority of the act of incorporation, for the Legislature can establish and change the boundaries of towns at will. An incorporated territory bounded by an innavigable stream of water ordinarily extends to its thread. A taxpayer whose property is overrated in the sense of an overestimation, or whose property, intentionally, is assessed by the taxing officials at its full and true value, while the property of others in the same class likewise is assessed at an undervaluation, has a remedy by abatement.

Towns are without power to alter boundary lines. They cannot enlarge their extents or taxing jurisdictions by prescription.

The Legislature, in incorporating the present town of Benton, defined the central line of the Kennebec river as that town's western limit.

Water power, in and of itself, is not taxable.

A petitioner for an abatement of taxes must show that his property is overrated; that the valuation, having reference to just value, is manifestly wrong, or that an unjust discrimination, denying the equal protection of the laws, exists. Otherwise, as in this case, his petition will be dismissed.

On report. The appellant, owning a dam across the Kennebec river, between the towns of Benton and Fairfield, and the bed of the river on which it is erected, and the land against which it abuts, petitioned the assessors in Benton for an abatement of taxes assessed in that town for the year 1920. The petition was denied and an appeal entered to the commissioners of Kennebec county. From the adverse decision of the county board the case was brought by further appeal to this court at nisi prius, where these points were in dispute: that the easterly bank of the river, and not the river's thread, is Benton's western corporate boundary; that the appellant's property is overrated in the sense of a rating above its true value; that because of an unjust discrimination, by scheme of the taxing officers, in deliberately assessing its property at full value, while the other property in the town is assessed at a less measure, the equal apportionment clause of the Constitution of Maine is infringed, and, in violation of the Fourteenth Amendment of the Federal Constitution, the equal protection of the laws is denied. None of the issues being sustained by the appellant in the Law Court, for decision by which both the facts and the law were reserved, the appeal was dismissed with costs.

The case is stated at length in the opinion.

Weeks & Weeks, for appellant.

Harvey D. Eaton, for appellee.

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

DUNN, J. An appeal under R. S., Chap. 10, Secs. 79 and 80, first, to the commissioners of Kennebec county, and from the adverse decision of that board to this court at nisi prius, from the denial by local assessors of a petition for an abatement of taxes assessed in 1920. The Justice below reserved the case, both of fact and law, for final judgment by the Law Court.

The issue was broadened, by mutual consent of the parties, beyond the allegations of the petition and the reasons of the appeals, to include the enquiry of whether all the assessed property was within the territorial limits of the town of Benton. The case being here on report, with technical pleading no longer a matter of concern, this new question has been considered. A study of the evidence fails to sustain the assertion that the assessors mistook the true and legal position of Benton's western boundary line. If in passing there be granted, what it is not necessary at present to decide, and that is that the river boundary of the original township of Clinton, from which Sebasticook, now called Benton, was set off into a separate town, was laid down by Massachusetts at the bank, and not in the middle of the river, then any dominion over the land between the bank and the river's thread was never placed elsewhere by that Commonwealth, except that eventually the title thereto was vested in our own State of Maine. The act incorporating Clinton is numbered 62 in the Massachusetts Laws of 1794-5; that incorporating Sebasticook, Chapter 40, Maine P. & S. L. 1842; and that changing the name to Benton, Chapter 311, Maine P. & S. L. 1850.

Towns are without power to alter boundary lines. They cannot enlarge their extents or taxing jurisdictions by prescription, however extended in time. *Eden* v. *Pineo*, 108 Maine, 73. If uncertainty attach to a charter's meaning, contemporaneous and subsequent interpretation by those in interest might aid in construing that which ink and paper were made to say. But mere erroneous recognition of the location of a town's boundary line, in spite of universal but mistaken supposition that the accepted place was the right one, cannot be superior and paramount in dignity and importance to the authority of the act incorporating the town. This, however, does not affect the case in hand one way or the other, since no ambiguity lies concealed on its page.

Commissioners, appointed in appropriate judicial proceedings, can ascertain and fix lines in dispute between towns, "and such lines shall be deemed in every court and for every purpose the dividing lines between such towns." R. S., Chap. 4, Sec. 136; *Winthrop* v. *Readfield*, 90 Maine, 235. That was done in 1896 as regards the line for a part of the way between Benton and the town of Fairfield on the opposite side of the river, but the report of the commissioners depends so much upon localities that it is not easy to make it

intelligible without reference to a plan which is not in evidence; nor is it necessary to do so, because the line so determined is not involved.

If Massachusetts delimited Clinton's bound at the river's bank, it does not necessarily follow that Sebasticook's line was drawn there too. Whether it was or not depends upon a construction of the act of incorporation, for the Legislature may establish and change the boundaries of towns at will. The descriptive part of the act or charter in question is thus: All of Clinton lying south and east of a dividing line, "beginning on the Kennebec river, in the centre line between L 2 and K 1," thence to and up the Sebasticook river, "in the centre thereof," to the east line of Clinton, shall be the new town. A punctuation point, a comma inserted after the word "line" and before the word "between" would have made it readily possible for the reader's eye to ken, at a single glance, where distinctive meaning came into play: "beginning on the Kennebec river, in the centre line (,) between L 2 and K 1." L 2 and K 1 are inferred to refer to a dividing line between lots delineated on a plan which mention made a part of the description, and a lot-dividing line scarcely could be perceived to have a center.

Ordinarily, where a stream of water, above the tide, and therefore not technically navigable, constitutes the boundary line of an incorporated territory, the thread of the stream is the true boundary line. *Perkins* v. *Oxford*, 66 Maine, 545. There is nothing to take this case out of the general rule. By implication of law, in the absence of negativing words, the side lines of a riparian proprietor, whose estate is bounded by an innavigable river, are extended from the termini on the margin, at right angles from the stream, to include one half of the bed of the river. A description "on" the stream carries likewise. *Lowell* v. *Robinson*, 16 Maine, 357; *Pike* v. *Munroe*, 36 Maine, 309; *Wilson* v. *Harrisburg*, 107 Maine, 207. Township boundaries are construed in like manner. *Perkins* v. *Oxford*, supra. Not only was Sebasticook's line begun "on" the river, but it was begun "in the centre line between L 2 and K 1"—the very centre line which marked the easterly boundary of the domain of the adjoining municipality of Fairfield, at which the Legislature was free to begin. The line was run to another river's centre and up that river to the old town's easterly exterior. All the territory south and east of that line, and by necessary conclusion west and north of other lines, became Sebasticook. The central line of the Kennebec river was made that town's western limit.

To pursue this phase a step further: Thirty-one years afterward Bunker's Island was taken from Sebasticook, or Benton as it had come to be known, and made a part of Fairfield. Note, in Chapter 390, P. & S. L. 1873, this language: "All that part of the town of Benton lying westerly of (a line) beginning in the west line of Benton in the middle of the Kennebec river," etc. In the knowledge of this evidence any doubt as to the situation of the river boundary of Benton is set at rest. The reverse of the contention that the bank is the confine is conformable to fact. Changed only by the set-off of the island, a thing inconsequential in these proceedings, the line remains as it was established.

So thus far, an abatement, if it is to be had, must be posited upon a showing that the petitioner, being liable to assessment, is overrated in the sense of an overestimation; of a rating of its property above its true value, *Penobscot, etc., Company* v. *Bradley*, 99 Maine, 263; of being valued too highly, Webster's Dict.; "Sir, you o'errate my poor kindness," Shak., Cymbeline, 1, IV, 40.

The appellant owns a dam across the Kennebec river, between the towns of Benton and Fairfield, together with the bed of the river on which it is erected, and the land at either end against which it abuts. This dam, built of concrete in 1912-13, creates a head, in an average flow of twenty feet; throwing back the water for a distance of ten miles, and draining a watershed four thousand two hundred and fifty square miles in area. The banks of the river are high and steep some of the way, though "in places they are a little shoal," "but usually higher than the ordinary water level," consequently the flooding is comparatively little. The development, when the river is neither appreciably shrunken by droughts nor swollen by freshets, approximates 6,000 horse power. The energy finds application in generating electricity on the western or Fairfield side, none being used in Benton.

The Benton assessors set the valuation at $75,000.00, on "that part of (appellant's) privilege water right and dam in Benton bounded as follows: on the north, east and south by land of the Company . . . on the west by the Fairfield town line."

The obligation of showing adequate reason for changing the existing order of things rests upon the appellant. It must prove enough at least to make a prima facie case before it can be entitled to have its appeal sustained. There is not, in the record, any evidence

showing that the property stands of valuation on the assessment book for more than its actual worth. There is evidence that the cost of building the Benton part was, in round numbers, $50,000.00, without the worth of the land on which it is built, and the water-covered land behind it, and the bank next it. Witnesses say that, since its building, the structure has appreciated rather than depreciated in value, due to the hardening and strengthening of the cement, the attendant element of indefinite life, and the actual demonstration of the dam's capacity to hold in check the mighty waters of the severest floods ever known to fall upon the basin supplying its reserve of stored force. And there is evidence that increases for labor and materials would make the cost of reproduction double that originally incurred.

It appears, too, that heretofore the official valuation was of lesser amount. But, being inadmissible, this must be allowed to flow by, like surplus water through the dam's wasteweir and over its crown. Boards of assessors come into existence annually in the several towns in virtue of a delegation of choosing power by the Legislature. These boards go on in the discharge of duty as each sees it to do amid changing conditions. And valuations, in resemblance to values, are chameleon-like things, varying from time to time, with regard to the objects about them, in the estimation of different officials. Once a board has fixed its valuation, its saying is as a story that is told, a chapter that is closed; if not unsaid after the manner of the statute.

Water power, as has been argued, in and of itself, is not taxable. The reason why is that the riparian proprietor has no property in the water which runs by his land. He has, as incident to his ownership, the right of interrupting and using the water, for needed and useful industries and otherwise, while it passes along; and of taking thereby all the profit, utility, and advantage which it may produce, without prejudice to the rights of other owners, above or below, unless he has acquired a superior right. In a word, he has the correlative rights and duties of a usufructuary.

Insistence that the words "water right" in the record of the assessment are a substitute expression for "water power" does not find assent in the mind addressed. Difficulty is continually experienced in so expressing an idea that the language implies no more and no less than just what is intended. Unstudied or colloquial

speech, the intention of which the man in the street knows, often suggests meaning in more vividness and force than literal statements could. The effectiveness of such expressions is the aptness of the relations between things which they mark.

That which the assessors wrote is interpretable: We are levying, not simply a tax on a dam by a dam site, but, additionally, a tax on the site by the dam, the "privilege water right," unoccupied at the present time, but with potential possibilities, attributable to advantageous position, affecting just and assessable value, in the view of sovereignty's taxing power. So is the law of the ruling cases. *Saco, etc., Company* v. *Buxton*, 98 Maine, 295; *Penobscot, etc., Company* v. *Bradley*, cited before. Plain common sense.

But the appellant argues further. It advances that, not as a result of mere error of judgment, but deliberately, a system of valuation was adopted, by those whose duty it was to make the assessment, which was designed to operate unequally and to violate the fundamental principle of uniformity.

The charge is grave. Were it proved it would distinctly spell unworthiness and wrong; it would disclose an intentional ignoring by the local officers of the constitutional provisions which they swore that they would uphold; it would tend to dim that justice which is the end of government.

"Every person elected . . . to . . . office under this State, shall, before he enter on the discharge of the duties of his place or office, take and subscribe the following oath or affirmation: 'I——do swear, that I will support the Constitution of the United States, and of this State, so long as I shall continue a citizen thereof. So help me God'. 'I——do swear that I will faithfully discharge, to the best of my abilities, the duties incumbent on me as . . . , according to the Constitution and laws of the State. So help me God'." Con. of Maine, Art. IX, Sec. 1.

"No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." U. S. Con., Amend. XIV, Art. 1.

"All taxes upon real . . . estate, assessed by authority of this State, shall be apportioned and assessed equally, according to the just value thereof. . . . ." Con. of Maine, Art. IX, Sec. 8.

Constitutional provisions are not self-executing; they have to be accomplished through human agency, imperfect as the means may be. But, fallible and finite though these agents are, there must be respect by them for the Constitutions, else they would have a government of law run riot.

The principle of equality, as courts and economists have observed, is cardinal in taxation. It requires a fair and equitable distribution so that each taxpayer shall contribute in proportion to his property. "Uniformity in taxing implies equality in the burden of taxation, and this equality of burden cannot exist without uniformity in the mode of the assessment, as well as in the rate of taxation." *Cummings* v. *National Bank*, 101 U. S., 153, 25 Law Ed., 903, a case holding that equity will interfere to restrain the operation of an unconstitutional exercise of power. Our own court has said that fraudulent action by assessors may be so corrected. *Bath* v. *Whitmore*, 79 Maine, 182, 186.

There are two ways, it is the consensus of judicially sanctioned view, in which a taxpayer may be wronged in the levying of taxes: he may be assessed on an excessive valuation, or he may be taxed on the basis of the just value of his property, while, by scheme of the taxing officers, the other property, in like situation, in the same jurisdiction is assessed at less than the just value thereof. When this is done, the central principle of equality, both in respect to the subject-matter and the ratio of taxation, is disregarded. If property is assessed excessively, the wrong may be righted easily. Where assessors knowingly and meaningly assess one property at its just value and the other property of the same class at less than its just value, there is a wrong. And if the wrong were not redressed there would be a denial of justice. Cases holding that a taxpayer so circumstanced cannot be relieved may be found quickly. But the other way around is best.

Under the topic of assessments at full value when valuations generally are less, an editor in L. R. A. well wrote, in volume 60, at page 368:

"It is true in a sense that a taxpayer whose property is assessed for taxation for no more than it is fairly worth suffers no wrong. Yet, if his neighbors are habitually and continually assessed upon their property at less than it is worth, it is plain that he pays more than his proportion of taxes, and that the rule of equality and

uniformity of taxation is violated. . . . Whenever it can be established indisputably by competent and sufficient evidence that a given assessment upon an aggrieved taxpayer's property has been laid upon a distinctly higher valuation than the assessments . . . upon the property of the taxpayers in general, and that this discrimination was intentional, ... the courts will intervene to reduce or annul the tax to the extent necessary to place the complaining taxpayer upon a plane of equality with others in his class."

In the case of *Sunday Lake Iron Company* v. *Wakefield*, 247 U. S., 350, 62 Law Ed., 1154, quoted approvingly and stiffened by the citation of analogous cases in *Sioux City Bridge Company* v. *Dakota County*, (announced January 2, 1923) 260 U. S., 441, 67 Law Ed., . . ., the Supreme Court of the United States said:

"The purpose of the equal protection clause of the Fourteenth Amendment is to secure every person within the State's jurisdiction against intentional and arbitrary discrimination, whether occasioned by express words of a statute or by its improper execution through duly constituted agents. And it must be regarded as settled that intentional systematic undervaluation by state officials of other taxable property in the same class contravenes the constitutional right of one taxed upon the full value of his property."

In Nebraska, (182 N. W., 485, the Sioux City Bridge Case below), the Supreme Court of that State held that, assuming the proof of discrimination, the sole remedy of the complaining taxpayer was "to have the property assessed below its true value raised, rather than to have property assessed at its true value reduced." Said Chief Justice Taft, oppositely, in delivering the opinion of his court, on certiorari to the Nebraska court:

"Such a result is to deny the injured taxpayer any remedy at all because it is utterly impossible for him by any judicial proceeding to secure an increase in the assessment of the great mass of underassessed property in the taxing district. This Court holds that the right of the taxpayer whose property alone is taxed at 100 percent of its true value is to have his assessment reduced to the percentage of that value at which others are taxed even though this is a departure from the requirement of the statute. The conclusion is based on the principle that where it is impossible to secure both the standard of the true value, and the uniformity and equality required by law, the latter requirement is to be preferred as the just and

ultimate purpose of the law." "There can be no doubt," remarks the Chief Justice earlier, "of the view taken by the federal courts in the enforcement of the uniformity clauses of state statutes and constitutions and of the equal protection clause of the Fourteenth Amendment."

The law is settled. Now for the facts: The advantage, in the beginning, is with the taxing authorities. They are public officers and what they say, oath-guided, is much set by. Their task is beset by difficulties at best. The system of taxation which it is for them to apply, like every other taxing method yet devised, is incapable of complete and perfect administration. Exact proportion or equality is impossible. There is no iron rule by which the public burden may be apportioned and imposed in equal exactitude. Burdens sometimes are made to rest unevenly, careful purpose otherwise notwithstanding. The proving of a mere error of human judgment, as has been indicated, will not support a claim of overrating; "there must be something more—something which in effect amounts to an intentional violation of the essential principle of practical uniformity." *Sioux City Bridge Company* v. *Dakota County.* (U. S.) supra.

As tending to show such premeditated transgression the appellant offers the testimony of two witnesses. The statement of one of them is so general and indefinite as to be without any convincing weight. The other, the register of deeds in the county, a resident and taxpayer of the town of Benton, sometime an assessor there, and more or less frequently buying and selling real estate therein, is more specific. From a registry search he selected, not all the transfers of Benton real estate by deed in 1920, but fourteen different lots. One of these he himself bought; he knew the selling price of another; both apparently above the assessment. Regarding the rest, using the revenue stamps on the individual instruments of conveyance as the bases of his estimates, each of these lots sold for more than the assessors' rating. And he had examined the assessment book at Benton. But the testimony of this practical, intelligent man does not show a distinction against the appellant's property. It does show that, in the opinion of the witness, all the taxable property in Benton is rated at from 55 to 60 per cent. of its just value; in sum, that what is owned there, and by whomsoever owned, meets taxability correspondingly undervalued. These are the questions

which were put to and the answers that were made by the witness, after he had spoken about examining the record of the fourteen lots:

Q. "Have you looked over the valuation book for the town of Benton for the year 1920?"

A. "I have."

Q. "In your opinion what is the percentage used in assessing the property in relation to its value?"

A. "Between 55 and 60 percent, that would be my judgment."

THE COURT: "Have you told the assessors about it?"

A. "I have not told anybody, only as I have testified before the commissioner. I was asked to go over the list on the books and also go over the assessors' books."

If it be that he meant his testimony to relate to the fourteen lots alone, it is enough to say in dismission, that, were the testimony otherwise sufficient, which is far from being suggested, the witness at no time differentiates the valuation of the appellant's property; he leaves it with a valuation comparable with that of all the other real estate, and bearing no more tax than it ought.

The remedy of the overvalued property owner is a broad and comprehensive enquiry which is not to be restricted by arbitrary and immutable rules inconsistent with substantial justness. But a petitioner for an abatement must make his case; he must show that his property is overrated; that the valuation, having reference to just value, is manifestly wrong, or that an unjust discrimination, denying the equal protection of the laws, exists; he must establish indisputably that he is aggrieved. This appellant's case does not so attain.

The appeal is dismissed. Costs must follow. R. S. supra.

Ordered accordingly.

JOSEPH COUTURE *vs.* JOHN GAUTHIER.

Oxford. Opinion September 7, 1923.

A lack of certainty in a general allegation of negligence in an action for personal injuries is a matter of form and not of substance and should be raised by a special demurrer or by motion to make more definite and certain.

In case of a general allegation of negligence in an action for personal injuries, any lack of certainty in this respect is a defect of form and not of substance and must be taken advantage of by a special demurrer or by a motion to make more definite and certain.

A general allegation of negligence must, therefore, be held good on general demurrer.

On exceptions. An action to recover damages resulting from alleged negligence of the defendant in operating his automobile on a certain highway, where the plaintiff was a lawful traveller, colliding with the plaintiff and injuring him. The defendant demurred generally to the declaration contending that it was not sufficiently definite and certain in setting out the cause of action. The demurrer was overruled and defendant excepted. Exceptions overruled.

The case is stated in the opinion.

Alton C. Wheeler and Frank P. Blair, for plaintiff.

Aretas E. Stearns, for defendant.

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

WILSON, J. An action on the case to recover damages alleged to have been caused by the negligent operation of the defendant's automobile. The declaration alleges, and in general terms only, that the defendant negligently and carelessly operated an automobile upon and along a certain highway; that the plaintiff was then and there a lawful traveller thereon and in the exercise of due care on his

part; that in consequence of the negligent and careless operation of the automobile by the defendant it collided with the plaintiff and injured him.

The defendant filed a general demurrer which was overruled, and the case is before this court on defendant's exceptions. The defendant contends that a general allegation of negligence is insufficient and relies upon *Aldrich* v. *Boothby,* 114 Maine, 318; *McGraw* v. *Paper Co.,* 97 Maine, 343, and *Boardman* v. *Creighton,* 93 Maine, 17.

The last two cases related to defective machinery and it did not appear certain in either case in what particular the machine was defective, nor was there any sufficient allegation that the injuries alleged to have been received were in fact due to the defective part or parts. In the case of *Boardman* v. *Creighton* it did not appear from the facts alleged what, if any, duty the defendant owed to the plaintiff.

In actions for the negligent driving of teams upon the highway it has never been deemed necessary to specify in what particular the defendant was negligent. Chitty on Pl., Vol. II, 16th Ed. Page 574; Oliver's Precedents, Pages 397-400. There may be more reason in actions for alleged negligence in the operation of automobiles than in the case of horse drawn vehicles why the plaintiff should set forth in what respect the defendant was negligent,—whether for operating his automobile on the wrong side of the road, or for failing to give warning of his approach, or for operating it at an excessive speed,—in order that the defendant may be appraised of what he has to meet, and we think it the better form of pleading so to do; but we deem a lack of certainty in this respect a matter of form and not of substance, and hold that, at least, in this class of cases, a general allegation of negligence must be held good upon general demurrer. Lack of certainty and definiteness in this respect must be taken advantage of by special demurrer or by motion to make more definite and certain. 14 Ency. of Pl. and Pr. 334, 340, Par. 13; 6 Ency. Pl. and Pr. 272; 20 R. C. L., Page 176, Sec. 145; 59 L. R. A., 209, Note; 21 R. C. L., Page 526, Sec. 88; Page 600, Sec. 146.

The defendant having filed a general demurrer in the case at bar, the entry will be,

Exceptions overruled.

THOMAS S. FLAHERTY *vs.* LOUIS HELFONT.

Cumberland. Opinion September 20, 1923.

A bailor is not responsible to a third person for the negligent use by his bailee of the chattel bailed. Where a bailment is by contract for a specified period, the bailee, unless he violates the conditions of his contract, has the right of possession during that period, even against the bailor. The relation of master and servant exists whenever one person stands in such a relation to another that he may control the work of the latter and direct the manner in which it shall be done.

In cases of substances or instrumentalities, whose dangerous qualities are latent and not obvious, manufacturers, vendors or distributors who intentionally or negligently fail to inform persons dealing with them of such qualities, or with greater reason misrepresent the same, are, notwithstanding want of privity, liable for injuries caused thereby to persons whose exposure to the danger could reasonably be contemplated.

Automobiles are not ordinarily such imminently dangerous instrumentalities, but may become so through latent defects in brakes or steering gear, or in other respects.

A third party between whom and the person sought to be charged there is no privity, must in order to recover, prove that he has suffered by reason of the qualities or defects that make the substance or instrumentality dangerous.

The defendant delivered an automobile truck to B, with the right to buy it after two days' trial and examination by the garage man. On the second day B, intrusted the truck to L, an employee at the garage to take it thereto for examination. On the way thither the truck collided with the plaintiff's carriage, causing the damage sued for. The collision was due to the fact that the driver did not see the carriage until after the impact.

Held:

That L was not the servant of the defendant, and that even if the truck was so defective in respect to its steering apparatus as to be imminently dangerous, the defendant is not liable because the collision was not caused by such defect.

On exceptions and motion by defendant. The defendant on November 16, 1919, being an automobile dealer, delivered to one Morris Benjamin a Ford truck, with the understanding that he could try it out for two or three days and if the truck was satisfactory, he was to pay the defendant an agreed price of $225.00 for the truck.

On the day that Mr. Benjamin took the truck and on the day following he used the truck in his business, and then entrusted it to one John Logue to take from his place of business to a garage for examination and while driving there collided with the wagon of the plaintiff in which he was riding, resulting in serious injuries to the plaintiff, this action resulting alleging negligence.

The case was tried and the jury returned a verdict for plaintiff for nineteen hundred dollars, and defendant excepted to the charge of the presiding Justice, and also filed a general motion for a new trial. Motion sustained. Verdict set aside. New trial granted.

The case is fully stated in the opinion.

J. E. F. Connolly, for plaintiff.

C. B. Skillin and E. H. Wilson, for defendant.

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

DEASY, J. On November 17, 1919, an automobile truck ran into a carriage on Cumberland Avenue, Portland. The plaintiff who was riding in the carriage received injuries, and to recover damages therefor brought this suit against the defendant. A verdict was rendered in his favor.

The rather remote connection between the driver of the truck and the defendant is shown by the following abbreviated summary of the facts: The day before the accident the defendant Helfont, owning a used Ford truck bargained and delivered it to Morris Benjamin. Benjamin was to try the truck, have it examined and then if satisfied, to pay the agreed price. He had used the truck parts of two days to try it. Passing the Cumberland Avenue Garage, Benjamin asked the person in charge to send a man to his (Benjamin's) shop to bring the car back to the garage. John L. Logue was sent for this purpose. He rode with Benjamin to the latter's place of business. While driving the truck back alone the collision with the plaintiff's carriage occurred.

The declaration as amended contains three counts. The first relies upon the "dangerous instrumentality" theory; the second and third set up negligent operation of the truck. It is apparent from the testimony and from the charge that the case was tried mainly upon the issues raised by the second and third counts.

It is plain that Helfont is not responsible for any negligence on the part of Benjamin or Benjamin's employee. There was some controversy as to whether the title had passed to Benjamin, and whether the latter were a vendee or bailee. This is immaterial. In neither case does the principle of respondeat superior apply.

"It seems to be very well settled that a bailor cannot be held responsible to a third person for the negligent use by his bailee of the chattel bailed." 3 R. C. L., 145.

But the plaintiff does not contend that Helfont was responsible for Benjamin's acts or negligence. The essence of his theory, in his argument strenuously urged and in his brief accentuated by italics, is that the truck "was on its way to a mechanic for inspection pursuant to defendant's instruction."

The testimony on this point omitting all non-essentials is "I (Benjamin) told him that I would buy the truck if it was all right and he told me to take it and I took the truck and tried it . . . He told me to take it for a couple of days, . . . told me to show it to a garage man, . . . to let anybody see it that I wanted to. . . I told him I would pay $225 if it was all right."

The plaintiff contends that when Benjamin had determined to show the truck to a garage man and had selected the garage and had permitted its employee to take the truck for inspection that such employee ipso facto became the servant of the defendant for whose acts and negligence the defendant is responsible.

The relation of master and servant exists "Whenever one person stands in such a relation to another that he may control the work of the latter and direct the manner in which it shall be done. The essential elements are that the master shall have control and direction not only of the employment to which the contract relates, but of all its details, and shall have the right to employ at will and for proper cause discharge those who serve him. If these elements are wanting the relation does not exist." 18 R. C. L., 490. The substance of this definition has been generally adopted and frequently reiterated by courts.

Not an element of this definition is illustrated in the present case. The defendant did not select the garage or man. He had no right to do so. That was left wholly to Benjamin. The defendant had no power to direct Logue, the driver, as to result or means. What garage the truck should be taken to, by whom, through what streets, at what

speed, were all matters beyond Helfont's control. He had no power to discharge Logue. He could not even have reclaimed the truck from him, for the time, two days, which by the contract of bailment Benjamin was to have the car on trial had not elapsed.

Where a bailment is by contract for a specified period the bailee has the right of possession during that period even against the bailor unless he violates the conditions of the contract. *Simpson* v. *Wrenn*, 50 Ill., 224; *Hickok* v. *Buck*, 22 Vt., 149; *Bowen* v. *Coker*, S. C., 2 Rich. Law, 13; 6 Corpus Juris, 1154, 3 R. C. L., 85.

That the inspection of the car might result in some benefit to Helfont in promoting the sale is immaterial. Some such incidental advantage accrues to the bailor from all contracts of bailment.

But the plaintiff says by the first count that even if the principle of respondeat superior does not apply the defendant is liable for the reason that the truck was an "imminently dangerous instrumentality."

"The general rule is that no liability attaches for injury to persons who cannot be brought within the scope of the contract." *Olds* v. *Shaffer*, 145 Ky., 616, 140 S. W., 1047; *Pitman* v. *Lynn Gas Co.*, (Mass.), 135 N. E., 223.

But in case of substances or instrumentalities which are imminently dangerous the rule is subject to an exception. High explosives, poisons and impure foods are examples.

In case of any such substance whose dangerous qualities are latent and not obvious, manufacturers, vendors or distributors who intentionally or negligently fail to inform persons dealing with them of such qualities, or with greater reason misrepresent the same, are, notwithstanding want of privity, liable for injuries caused thereby to persons whose exposure to the danger could reasonably be contemplated. *Wellington* v. *Oil Co.*, 104 Mass., 67; *Roberts* v. *Brewing Co.*, 211 Mass., 449; *Cunningham* v. *House Furnishing Co.*, 79 N. H., 435, 69 Atl., 120; *Ward* v. *Pullman*, 138 Ky., 554, 128 S. W., 606; *Travis* v. *Bridge Co.*, Ind. 122 N. E., 1.

Counsel for the plaintiff concedes that automobiles are not ordinarily such imminently dangerous instrumentalities. He contends, however, that they may become so through latent defects in brakes or steering gear or in other respects. This reasoning is sound and is supported by eminent authorities. *Olds Motor Works* v. *Shaffer*, supra; *Johnson* v. *Cadillac Co.*, 261 Fed., 878; *Texas Co.* v. *Veloz*,

(Texas), 162 S. W., 377; *Collette* v. *Page*, (R. I.), 114 Atl., 136; *McPherson* v. *Buick Co.*, 217 (N. Y)., 382, 111 N. E., 1050; *Quackanbush* v. *Ford Motor Co.*, 153 N. Y. S., 131.

Whether the jury were justified in finding, if they did find, that the truck bargained by the defendant to Benjamin was so defective as to be an imminently dangerous instrumentality and that the defendant knew or should have known of such defect we need not determine for one other essential element is wanting.

A third person having no contractual relations with the party sought to be charged must in order to recover prove that he has suffered by reason of the qualities or defects that make the instrumentality dangerous. A man injured by being run over by a cart loaded with dangerous explosives has no more or different remedies than he would have if the cart had been loaded with bricks.

The learned counsel for the plaintiff appreciates this and in his declaration having alleged that the truck "was in a defective condition as regards the steering and controlling mechanism," he says that it "became so unmanageable and unresponsive to its controlling mechanism that it collided with the rear of said plaintiff's wagon." But of this alleged fact which is the gravamen of the first count there is no evidence. The testimony shows that the collision was due to an entirely different cause.

The only witness who attempts to tell how the accident occurred was Logue, the driver. Some months before the trial he signed a written statement that "the only reason I know for the accident was the poor lights, the dirty wind shield and the fact that I did not see Flaherty's team until I struck it." He says that at that time he did not remember about the steering gear. In his testimony given at the trial he says that the steering gear was defective, but does not claim that this defect caused the accident. He testifies, "Well, when I came down to the corner of Myrtle I stopped at the corner because there was an auto coming up and then when I started around the corner I hit Flaherty's team. I did not know he was there until I hit him."

Q. "Why not?"

A. "Well I couldn't see him."

It is fairly obvious that steering gear in perfect order would not have improved his vision. Assuming that the steering gear was in

dangerously defective condition it is apparent that such defect was not the cause of the accident.

It is unnecessary to consider the exceptions.

Motion sustained.
Verdict set aside.
New trial granted.

R. IRVING WOOD, In Equity,

vs.

ARTHUR O. WHITE.

Piscataquis. Opinion September 20, 1923.

Findings of fact by a single Justice unless manifestly erroneous are presumed by the Law Court to be correct; but there is no presumption in favor of the correctness of his conclusions of law.

The single Justice who heard the case found the facts to be as claimed by the plaintiff and ruled that the defendant holds one half the property involved in trust for the plaintiff.

For want of written evidence no enforcible express trust appears, and the ruling cannot be sustained on the ground that a resulting trust is shown, for the plaintiff paid but a very small part of the consideration.

But a constructive trust is sufficiently proved. There existed between the parties a confidential or fiduciary relation. The defendant secured the advantage, which he seeks unconscientiously to retain, by abusing the trust and confidence reposed in him by his son-in-law who was his business associate.

On appeal. A bill in equity to determine and protect plaintiff's interest in certain real estate situate in Milo, the title to which is in the defendant, but plaintiff claiming that defendant holds an one half interest in said real estate in trust for him. A hearing was had upon

the bill, answer, replication and proofs and the sitting Justice found for the plaintiff and defendant entered an appeal. Appeal dismissed. Decree below affirmed.

The case is stated in the opinion.

Hudson & Hudson, for the plaintiff.

Leon G. C. Brown and J. S. Williams, for defendant.

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

DEASY, J. In March, 1921, the defendant received a conveyance of real estate in Milo. The deed is absolute in form but the plaintiff by his bill alleges that it is, in intent and effect, a trust deed and that the defendant holds the title for the benefit of the plaintiff and himself jointly and equally.

The single Justice who heard the case found in favor of the plaintiff decreeing "that said respondent Arthur O. White does hold title to one undivided half of the real estate, as described in said bill, in trust for the plaintiff the said R. Irving Wood." From this decree the defendant appeals.

Unlike a motion or exception, an equity appeal authorizes the Law Court to determine facts and law and to direct a decree in accordance with such determination. But findings of fact by a single Justice unless manifestly erroneous are sustained by the Law Court.

There rested upon the plaintiff the burden of proving the trust and of proving it by full, clear and convincing evidence. The single Justice found this burden sustained. He found the facts to be as claimed by the plaintiff. The finding was not manifestly wrong.

The R. S., Chap. 78, Sec. 17 provides that "There can be no trust concerning lands except trusts arising or resulting by implication of law unless created or declared by some writing signed by the party or his attorney."

This statute recognizes the two general classes of trusts, express and implied. Express trusts must be signed by a writing duly signed. In the instant case that element is lacking. If the trust now under consideration is to be sustained as an express trust, or not at all it fails for want of written proof, however clearly it may be orally established. The exceptions in the statute, (trusts requiring no writing) are implied trusts. These are of two fundamentally differ-

ent kinds, to wit, resulting and constructive. The former carry into effect the presumed intent of the parties. The latter defeat the intent of one of the parties.

The decree in this case cannot be sustained on the ground that a resulting trust is shown. Such a trust is created when property is conveyed to one person and the whole consideration (*Wentworth* v. *Shibles*, 89 Maine, 167) or some definite fractional part thereof (*Lawry* v. *Spaulding*, 73 Maine, 32) is paid by another.

The plaintiff in this case paid $400.00 of a total consideration of $6,000.00. The defendant says that the $400.00 was not paid as a part of the consideration, but was a loan subsequently repaid. Accepting the plaintiff's testimony, however, and giving it its full face value a resulting trust is shown only to the extent of one fifteenth of the property.

Constructive trusts, the second species of implied trusts, are based upon fraud, abuse of a confidential relation, oppression or mistake.

A constructive trust cannot be predicated alone upon a broken promise to hold land in trust, though such promise be fully proved and based upon an adequate consideration. Such a promise creates an express trust which to be valid must be in writing. *Anderson* v. *Gile*, 107 Maine, 332. *Silvers* v. *Howard*, Kan., 190 Pac. 1, *Chandler* v. *Riley*, (Tex.), 210 S. W.; 720. *Down* v. *Down*, (N. J.), 82 Atl., 325.

"The fraud upon which the court acts in such cases must be something more than that which in a moral sense arises from a mere breach of an oral agreement." *Wood* v. *Rabe*, 96 N. Y., 426. See 39 Cyc., 178 and cases cited.

But fraud or abuse of a confidential relation gives rise to a constructive trust, none the less because accomplished by or accompanied by a parol promise which is as such unenforcible. *Bank* v. *Tracy*, 115 Maine, 439; *McNinch* v. *Trust Co.*, (N. C.), 110 S. E., 667; *Wood* v. *Rabe*, supra; *Silvers* v. *Howard*, supra; *Hillyer* v. *Hymes*, (Cal.), 165 Pac. 718; *Faville* v. *Robinson*, (Tex.), 227, S. W., 938; *Miller* v. *Miller*, (Ill.), 107 N. E., 824; 39 Cyc., 178 and cases cited.

Stripped of non-essentials the facts as testified to by the plaintiff and his witnesses and which the justice who saw and heard them found to be true are as follows: The plaintiff has a store in the Farrar Block at Milo. The owner (Farrar) had an opportunity to sell the building. The plaintiff, presumably to avoid possible eviction, determined to try to buy the store occupied by himself. He procured

from Farrar an oral option of purchase, covering the whole building at the price of $11,000.00. He secured a purchaser (Carpenter) for a part of the building, apparently the less valuable part, for $5,000.00. He was unable to alone finance the purchase of the remainder. Thereupon he applied to the defendant, his wife's father. The latter agreed to take up the option, to provide the bulk of the necessary funds, to take title in his own name, to hold the title for the benefit of the plaintiff and himself in equal shares, to execute a declaration of trust to this end and when the plaintiff had paid one half the cost to convey to him one half the property.

The seller had no dealings directly with White. In response to a telephone message he went to the office of an attorney who told him that "Mr. White was going in with Wood." Thereupon the deed running to White was drafted by the attorney and executed by Farrar. Of the consideration $5,000.00 was paid by Carpenter, $4,000.00 was secured by the defendant on mortgage of the store, $1,600.00 paid by the defendant and $400.00 by the plaintiff. Subsequently the defendant refused to execute a declaration of trust, repudiated his trusteeship and claimed that the $400.00 was not paid by Wood as a part of the consideration, but was a loan which was afterward repaid.

Notwithstanding that the defendant denied making the alleged agreement, the justice who heard the case found the facts as claimed by the plaintiff, and summarized above, to be true. His finding was not clearly erroneous.

Whether the facts establish an enforcible trust is a question of law which the Law Court considers de novo. There is no presumption in favor of the correctness of such legal conclusions. *O'Leary* v. *Menard*, 118 Maine, 27.

No enforcible express trust is proved. No resulting trust is established, or at all events none as to more than one fifteenth of the property. There seems to have been no fraud practiced in the ordinary sense of misrepresentation, deception or chicanery and no duress or mistake is shown.

But on the ground that the defendant abused a confidential relation we think that his appeal must be dismissed.

In its ordinary acceptation a confidential relation is that relation that exists between attorney and client, guardian and ward, and the like. But the true definition of the term is much broader.

"A person is said to stand in a fiduciary relation to another when he has rights and duties that he is bound to exercise for the benefit of that other person." *Dick* v. *Albers*, (Ill.), 90 N. E., 685.

"Whenever one person is placed in such relation to another . . . that he becomes interested for him or interested with him in any subject of property or business he is prohibited from acquiring rights in that subject antagonistic to the person with whose interests he has become associated." Judge Sanborn in *Trice* v. *Comstock*, 121, Fed., 627.

The above quoted definitions fit the facts in the case. Applying the foregoing definition adopted by the Federal Court it appears that the defendant and plaintiff had become interested together, associated together in the plan to purchase the store. White so understood. It is found as a fact that he agreed to it. Wood so understood. His testimony to that effect was believed by the judge who saw and heard both parties. The attorney who did the business so understood. He informed Farrar the seller that "Mr. White was going in with Wood" and Farrar so understood as is apparent from his testimony. The defendant is "prohibited from acquiring rights in that subject antagonistic to the person with whose interests he has become associated."

This is not a case of a mere promise to hold property in trust. It is a case where one woman's husband and her father entered into a business venture as associates, practically as partners and where one abused the confidence and trust reposed in him by the other.

Two Maine cases lend support to this opinion. In each a constructive trust was held established. *Gilpatrick* v. *Glidden*, 81 Maine, 150. (Devise to wife upon her promise to devise remainder to the testator's heirs.)

Bank v. *Tracy*, 115 Maine, 439. (Conveyance upon oral condition that grantee would devise property to grantor's children).

In several cases in other states an association for the purchase and holding of land has been held to be a confidential relation upon which a constructive trust may be predicated. *Russell* v. *Wade*, (N. C.), 59 S. E., 345. *Butler* v. *Watrous*, (Ala.), 64 So., 346.

In *Gilpatrick* v. *Glidden*, supra, our court said:

"So for like reason, when one obtains the legal title to real or personal estate, either by will or otherwise, under circumstances which render it unconscientious for him to retain it for his own benefit,

while in fact another is entitled to it, or to some interest in it, equity secures to the latter his right, not by disregarding the former's legal title but by imposing on him the duty of holding and using his title for the real beneficiary."

To this there is a necessary qualification. A reading of the whole opinion so shows. To escape from the obligation of an express trust on the ground that it is not in writing may be "unconscientious." But the statute permits it and a court of equity cannot interfere. In order that a given case may be classified with constructive trusts there must appear to have been abuse, duress, mistake or fraud in some one of its multifarious forms. In the present case the defendant secured the unconscientious advantage which he seeks to retain by abusing the trust and confidence reposed in him by his son-in-law, who was his business associate.

The point is made that the plaintiff failed to make a tender before beginning his suit. The defendant having repudiated his trusteeship no tender was necessary.

Appeal dismissed.
Decree below affirmed.

GEORGE B. BOYNTON, In Equity,

vs.

ACME CANNING COMPANY.

Washington. Opinion September 24, 1923.

When the report of a Master is recommitted for further hearing of the parties, and the parties agree that the report of the Master upon such further hearing shall be final, it must be so regarded, and the parties must abide by the report.

Newly-discovered evidence is proper for consideration upon a motion to recommit a Master's report.

But evidence alleged to be newly discovered, taken at the term of court following the date of decree appealed from, cannot change the result, where there is nothing to show that the new evidence was not available at the time of the hearing before the Master, or could not have been discovered by the exercise of reasonable diligence in the interval between the hearing and the date of the report; or it does not appear that it is probable that the findings of the Master would thereby have been changed.

On appeal. This is an appeal by plaintiff from a decree of a single Justice accepting the report of Special Masters wherein a balance of $725.97 was found due from plaintiff to defendant.

Appeal dismissed. Decree of sitting Justice affirmed.

The case is stated in the opinion.

A. D. McFaul and J. H. Gray, for plaintiff.

Gray & Sawyer, for defendant.

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

MORRILL, J. This cause is before the Law Court upon an appeal by the plaintiff from the final decree of a single Justice upon and in accordance with the report of Special Masters, a motion to recommit said report having been denied and the report accepted. The record in the case is imperfect, because incomplete; neither the bill, answer nor replication is before us, nor any docket entry prior to the second day of the January Term, 1918, of this Court in Washington County;

nor are all the exhibits, referred to in the transcript of the testimony before the Masters, printed as a part of the record.

The report of the Special Masters has to do with the accounts between the plaintiff and defendant; it is therefore necessary to ascertain the duties of the Masters as fixed by the order of reference. On the second day of said January Term a decree was entered by which it was "ordered and decreed that the said George B. Boynton file . . . . a true statement of the affairs of said company, as Treasurer and Manager thereof and of his own private account with said corporation, and that Leo D. Lamond be and is hereby appointed Master in Chancery to determine said amounts and hear the parties in reference to the same." At the January Term, 1919, the Master filed his report, and at the May Term following the same was recommitted, but any further instructions do not appear. An amended report was later filed, submitting in detail a statement of the affairs of said company and a statement of George B. Boynton's private account with said corporation as submitted and determined by the Master, which statement was annexed to the report, showing an indebtedness of the defendant to the plaintiff as found by the Master, on private account, of $6,358.44, and on mortgage, of $2,604.92. The only evidence before us as to the court's action upon this amended report, appears from the docket entries as follows: "Exceptions to Special Master's Rep. filed Jan. 10, 1920. By agreet. of parties the amend. Rep. of Leo D. Lamond Spec. Master in Chancery is to be recommitted to said Lamond Spec. Master and to L. H. Newcomb Genl Master in Chancery they to hear the parties, their witnesses and evidence touching such account or accounts as have already been presented to said Lamond as Spec. Master. Said Masters to make Rep. after hearing, which report, the parties now represented in open court, agree shall be accepted as final upon said account or accounts." The Masters heard the parties and made their report, dated March 1, 1922, at the May Term, 1922; at the request of the plaintiff's attorney they report ten special findings of fact upon which their findings are "founded in part." The report does not transmit to the court the evidence taken before the Masters; it reported their conclusions only, in accordance with approved equity practice. *Mason* v. *Y. & C. Railroad Co.*, 52 Maine, 82, 115. *Simmons* v. *Jacobs*, id. 147, 154. *Nichols* v. *Ela*, 124 Mass., 333, at foot of Page 337. *Lincoln* v. *Eaton*, 132 Mass., 63, 71.

Nor does the report show that objections were taken before the Masters and overruled by them, and exceptions taken afterwards based on such particular objections, in which case it would have been the duty of the Masters, if so requested, to annex to their report so much of the evidence as bears upon such overruled objections, so that exceptions might be raised thereon. *Cary* v. *Herrin*, 62 Maine, 18. If such request is refused, application may be made to the sitting Justice for an order to the Masters, directing them to comply with the request, before hearing on the exceptions.

The plaintiff filed a motion to recommit the report of the Masters, alleging six reasons therefor, all relating to matters of fact clearly within the scope of the reference. The ruling denying this motion was clearly right. The parties had agreed that the report should be accepted as final, and it must be so regarded.

The so-called "newly discovered evidence" taken at the term of court following the date of the decree and appeal, which was reported by the presiding Justice "to be considered by the Law Court in connection with the appeal if the same can properly be so considered," cannot change the result. Newly-discovered evidence is proper for consideration upon a motion to recommit a Master's report; but here there is nothing to show that the new evidence was not available to the plaintiff at the time of the hearing before the Masters; or could not have been discovered by the exercise of reasonable diligence in the interval of fifteen months between said hearing and the date of the report, nor can we say that it is probable that the findings of the Special Masters would thereby have been changed.

The accounting in question has been before the court for a long time; the report of a Master thereon has been twice recommitted, the last time with the agreement that the report should be accepted as final. We think that the parties must abide by the report.

Appeal dismissed.
Decree of sitting Justice affirmed.

LEDA POULIOT *vs.* ALFRED A. BERNIER.

Oxford. Opinion September 24, 1923.

Where the validity of a divorce is involved in an issue tried before a jury, objections to the sufficiency of the notice to the libellee, and to the form of the proceedings, which are not made at the trial, are not open in the Law Court upon a motion to set aside the verdict.

When in an action for breach of promise to marry brought by a divorced woman against her former husband upon an alleged promise to remarry her, the defendant contends for the first time in the Law Court that the decree is void because the name of the present plaintiff, the libellee in the action for divorce, was incorrectly stated in the libel, and that service by publication upon the person so named is insufficient, there being no appearance for the libellee, such contention comes too late.

The court is committed to the settled rule that points not made at the trial are considered as waived.

On motion for a new trial. This is an action to recover damages for breach of a promise to marry. The case was tried to a jury and a verdict of five thousand, four hundred and seventy-nine dollars was rendered in favor of the plaintiff and defendant filed a general motion for a new trial. Motion overruled.

The case is fully stated in the opinion.

Albert Beliveau, for plaintiff.

Ralph T. Parker and George A. Hutchins, for defendant.

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

MORRILL, J. This is an action to recover damages for a breach of a promise of marriage; the plaintiff has a verdict, and the case is before us upon a general motion for a new trial.

The parties were married October 31, 1904; a divorce from the bonds of matrimony was decreed October 20, 1908. About a year thereafter the plaintiff returned to Rumford, and to live with the defendant upon his promise, frequently repeated, as she alleges, to remarry her; these relations continued until April, 1922.

The defendant denied any promise to remarry, and the case was submitted to the jury upon that issue alone. Throughout the testimony in chief on both sides the fact that a divorce had been decreed was not questioned; the record of the divorce proceedings was introduced by plaintiff upon rebuttal, without objection from defendant's counsel who remarked, "I have no objection to that going in for either side to use."

The defendant does not contend that the jury were not warranted in returning a verdict for the plaintiff, but now, for the first time, contends that upon the record presented the decree of divorce was absolutely void and that the parties are now husband and wife.

The contention comes too late. Where the validity of a divorce is involved in an issue tried before a jury, objections to the sufficiency of the notice to the libellee, and to the form of the proceedings, which do not appear to have been made at the trial, are not open in the Law Court. *Burlen* v. *Shannon*, 115 Mass., 438, at Page 447. A losing party cannot avail himself of a point of law, not raised at the trial, as a ground for setting aside a verdict, on motion for a new trial. *Perkins* v. *McDuffee*, 63 Maine, 181, 183.

This court is committed to the settled rule that points not made at the trial are considered as waived. *Eaton* v. *Telegraph Co.*, 68 Maine, 63. *Cowan* v. *Bucksport*, 98 Maine, 305. *Coan* v. *Auburn Water Comrs.*, 109 Maine, 311. "It is obvious that such should be the general rule. A party should not be silent when he ought to speak. He ought to speak at the earliest practical moment in the progress of a trial, if he has, or thinks he has, a point which may be decisive." Cases have arisen, (*Belmont* v. *Morrill*, 69 Maine, 314), and doubtless will arise which involve exceptions to the rule; but the court recognizes such exceptions only in furtherance of justice. *Coan* v. *Water Comrs.*, supra.

This is not such a case. The attack upon the validity of the decree of divorce comes, not from the libellee, but from the libellant, who now asks us to declare void a decree of divorce between the parties to this action, that he may escape payment of damages for breach of a contract to remarry the libellee.

His counsel, recognizing the distinction between judgments void for lack of jurisdiction, which may be attacked collaterally, and those voidable only, which must be attacked directly, if at all, (*Blaisdell* v. *Inhbts. of York*, 110 Maine, 500, 509), contends that the court making

the decree of divorce had no jurisdiction of the cause and that the judgment is void. The facts are as follows: On August 25, 1908, the defendant signed by the name of "Fred Bernier" and made oath to a libel for divorce, in which he described himself as "Fred Bernier, of Rumford, in said county, husband of Lydia Pouliout Bernier, formerly of Rumford, now of parts unknown," and alleged "that he was lawfully married to the said Lydia Pouliot at Rumford Falls, Maine, on the 31st day of October A. D. 1904;" the libellee's name does not elsewhere appear in the libel. On August 26, 1908, a justice of this court made an order in accordance with the statute that notice be given "to said Lydia Pouliout Bernier Libellee" by publication of an attested copy of said libel and the order thereon. Personal service of the libel was not made upon the libellee, nor did she appear in the case; she testified that she knew nothing about the proceedings until after the divorce was granted. It is unquestioned that the name of the libellant is "Alfred A. Bernier," and the maiden name of the libellee "Leda Pouliot." On October 20, 1908, proof of notice by publication, as ordered, having been made, a decree was entered dissolving the bonds of matrimony "heretofore existing between the said Fred Bernier and the said Lydia Pouliout Bernier."

If the libellee had been personally served with process within the State, or had appeared and answered the libel, the misnomer alone would not invalidate the judgment; it is the constant and well established practice to admit parol testimony to identify persons named in a record; *Jay* v. *East Livermore*, 56 Maine, 107, 120; and if the writ is served on the party by a wrong name intended to be sued, and he fails to appear and plead the misnomer in abatement, and suffers judgment to be obtained, he is concluded, and in all future litigation may be connected with the suit or judgment by proper averments. Freeman on Judgments, Section 154. "But where reliance is had upon the constructive notice given by publication—a notice which the party to be charged may never in fact see or hear of—greater strictness must be observed. A judgment rendered upon such service will bind no one not properly named in the record. This does not mean that the name must be correctly spelled, but it must be so nearly correct as to come within the rule of idem sonans . . . . Where, however, the record of a judgment entered upon a notice of this kind presents not a mere discrepancy or variation in the spelling of a defendant's name, but the use of a name other and different than

that borne by the person against whom such judgment is sought to be enforced, the rule of idem sonans is not applicable, and the adjudication is of no validity against such persons." *Thornily* v. *Prentice,* 121 Iowa, 89; 96 N. W., 728; 100 Amer. St., 317, where the reported case is followed by an exhaustive note collecting the cases in which the names in question have been held to be the same, or not the same, and cases in which the names have been held to be idem sonans, or the contrary, among which is our own case of *Millett* v. *Blake et al.,* 81 Maine, 531. *Flood* v. *Randall,* 72 Maine, 439. *Farrar* v. *Fairbanks,* 53 Maine, 143.

The defendant contends that the name of the libellee given in the libel is so different from her true name that the decree of divorce is a nullity. We have no occasion to pass upon this contention; it is not now, if ever, available to the defendant. Well knowing the correct name of his wife, he misstated it in the libel, either through sinister motives or negligently, and was content to take a decree of divorce upon a notice issued to the person so named. Relying upon that decree, he denied that he promised to remarry the plaintiff. Having taken the chance of a favorable verdict upon the theory that the divorce was valid, he cannot for the first time, in the Law Court, after an adverse verdict, be heard to contend that the decree of divorce is invalid. He must abide by the election he made at the trial. *Lawrence* v. *Chase,* 54 Maine, 196, 201.

Motion overruled.

BLANCHE E. MCKENZIE et als., Appellants,

In Re Guardianship of JOHN E. FARNHAM.

Piscataquis. Opinion September 26, 1923.

Presumptive heirs of a ward are so interested in his estate that they have the right to claim an appeal from a decree affecting it. The findings of a single Justice sitting in the Supreme Court of Probate upon questions of fact are final, as a rule, though they may be reviewed in extreme cases of a serious mistake.

Upon hearing in the Supreme Court of Probate before a single Justice, without a jury, if there be found any evidence upon which the ruling and finding can be based, the sufficiency of such evidence is a question of fact upon which the finding of the justice is conclusive and is not to be reviewed by the Law Court.

Whether a medical witness is qualified to testify on the ground that he is an attending physician is a question of fact for the presiding Justice, and his decision of such a question is final, although in extreme cases, where a serious mistake has been committed, through some accident, inadvertence, or misconception, his action may be reviewed.

On appeal and exceptions. An appeal from a decree of the Judge of the Probate Court for the county of Piscataquis, made December 5, 1922, relieving one John E. Farnham from guardianship and restoring to him his property. Exceptions also were taken pertaining to the admission of testimony. Exceptions overruled.

The case is fully stated in the opinion.

Leon G. C. Brown and J. S. Williams, for appellants.

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

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

PHILBROOK, J. This case arises from proceedings instituted in the Probate Court of Piscataquis County. By a decree of that Court dated September 7, A. D. 1920, John E. Farnham, then past eighty years of age, was adjudged to be a person of unsound mind who, by

reason of infirmity and mental incapacity, was incompetent to manage his own estate and to protect his rights. By the same decree his son, Elmer J. Farnham, was appointed guardian. The guardian died in May, 1922, and on July 24, A. D. 1922, the ward, declaring himself then to be capable of managing his own estate, and that a guardian was no longer necessary, presented to the Probate Court a petition praying that the remaining property be restored to him, except legal compensation to his guardian for his services. On this petition, notice thereon having been given pursuant to the order of court, a hearing was held and decree of the Probate Court was issued declaring that guardianship was no longer necessary and ordering restoration of his remaining property except legal compensation to his guardian for his services.

From this decree Blanche E. McKenzie and Bertha H. Littlefield apppealed to the Supreme Court of Probate. It appearing that the appellants are presumptive heirs of the ward, they are so interested in his estate that they have the right to claim an appeal from a decree affecting it. *Lunt* v. *Aubens,* 39 Maine, 392.

At the March Term of the Supreme Judicial Court, A. D. 1923, sitting as the Supreme Court of Probate, the appeal was heard by a justice of that Court without a jury. The presiding Justice affirmed the decree of the Probate Court. The appellants then presented a bill of exceptions, which was duly allowed, the stipulations of the exceptions being that the petition of dismissal of guardian, appeal and reasons of appeal, decree of Judge of Probate, and the testimony taken in the Supreme Court of Probate are made part of the exceptions.

Before the Law Court the appellants directed much of their argument to show error in the finding of the Supreme Court of Probate, declaring, as alleged in their bill of exceptions, that "the main question involved is whether the said John E. Farnham was, on the date of the petition, and now is 'capable of managing his own estate,' or, to state the issue exactly as the Revised Statutes set forth, Chap. 72, Sec. 4, is he or is he not 'a person insane or of unsound mind who, by reason of infirmity or mental incapacity, is incompetent to manage his own estate or to protect his rights'."

But this exception can only raise the question whether there was any evidence upon which the ruling and finding could be based. If there was any such evidence its sufficiency was a question of fact upon

which the finding of the court is conclusive, not to be reviewed by the Law Court. *Eacott, Appellant,* 95 Maine, 522. Such evidence being found in the record the appellants take nothing upon this branch of their exceptions.

The other branch of exceptions relates to the admission of certain parts of the testimony of a local doctor as the attending physician of John E. Farnham for the purpose of establishing his competency and mental capacity. Whether a medical witness is qualified to testify as an expert is a question of fact for the presiding Justice, and his decision of such a question is final, although in extreme cases, where a serious mistake has been committed through some accident, inadvertence, or misconception, his action may be reviewed. *Fayette* v. *Chesterville,* 77 Maine, 28. We see no reason to apply a different rule in determining, from all the testimony, whether a witness is or is not an attending physician. In the colloquy which ensued at the time the doctor's testimony was offered it is very plain that the presiding Justice considered this proposition very carefully and declared that the fact that the doctor was an attending physician was sufficiently established. We are not disposed to disturb this finding either upon law or fact.

Exceptions overruled.

BATES BROTHERS SEAM FACE GRANITE COMPANY

vs.

T. F. MOREAU COMPANY.

Androscoggin. Opinion October 3, 1923.

In a case that has been fully and fairly tried without surprise to the defendant, an amendment may be considered as made, and the verdict allowed to stand.

In the instant case the issue was fairly tried under instructions to the jury to which no exception was taken. The record fails to show where the jury erred in calculating amounts, or were influenced by bias or prejudice.

The error was unnoticed at the time of the trial. The writ could have been amended on motion, and no doubt would have been if the plaintiff had asked to amend.

Under the circumstances an amendment may be considered as made.

On motion for new trial. An action of assumpsit on an account annexed to recover a balance due for seam face granite furnished in the construction of the United Baptist Church at Lewiston. A verdict of $1,748.53 was rendered for plaintiff which was $88.66 more than the amount sued for in the writ and defendant filed a general motion for a new trial. Motion overruled.

The case is stated in the opinion.

James E. Philoon, for plaintiff.

Frank A. Morey, for defendant.

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

HANSON, J. Action of assumpsit on an account annexed to the writ, to recover a balance due for seam face granite furnished in the construction of the United Baptist Church at Lewiston, at the agreed price of "62 cents per square face foot" in accordance with the terms of a written contract between the parties. The jury returned a verdict for the plaintiff for $1,748.53. The case is before us on general motion by the defendant.

The principal contention in the case was over the method of ascertaining the square face feet involved in the contract. An auditor was appointed and his report was read in evidence. The verdict was apparently based on the report of the auditor, who found "that the balance due from the defendant to the plaintiff would be $88.60 more than the plaintiff has declared for, by reason of the fact that the scale bills furnished me indicate the plaintiff had furnished 143 square feet more granite than the amount sued for." An error of the auditor or printer is apparent in the amount stated, which under the testimony should be $88.66.

The issue was fairly tried under instructions to the jury to which no exception was taken. The record fails to show where the jury erred in calculating amounts, or were influenced by bias or prejudice. We cannot therefore say that the verdict is manifestly wrong.

That the verdict is larger by eighty-six dollars and sixty-six cents than the amount sued for in the writ, presents no serious difficulty in the case, nor does defendant's counsel in his brief consider it as a vital objection.

The error was unnoticed at the time of the trial. The writ could have been amended on motion, and no doubt would have been if the plaintiff had asked to amend.

In view of the circumstances, we think that an amendment may be considered as made. *Clapp* v. *Power and Light Co.*, 121 Maine, 356.

The entry will be

Motion overruled.

FLORENCE J. MCCARTHY et als.

vs.

LOUIS S. WALSH, SPEC. ADM'R. & EX'R. et als.

Cumberland. Opinion October 20, 1923.

A devise of a life estate in all the estate to the wife, if she survives testator, and a further provision that, at the death of the wife, after payment of numerous legacies, all the rest, residue and remainder of the estate should "be disposed of according to the laws of inheritance of the State of Maine in force at the date thereof," the wife having survived the testator and died testate, does not give any interest in the residuary estate to the widow which could pass by her will to the beneficiaries named therein, the heirs at law and next of kin of the testator takes the entire residue and remainder of the estate.

In the instant case the testator devised to A certain real estate, "to have and to hold to her, her heirs and assigns forever;" then followed these words: "If, however, she shall die without leaving lawful issue then I give and devise said land and buildings to the surviving sons of my said nephew, B, in equal shares the child or children of any deceased son to take by right of representation, to have and to hold to them and their heirs and assigns forever."

The words, "if she shall die without leaving lawful issue," must be construed to mean an indefinite failure of issue, and that A takes an estate in fee tail.

The legacy to the Reverend John O'Dowd did not lapse upon the death of the legatee in the lifetime of the testator; a valid trust was created, and a trustee should be appointed to administer the trust.

On report. This is a bill in equity seeking the construction and interpretation of Paragraph 2, and Subdivisions (c), (e) and (h) thereunder of the will of Charles McCarthy, Jr., late of Portland, deceased.

The principal question involved was as to whether the widow, Elizabeth G. McCarthy, took a share of the residue and remainder of the estate in full ownership in addition to a life estate in the entire estate. Paragraph 2 reads as follows: "I give, devise and bequeath to my beloved wife, Elisabeth G. McCarthy, if living at my decease,

the income of all of my estate of every name and description and wherever and however situate, to be used and enjoyed by her during her natural life. At her death, or if she be not living, at my decease, said estate is to be disposed of as follows:"—Then follow certain legacies not involved in the questions at issue. The residuary clause, Subdivision (h), Paragraph 2, reads as follows: "All the rest, residue and remainder of my estate of every name and nature, and wherever and however situate, including any of the foregoing legacies which may lapse or fail for any reason whatsoever, I direct shall be disposed of according to the laws of inheritance of the State of Maine in force at date hereof." A hearing was had upon the bill and answer and by agreement of the parties the cause was reported to the Law Court. Bill sustained. Decree in accordance with opinion.

The case is fully stated in the opinion.

Strout & Strout, for complainants.

Cook, Hutchinson & Pierce; Snow & Snow and C. L. & P. E. Donahue, for respondents.

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

MORRILL, J. All parties to this proceeding seek interpretations of portions of the will of Charles McCarthy, Jr., late of Portland, deceased, who died April 2, 1921, viz.:

"SECOND: I give, devise and bequeath to my beloved wife, Elizabeth G. McCarthy, if living at my decease, the income of all my estate, of every name and description, wherever and however situated, to be used and enjoyed by her during her natural life. At her death, or if she be not living at my decease, said estate is to be disposed of as follows, viz.:"

Then follow certain provisions designated by letters as subdivisions of the above item, of which those marked (c), and part of (e), and the final provision (h) are in question, as follows:

"(c) I give, and devise to Elizabeth B. Dunphy, who has been reared in my family since her childhood, land and buildings at 574 Congress Street in said Portland, now under lease to Libby & Chipman, to have and to hold to her, her heirs and assigns forever. If, however, she shall die without leaving lawful issue then I give

and devise said land and buildings to the surviving sons of my said nephew, Florence J. McCarthy, in equal shares, the child or children of any deceased son to take by right of representation, to have and to hold to them and their heirs and assigns forever."

"(e) I give * * * * to the Reverend John O'Dowd, pastor of the Church of the Sacred Heart, situated in said Portland, One Thousand (1,000) Dollars, to be used in the purchase of stained glass windows for that church, the latter gift upon condition that the said Reverend John O'Dowd celebrate or cause to be celebrated a mass once a week for the repose of the souls of myself and my beloved wife Elizabeth during his pastorate of that church."

"(h) All the rest, residue and remainder of my estate, of every name and nature and wherever and however situated, including any of the foregoing legacies which may lapse or fail for any reason whatsoever, I direct shall be disposed of according to the laws of inheritance of the State of Maine in force at date hereof."

The cause is submitted upon the bill, the truth of the facts therein stated being admitted, the answer of David W. Snow and Edward Duddy, Executors of the will, who disclaim any interest in the controversy, and a decree taking the bill pro confesso against certain defendants.

It appears from the bill that said Snow and Duddy "turned over to Louis S. Walsh, conservator of the estate of the life tenant, Elizabeth G. McCarthy, the whole of said estate of Charles McCarthy, Junior, as set out in their several accounts filed and allowed in the Probate Court for said County of Cumberland, their third and final account as such executors being allowed by said Court on July 31, 1922;" that the "said Elizabeth G. McCarthy, life tenant under the will of said Charles McCarthy, Junior, died on the tenth day of January, A. D. 1923, and the said Louis S. Walsh was appointed and qualified as special administrator of her estate on the first day of March, 1923, pending the probate of her said will. In such capacity he now holds the whole of the estate of Charles McCarthy, Junior, which was formerly held by him as conservator of the estate of said Elizabeth G. McCarthy during her said life tenancy."

The said defendants, Snow and Duddy, are properly made parties to this bill, because, upon renewing their bond to the Judge of Probate, they are entitled to receive, as executors of the will of Charles McCarthy, Jr., from the conservator of the estate of the life tenant,

Elizabeth G. McCarthy, upon the settlement of his account in the Probate Court, the estate of Charles McCarthy, Jr., so turned over to him, and should distribute the same according to said will.

The court is asked to construe and interpret the provisions of said will before quoted, and particularly to determine:—

FIRST: Whether or not the said Elizabeth Kelleher, Mary Plane and Joanna McCarthy Ferris, and Florence J. McCarthy, nieces and nephew, the heirs at law and next of kin of said Charles McCarthy, Junior, take the whole of the said residue and remainder of the estate of said Charles McCarthy, Junior, and if not what share of said residue and remainder they are entitled to, and what person or persons are entitled to the balance of said residue.

The plaintiffs contend that the next of kin above named are the only persons interested under said residuary clause, and that the representatives of the estate of Elizabeth G. McCarthy, the widow, who took a life estate in the entire estate of Charles McCarthy, Jr., have no interest under the residuary clause.

The special administrator of the estate, and executor of the will, of the widow, and her next of kin claim that R. S., 1903, Chap. 77, Sec. 1 furnishes the rule for the distribution of the residuary estate, and that Mrs. McCarthy took under the will of her husband not only a life estate in his entire estate, but also a vested remainder in one half of the residue, which now passes under her will to her legatees and devisees.

If this construction is correct, it is apparent that both she and her next of kin would take under the residuary clause only in case she survived her husband; upon the theory of her personal representative and the legatees under her will, if she survived her husband, the residuary estate would be distributed under Paragraphs I and VI of Section 1 of Chapter 77; if she did not survive him, it would be distributed under Paragraph VI alone. If the testator intended that his wife's next of kin or legatees should share in his residuary estate, it is worthy of note that he did not provide against the above result.

It is familiar law and not disputed, that the intention of the testator collected from the whole will and all the papers which constitute the testamentary act, is to govern; that the intent is to be sought in the will as expressed. The language of Mr. Justice Miller in *Clark* v. *Boorman's Executors*, 18 Wall., 493, is so pertinent that we quote: "It may well be doubted if any other source of enlighten-

ment in the construction of a will is of much assistance than the application of natural reason to the language of the instrument, under the light which may be thrown upon the intent of the testator by the extrinsic circumstances surrounding its execution and connecting the parties and the property devised with the testator and with the instrument itself."

The cases cited by counsel, and such as we have found, do not afford much aid. Counsel for the executor of Mrs. McCarthy's will relies much upon *Carver* v. *Wright,* 119 Maine, 185, as sustaining his claim of a vested remainder; that case did hold that the will there under consideration created a vested remainder in favor of the testator's "children," and that there was no legal inconsistency in the life tenant taking also a share in the vested remainder; but the case does not aid us in determining the intention of the testator when he used the words, "according to the laws of inheritance of the State of Maine." Nor do the cases from Massachusetts cited at the close of that opinion aid us; they hold that a bequest or devise of a remainder, after a life estate, to the heirs at law of the testator, goes to those who are such at the testator's death; that is the general rule unless a different intent is plainly manifested by the will. *Dove* v. *Torr,* 128 Mass., 38.

The brief of counsel says: "It is the case of a gift of a life estate to the testator's wife, Elizabeth G. McCarthy, with a remainder of the residue over to a definite class of persons. Those who constitute the class at the death of the testator take unless the will shows clearly a different intention," citing *Carver* v. *Wright,* and cases there cited. The will before us does not expressly create a class of persons, consisting of testator's widow and heirs; and in the absence of such express creation of such a class, the widow cannot be said to be, or be placed by law, in a class with the testator's heirs. Both before and since the Statute of 1895, Chapter 157, the widow is not the heir of her deceased husband. *Lord* v. *Bourne,* 63 Maine, 368. *Golder* v. *Golder,* 95 Maine, 261. *Herrick* v. *Low,* 103 Maine, 353. *Morse* v. *Ballou,* 112 Maine, 127. "The statute does not change the status of the widow with reference to her deceased husband's estate. It enlarges her interest by giving her an estate in fee instead of an estate for life. She still takes not as heir, but as widow." *Golder* v. *Golder,* supra. An Androscoggin County case, *Clark* v. *Dixon et als.,* decided in 1915, involved a will by which a testatrix created a trust

for the benefit of her husband, and provided that at the termination of the trust the trustee should "then divide said trust fund then existing among my then living heirs according to the laws of descent in this State." At the termination of the trust the husband was living and claimed a share of the fund. The late Chief Justice SAVAGE held in a careful opinion that the husband was not entitled thereto, upon the authority of *Morse* v. *Ballou*, supra. In *Cheney* v. *Cheney*, 110 Maine, 61, this court held that it was "evidently the primary intention of the legislature, in enacting this chapter (P. L. 1895, chap. 157) to change the quality of the estate to which a widow was entitled under the law of dower, from a life estate to an estate in fee, and in other respects neither to increase nor diminish the attributes of the estate;" . . . . "that when the statute of 1895 became a law, the only change the legislature intended to make, or in the use of the language employed, did make, was to enlarge the interest of the widow by giving her an estate in fee instead of an estate for life. In all other respects . . . . her interest in the lands of her husband was not affected, nor were her rights in the personal estate of her husband altered in the least."

The case of *Proctor* v. *Clark*, 154 Mass., 45, does not aid the contention of the representatives of the widow, because under the decisions of that court, as to the interest, which the widow takes in fee in the real estate of her husband, to the amount of five thousand dollars, she is regarded as a "statutory heir," (*Lavery* v. *Egan*, 143 Mass., 389, 392. *Lincoln* v. *Perry*, 149 Mass., 368, 374) a status which our decisions do not recognize.

It is clear, therefore, that if the testator used the words "according to the laws of inheritance of the State of Maine," with the intention of restricting the takers to his heirs, the widow was not included.

We return to the primary inquiry: What was the testator's intention? In common parlance, when we speak of one as inheriting an estate, we refer to one upon whom the estate devolves as an heir; such is the derivative meaning from the Latin; such is the meaning given by the lexicographers: Webster's Dictionary; Century Dictionary; New Standard Dictionary; "Inherit." "Inheritance" is defined in Webster's Dictionary as a perpetual or continuing right to an estate in a man and his heirs. Bouvier's Law Dictionary states that the word "inheritance" includes "all methods by which

a child or relation takes property from another at his death, except by devise." In ordinary speech we do not say that a wife inherits from her husband.

Counsel contend that the testator used the word "inheritance" as synonymous with succession, descent and distribution. It is frequently so used, and as applied to personal property it can mean nothing else than to signify succession. Bouvier's Law Dict. "Inheritance." It is worthy of note, however, that the testator did not use the phrase "laws of descent," which would have clearly indicated R. S., 1903, Chap. 77, Sec. 1; in that section the verb "inherit," or the noun, "inheritance" do not appear except in Clause VII, where the word "inherited" is used in its strictly accurate sense, referring to property received by a minor child from his or her parent by operation of law.

A study of this will discloses that it was drafted with great care by one who knew the legal effect of the language used, and how to accurately express the intention of the testator. We are convinced that the testator used the words "laws of inheritance," not as synonymous with "laws of descent," but as indicating the rules then in force in Maine under which real estate devolves from the last holder to his heirs by operation of law, thus using the words in a strictly accurate sense as well as in accordance with common usage; there is nothing in the will to indicate a broader meaning. Recent New Jersey cases, *In re Buzby's Estate*, 118 Atl., 835 and *American Builders' Corp.* v. *Galligan et als.*, 121 Atl., 595, sustain such application of the word "inherit" to both real and personal estate; it is said in the former case to be "a settled rule of construction that where words of inheritance are used by a testator in his will to indicate the persons who are to be the beneficiaries of his personal estate, the next of kin are intended." In the first of these cases the residuary personal estate was bequeathed "to such person or persons as would by law inherit the same;" and in the second case the residuary estate was to go "to such persons as would by law inherit the same, to them and their heirs and assigns forever."

Accordingly, we hold that the widow, Elizabeth G. McCarthy, did not take a share of the residuary estate, and that the heirs at law and next of kin of the testator, viz.: Elizabeth Kelleher, Mary Plane, Joanna McCarthy Ferris and Florence J. McCarthy, take the whole thereof.

SECOND: Whether under said Paragraph 2, Subdivision (c) Elizabeth B. Dunphy takes a fee, simple, absolute and unconditional, in land and buildings at 574 Congress Street, or whether she takes a lesser estate, and if she takes a lesser estate, the nature and extent thereof, and what person or persons or class of persons are entitled thereto at the termination of her said estate.

The contention of the plaintiffs is that the testator, by the use of the words, "if she shall die without leaving lawful issue," intended a definite failure of issue, a failure at the time of Miss Dunphy's death, and that the devise over should be given effect as an executory devise. Counsel for Miss Dunphy contend that the language used must be construed, in accordance with established rules of law, as meaning an indefinite failure of issue and as vesting in Miss Dunphy an estate in fee tail, and that the devise over takes effect as a remainder.

To adopt the contention of plaintiffs will disregard the definite legal meaning which the language used has acquired by judicial determination, thus becoming a rule of property. *Gilkie* v. *Marsh*, 186 Mass., 336. *Burrough et ux.* v. *Foster*, 5 R. I., 534, 539. *Arnold* v. *Muhlenberg College*, 227 Pa. St., 321, 324.

We are unable to distinguish this case from carefully considered cases heretofore decided by this court, *Fisk* v. *Keene*, 35 Maine, 349, *Richardson* v. *Richardson*, 80 Maine, 585, *Skofield* v. *Litchfield*, 116 Maine, 440, and are of the opinion that it is ruled by them. We discover nothing in the will which discloses that the words, "shall die without leaving lawful issue," mean other than an indefinite failure of issue.

We therefore hold that Elizabeth B. Dunphy takes an estate in fee tail.

THIRD: Whether or not under Paragraph 2, Subdivision (e) of said will the legacy bequeathed to Reverend John O'Dowd has lapsed and becomes a part of the general rest, residue and remainder of said estate, and if not what person or persons are entitled to same.

Counsel do not question that a valid bequest in trust to Rev. John O'Dowd was made by the paragraph referred to, and that it did not lapse at the death of trustee in the lifetime of the testator. A new trustee may be appointed to administer the trust, as was done in *Dupont* v. *Pelletier et als.*, 120 Maine, 114, and it seems proper that

the pastor of the Church of the Sacred Heart, in Portland, be appointed to the trust.

Bill sustained.
Decree in accordance with opinion.

SAMUEL CLARK, JR. et als. *vs.* CARL A. ANDERSON.

Cumberland. Opinion October 23, 1923.

The same rules govern in construing guaranties as other contracts, and in case of ambiguity the language is construed most strongly against the guarantor. The intention of the parties controls and the circumstances under which, and the purposes for which, the contract was made, may be proved, and must be kept in view in its construction.

In the instant case the "obligation" which was to "continue until you are notified in writing of the withdrawal therefrom," was defendant's obligation to continue to guarantee payment of renewal notes; and by his notice of July 1, 1921, he withdrew from his obligation to guarantee of any notes thereafter received in renewal of existing notes; and the notice of withdrawal cannot be considered as avoiding his liability as guarantor of notes then outstanding.

If the language used is ambiguous and admits of two fair interpretations, and the guarantee has advanced his money upon the faith of the interpretation most favorable to his rights, that interpretation will prevail in his favor.

On report on an agreed statement. An action to recover damages for breach of a written contract. The question involved was the construction to be given to the last sentence of the written contract which read as follows: "This obligation shall continue until you are notified in writing of the withdrawal therefrom." The case was reported to the Law Court on an agreed statement of facts. Judgment for the plaintiff for the amount of the seven notes set out in the writ and agreed statement as unpaid, with interest according to their tenor, allowing credit for the dividend thereon received in bankruptcy.

The case is stated in the opinion.

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

Pattangall, Locke and Perkins and John B. Roberts, for defendant.

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

MORRILL, J. Action of covenant broken upon a sealed instrument of the following tenor:

"Portland, Maine,
April 6th, 1921

D. W. TRUE & Co.,
Portland, Me.

Gentlemen:

In consideration of your selling merchandise and giving credit therefor, to Albert B. Anderson of Stockholm, Me., I hereby guarantee the payment to you of all indebtedness now owing D. W. True & Co., this indebtedness to be made into notes signed by A. B. Anderson with the privilege of renewal until fully paid.

This obligation shall continue until you are notified in writing of the withdrawal therefrom.

CARL A. ANDERSON (Seal)"

Witness
M. L. BUCK

The case is presented for final decision upon the writ, amended pleadings, and an agreed statement of facts.

On July 1, 1921, the defendant sent the plaintiffs a letter, which was duly received, in which he said that he withdrew from said agreement. On that date plaintiffs held seven notes of Albert B. Anderson to the face amount of $7,311.82, representing his indebtedness to them on April 6, 1921, and demand for payment of these notes was made upon defendant by plaintiffs after receipt of said letter. Albert B. Anderson was adjudicated a bankrupt upon his own petition filed July 22, 1921.

That the first paragraph of this instrument of April 6, 1921 was an express guaranty of payment of the then existing indebtedness of Albert B. Anderson to plaintiffs, and of the notes into which it might be converted as therein stipulated, is not questioned; no question is raised as to acceptance of the guaranty, or as to demand on defendant.

The defendant contends that the final sentence of the instrument in question, viz.: "This obligation shall continue until you are notified in writing of the withdrawal therefrom," gave him a right to avoid any liability thereon by notifying the plaintiffs of his withdrawal therefrom, and that said withdrawal terminated any liability of the defendant as guarantor or otherwise under said agreement.

This contention is not tenable; it does violence to the intention of the parties as disclosed by the terms of the undertaking, construed in the light of the circumstances. We should not adopt a construction, if it can be avoided, which renders the action of the parties ineffective, and leaves the plaintiffs who have relied upon the guaranty, without remedy.

This court is committed to the view that guaranties are governed by the same rules of construction as other contracts; that in case of ambiguity the language is construed most strongly against the guarantor; that it is the duty of the court to ascertain and give effect to the intention of the parties; that to arrive at that intention the circumstances under which, and the purposes for which, the contract was made, may be proved, and must be kept in view in its construction. *Smith* v. *Loomis*, 72 Maine, 51, 54. *Hines & Smith Co.* v. *Green*, 121 Maine, 478, 481.

The defendant argues that he has a right to stand upon the terms of the contract; that, if his construction be the true one, and the contract of guarantee is thereby rendered worthless and was worthless at the start, it is the plaintiffs' misfortune; they should not have accepted the contract. It may be conceded that the defendant has the right to stand upon the terms of the contract (*Miller* v. *Stewart*, 9 Wheat., 680, 703); but the question is one of construction; what in view of all the facts was the understanding and intention of the contracting parties, as declared in the instrument.

"If the language used be ambiguous and admits of two fair interpretations, and the guarantee has advanced his money upon the faith of the interpretation most favorable to his rights, that interpretation will prevail in his favor." *Lawrence* v. *McCalmont*, 2 How., 426, 450, quoted in *Maine Red Granite Co.* v. *York*, 89 Maine, 54, 56, as supporting the proposition that the words are to be taken as strongly against the party giving the guaranty as the sense or meaning of them will allow.

But without resorting to a strained construction of the language of the contract, we think that it is not difficult to ascertain the intention of the parties, and by reasonable interpretation make the contract effective.

On April 6, 1921, the credit of Albert B. Anderson was exhausted; the plaintiffs were willing to extend further credit to him, provided the defendant would guarantee payment of Albert's indebtedness to them then existing, amounting to about seventy-three hundred dollars; the defendant was willing to furnish that guaranty provided said indebtedness could be put in the form of notes, with the privilege of renewal until they were paid. This was the arrangement made by the parties for aiding Albert B. Anderson, and adhered to by plaintiffs who, relying upon the guaranty, "honored all requests of Albert B. Anderson for selling and delivering to him merchandise and did sell and deliver to him merchandise upon credit to the total amount of eight hundred forty-two dollars and twenty cents from April 9, 1921 to June 23, 1921," as the agreed case shows, and renewed his notes until defendant's letter of July 1, 1921 was received.

But it was manifestly for the interest of defendant to be in a position to terminate his liability as guarantor of payment of future renewals whenever he became convinced that his aid was useless and that Albert could not extricate himself from financial difficulties. This was the right which he reserved by the last sentence of the agreement, which directly follows the provision for renewal of the notes.

The "obligation" which was to "continue until you are notified in writing of the withdrawal therefrom," was defendant's obligation to continue to guarantee payment of renewal notes, and by his notice of July 1, 1921, he withdrew from his obligation to guarantee payment of any notes thereafter received in renewal of existing notes; but that notice of withdrawal cannot be considered as avoiding his liability as guarantor of notes then outstanding. Such a construction would permit the defendant to avoid his contract as soon as it was executed, and cannot be adopted against those who, if it prevail, will have been misled to their injury. *Lawrence* v. *McCalmont*, supra.

Judgment for the plaintiffs for the amount of the seven notes set out in the writ and agreed statement as unpaid, with interest according to their tenor, allowing credit for the dividend thereon received in bankruptcy.

WALTER E. LUCE *vs.* PARK STREET MOTOR CORPORATION.

Androscoggin. Opinion October 20, 1923.

A written agreement prevails over an alleged subsequent oral agreement upon which the plaintiff relied to support his action.

The contract is clearly one of employment only, and the commission was payable on sales of Studebaker cars "to prospective purchasers which the said Walter E. Luce may or will personally turn over to the said corporation."

The testimony of the plaintiff that there was another and later hiring is too flatly contradictory of his written agreement to justify its acceptance; no reason for making another contract appears.

On motion for a new trial. An action of assumpsit upon an account annexed to recover a balance of $800 claimed to be due as commissions for furnishing defendant prospects for the purchase of automobiles, under an express contract. The jury rendered a verdict for the plaintiff for the full amount claimed with interest, 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.

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

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

MORRILL, J. This cause is before us upon defendant's general motion to set aside the verdict. The action is assumpsit, upon an account annexed to recover a balance alleged to be due the plaintiff for commissions on motor cars sold by the defendant corporation to so-called "prospects," whose names were upon a list delivered to defendant by plaintiff when the latter sold to the former the good-will and Studebaker agency rights of his business, in January, 1921; the plaintiff does not claim to have personally sold any of the cars,

on the sale of which he now claims commission; but he claims to be entitled to commissions on sales of cars by other salesmen of defendant, as part of the consideration for the good-will and agency rights of the business sold.

It appears that on January 29, 1921, plaintiff sold to the defendant all his stock in trade consisting of automobiles, new and second-hand, automobile supplies, stock and accessories; "also the good-will of the business hitherto conducted by him and all his rights in and to the Studebaker Sales Agency." The consideration for the sale of the physical property was fixed by the written agreement of sale; the consideration for the transfer of the good-will and agency rights was not so fixed, and probably could not be agreed upon until the assent of the Studebaker Automobile Company to the transfer of the agency had been received.

The plaintiff demanded sixty-five hundred dollars for the good-will and agency rights, and as an inducement produced a list of ninety-two so-called "prospects," persons supposed to be interested in the purchase of Studebaker cars. The consideration was finally settled by a note of the defendant for five thousand dollars and the execution of an agreement dated February 8, 1921, upon which this action is based; the list of "prospects" was delivered to defendant, plaintiff retaining a copy, when the agreement was executed.

The right of the plaintiff to maintain this action depends upon the construction of the agreement last referred to; it is therefore here copied in full:—

"Memorandum of agreement made this eighth day of February, A. D. 1921, by and between Walter E. Luce of Lewiston and the Park Street Motor Corporation of Lewiston, witnesseth as follows:—

1. The said Park Street Motor Corporation hereby agrees to pay to Walter E. Luce a commission of 5% on the selling price of all sales of Studebaker cars, which may be made to prospective customers, which the said Walter E. Luce may or will personally turn over to the said corporation.

2. The said Luce does hereby agree to render faithful services to said corporation in obtaining such prospective customers and to exclusively handle the Studebaker cars, for and during the automobile season of 1921.

3. The total amount of commissions to be paid to said Luce for the said services during said entire automobile season shall not

exceed in the aggregate from all commissions, the total of fifteen hundred dollars ($1,500.00). All of the excess revenue and profit over and above the said fifteen hundred dollars ($1,500.00) shall inure entirely to the benefit of said corporation.

4. If, and in event, the said corporation is required to repossess itself of any car delivered to any customer of said Luce, then the said Luce is to reimburse the said corporation for the proportion of the commission on said refund or reclamation.

Dated at Lewiston, aforesaid, this day and year first above written.

HERMAN E. SHAPIRO (Seal)
SAMUEL SHAPIRO (Seal)

WALTER E. LUCE."

Herman E. Shapiro is President, and Samuel Shapiro is Treasurer of defendant corporation; both plaintiff and defendant treat this instrument as a contract of the corporation.

It is further not disputed that the plaintiff worked for defendant during the season of 1921, as a salesman upon a five per cent. commission basis; he devoted only a part of his time to that employment; his commissions upon cars sold by him amounted to about eight hundred dollars which he has received; the names of some persons to whom he sold cars, for which he received commissions included in the eight hundred dollars, were upon the list of "prospects" delivered to defendant when the contract of February 8, 1921 was executed.

So far the parties agree; from this point their contentions are squarely conflicting.

The defendant has set out the latter contract in its pleadings and Samuel Shapiro, its Treasurer, with whom Luce had his dealings, contends that having paid the plaintiff his commissions on all cars sold by him, nothing further is due; he denies that the corporation was to pay Luce commissions on cars sold by others to persons on the list, or anything for the list.

The plaintiff denies that he worked for defendant under the agreement of February 8, 1921; he denies that he signed any contract to sell Studebaker cars; he testifies that he did not hire out to defendant for about three weeks after the above agreement was made, and that his employment had nothing to do with the agreement. Admitting that he signed it, he in effect disavows three paragraphs out of

four, of that agreement. The language of those paragraphs is so clear and unambiguous, and plaintiff's testimony as to his employment is so squarely contradictory to his acknowledged agreement, that his testimony on that point is inherently improbable and cannot be accepted as true. It is difficult to understand why he should testify in flat contradiction to his signed contract, unless he had forgotten its tenor.

The plaintiff, however, bases his present claim for "Commissions for names of prospects furnished to the defendant of persons wishing to purchase automobiles," upon the agreement which he in part disavows in his testimony, and he testifies that his written contract, as he understood it, was "simply for the $1500 due me if they sold cars enough to amount to that, if not, whatever the amount came to."

This construction is not tenable; the language is clear and unambiguous; not a word is to be found as to commissions on cars sold by others, as to cars sold to persons named on any list, or as to any list turned over to the corporation. The contract is clearly one of employment only, and the commission of five per cent. was payable on sales of Studebaker cars "to prospective purchasers which the said Walter E. Luce may or will personally turn over to the said corporation." As stated above, the testimony of plaintiff that there was another and later hiring is too flatly contradictory of his written agreement to justify its acceptance; no reason for making another contract appears. By his written agreement he was placed on precisely the same footing as other salesmen of the defendant, and given the opportunity to earn by sales to prospective customers the fifteen hundred dollars, which he had asked for the good-will and agency rights in addition to the amount of the note given him.

After the plaintiff had been examined in direct, and cross-examined, he was permitted to testify upon redirect examination, without objection, as follows:

"Q. Now wont you please state again what your arrangement was about this list and how you happened to turn in the list as a part of the assets? Tell us about it?

"A. Well, I asked him $6,500, and he said he wouldn't give that in cash, and I told him about the eighty to one hundred prospects I had, all good prospects, and he says 'I will tell you what I will do, I will give you $5,000 on a note, and you turn in your prospects and I

will give you 5 per cent. on any prospects what *we* sell a car to, factory price, and if it amounts to $1500 I will give it to you, if it amounts to more than that it is my gain, and if it is less it is your loss.' Now that was the understanding. I took it that way because I knew the prospects were good and would amount to that amount of money."

This testimony as to a conversation had before the written contract was signed, cannot be considered for the purpose of contradicting, or altering the later written contract; but it is worthy of notice that change one word in this statement—change "we," printed in italics, to "you" . . . and the testimony supports the construction which we have placed upon the written contract to which the oral agreement was later reduced, and in which it was merged. This construction in the light of the attendant circumstances and the purposes for which the contract was made is reasonable, probable, and in accord with the course of action of prudent business men, and reflects the intentions of the parties at the time.

The contract presented and relied upon by the plaintiff does not support his action, and the entry must be,

Motion sustained.
New trial granted.

JOSEPH E. HARVEY *vs.* HAVEN A. ROBERTS.

York. Opinion October 25, 1923.

Plaintiff must have either title to, or possession, or right of possession of the property involved, in order to maintain trespass de bonis. An assignee of an action, under the statute, cannot sue in his own name without an assignment in writing. A judgment of a court of competent jurisdiction, in absence of fraud or collusion, cannot, at the instance of a party to it, be impeached collaterally by proof of errors. On report the court can give effect to any contention in defense which is supported by the evidence and could have been pleaded in the action.

At common law, subject to an exception immaterial in the present case, no action could be assigned so as to give the assignee a right to sue in his own name. The statute which alone gives such right imperatively requires an assignment in writing.

Under Chapter 294 of the Acts of 1917, as amended by Chapter 63 of the Acts of 1921 an automobile used for the illegal transportation of intoxicating liquor may be seized and forfeited.

On report. An action of trespass de bonis against the sheriff of York County whose deputy seized a certain automobile alleged to be used in the illegal transportation of intoxicating liquor, which at the time of seizure was in the possession of its owner, one Walter Chorosky. The automobile was seized, libeled, and ordered forfeited to the county. An appeal was taken and judgment was affirmed. After the judgment of forfeiture was entered, the owner gave to plaintiff a bill of sale of the automobile on which this action was based. Judgment for defendant.

The case is stated fully in the opinion.

John P. Deering, for plaintiff.

Edward S. Titcomb, for defendant.

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

DEASY, J. On report. Action of trespass against the sheriff of York County. The facts relied upon to prove such trespass are

these:—The defendant's deputy seized a certain automobile alleged to be in use in the illegal transportation of intoxicating liquor. At the time of its seizure the automobile was in the possession of its owner, one Walter Chorosky. The owner was convicted of illegal transportation.

The automobile was libeled in a trial Justice Court and ordered forfeited to the county. On appeal the judgment was affirmed. Exceptions were reserved. The mandate of the Law Court was as follows: "Exceptions overruled. Automobile ordered forfeited to the County of York." *State* v. *Automobile, Chorosky claimant,* 122 Maine, 288.

Subsequently to this judgment of forfeiture Chorosky executed a bill of sale of the car to the plaintiff, mainly in consideration of services to be rendered in an effort to retrieve the car or recover its value. Thereupon this action of trespass was brought in the name of the plaintiff. For several reasons, either of which alone would compel the same result, judgment must be rendered for the defendant.

(1) Admittedly the plaintiff at the time of the alleged trespass had neither title to the automobile, nor possession, nor right to possession of it. No trespass was committed and no trespass was alleged or claimed to have been committed upon or against the person or property of the plaintiff.

(2) At common law, subject to an exception having no relation to the present case, no action could be assigned so as to give the assignee a right to sue in his own name. *Davenport* v. *Woodbridge,* 8 Maine, 18. *Hall* v. *Hall,* 112 Maine, 237.

The right of an assignee to bring suit in his own name depends entirely upon R. S., Chap. 87, Sec. 152. This section imperatively requires an assignment in writing. The action fails because no written assignment, and indeed no oral assignment of the right of action is shown. A bill of sale of a car is of course not equivalent to an assignment of a cause of action for trespass.

(3) A judgment of a court having jurisdiction, no fraud or collusion appearing, cannot, at the instance of a party to it, be impeached collaterally by proof of errors.

This is true of judgments of inferior courts. With at least equal reason is it true of a court of final jurisdiction. *Cunningham* v. *Gushee,* 73 Maine, 422. *Blaisdell* v. *York,* 110 Maine, 509.

(4) But we perceive no error in this case. The plaintiff urges that under R. S., Chap. 127, Secs. 30-31 forfeitures can be decreed only when seizure has been made under Section 29, the search and seizure section. The judgment of forfeiture in this case, however, was not rendered under the above sections but under Chapter 294 of the Acts of 1917 as amended by Chapter 63 of the Acts of 1921. This act authorizes the seizure and forfeiture of automobiles used for the illegal transportation of intoxicating liquor. For the procedure only reference is made to the Revised Statutes.

The plaintiff argues that the defenses should have been specially pleaded. Even if this point would otherwise have been valid the report of the case by consent was a waiver of pleadings. On report "the court can give effect to any contention in defense which is supported by the evidence, and could have been pleaded in the action." *Martin* v. *Smith,* 102 Maine, 30.

Judgment for defendant.

JAMES W. MITCHELL

vs.

BANGOR & AROOSTOOK RAILROAD COMPANY.

MARTHA E. MITCHELL *vs.* SAME.

Penobscot. Opinion October 27, 1923.

A railroad company at a highway crossing has a superior right of passage only, to that of the traveling public. To all other rights it cannot claim superiority. Negligently causing the existence, within the limits of a highway, of objects reasonably calculated or likely to frighten horses ordinarily gentle and well broken, traveling in the highway, constitutes negligence, for which one may be held responsible.

In the instant case, considering the size and nature of the push-car, its color, its proximity to the traveled way, and whether it is customarily found in similar places and under similar conditions, and was so situated that a horse would

come suddenly in sight of it, it cannot be said that the finding of the jury that the defendant was negligent, was manifestly wrong under the general rule as stated.

The same may be said as to the alleged want of due care on the part of the husband. As to the wife, no claim of contributory negligence can be entertained because even if the husband had lacked in due care such lack could not legally be imputed to her.

Considering the nature and extent of the wife's injuries, and her consequent suffering, the verdict in her favor, thirteen hundred dollars, cannot be deemed excessive, and the husband's award of two hundred dollars to cover expenses and loss of services, is also deemed reasonable.

On motions. Two actions tried together, the plaintiffs being husband and wife. The action by the wife to recover damages for personal injuries alleged to have resulted from the negligence of defendant, and the action by the husband to recover expenses and for loss of services of his wife. Plaintiffs alleged that the defendant corporation was negligent in allowing a hand or push-car, so called, to remain within the limits of a public highway, in the town of Alton, at which the horse of the husband being driven by him in the public way, drawing a load of boards on which the wife was riding, took fright and ran away, throwing the wife from the wagon to the ground, resulting in serious injuries to her. The two cases were tried together to a jury and a verdict of thirteen hundred dollars was rendered in favor of the wife, and a verdict for two hundred dollars rendered in favor of the husband. A general motion for a new trial was filed in each case. Motion in each case overruled.

The cases are fully stated in the opinion.

F. W. Knowlton and Fellows & Fellows, for plaintiffs.

Frank P. Ayer, Henry J. Hart and George E. Thompson, for defendant.

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

CORNISH, C. J. These two actions, one brought by the husband and the other by the wife, arose from an accident that occurred on March 16, 1922, in the town of Alton, caused by the fright of Mr. Mitchell's horse at a hand or push-car removed by employees of the defendant from the railroad tracks and placed and allowed to remain

near a railroad crossing and within the limits of the public highway. The section-men had been putting new plank in the crossing. They had come there in their gasolene car and hauled the plank in the push-car. While there they received orders to proceed to another place on the railroad and make repairs and, to use the words of the section foreman, "We was there all the rest of the day, and we never thought of the push-car afterwards and so it was left there over night." This accident happened about four o'clock in the afternoon.

Mrs. Mitchell was riding on some boards placed on a truck wagon, leaning against a bag of grain and facing toward the left or west. Mr. Mitchell had also been riding on the boards but had stopped to water the horse at a point a short distance southerly from the crossing, and then had walked beside the team on the easterly side toward the crossing, holding the reins in his hands as he testified. Just as or after the horse passed over the crossing he became frightened at this push-car, jumped quickly to the left and threw Mrs. Mitchell off the team causing serious injuries.

The jury rendered a verdict in favor of the plaintiff in each action and a general motion by the defendant brings the cases before the Law Court.

1. NEGLIGENCE.

The principle of law upon which the plaintiffs' right of action must rest, if at all, cannot be in controversy. It is this. One may be held legally responsible for injuries resulting from negligently depositing within the limits of a highway objects reasonably calculated or likely to frighten horses ordinarily gentle and well broken traveling along the highway. This rule applies to railroads as well as to other persons or corporations. At a highway crossing the railroad company has one right superior to that of the traveling public and that is the right of passage. As to other rights, however, the railroad cannot claim superiority, and it comes under the general rule above stated as to depositing objects off the track and within the limits of the highway.

In *Lynn* v. *Hooper*, 93 Maine, 46, this rule of law is thoroughly discussed and many illustrations of its application in decided cases are cited. To these may be added as objects that under certain circumstances have been held to be likely to cause fright, and especially

pertinent in the case at bar; a push-car loaded with tools standing on the track at a crossing, *Sherman S. & S. Ry. Co.* v. *Bridges*, 16 Tex. Civ. App., 61; push-car removed from track and placed within the limits of the highway, *Ohio & M. Ry. Co.*, 126 Ind., 391; same situation, *A. T. & S. F. R. R. Co.* v. *Morrow*, 4 Kan. App. 199.

The problem therefore resolves itself into one of fact. Conditions vary. Were the appearance and location of this car such as to make it a naturally fright-producing object to a gentle and well-broken horse? The jury have found that it was. Is their finding manifestly wrong? This depends upon various considerations, such as the size and nature of the object, its color, its proximity to the traveled way, "whether it is customarily found in similar places and under similar conditions," and whether it is so situated that a horse being driven along the road came suddenly in sight of it. Taking up these elements seriatim the evidence discloses that the car was about eight or ten feet long, with handles projecting about one foot at each end. It was painted a red or reddish color. It was placed thirteen feet within the highway location, the distance from the center of the road to the outside end of the car being twenty feet, and from the wheel track to the end of the nearest handle only four feet. It could hardly be said that such a push-car is customarily found in similar places and under similar conditions; the land lay so that the car was partially concealed and a horse going in the direction of the plaintiff's would come in sight of it suddenly. So much for the test elements.

In addition two witnesses testified that they passed this place twice and their horses were frightened by the car each time. This class of testimony is admissible and has weight. *Crocker* v. *McGregor*, 76 Maine, 282; *Lynn* v. *Hooper*, 93 Maine, 46.

There was some contradictory evidence as to the character of the plaintiff's horse, but we think on the whole he could be characterized as slightly fussy with strangers, but a well-broken horse and gentle with its owner as driver.

Under this state of facts we think the demands of the legal rule have been met.

2. CONTRIBUTORY NEGLIGENCE.

The want of due care charged against the husband is that he did not have the reins in his hands at the time of the accident and there-

fore could not control his horse. He testifies squarely that he had a rein in each hand, that they were buckled, and he was driving carefully. He may and very likely did throw the reins over the post on the right-hand side of the wagon as he says, when his wife was thrown out, and when he started quickly around the team to her rescue, and they may have been found there when the team was stopped a quarter of a mile up the road. His verdict should not be set aside on this ground.

As to the wife, no claim of contributory negligence can be entertained, because even if the husband had lacked in due care such lack could not legally be imputed to her.

3. DAMAGES.

Considering the nature of the wife's injuries, and her suffering in consequence, the verdict in her behalf, $1,300, cannot be deemed excessive. And the husband's award of $200 to cover expenses and loss of service must also be deemed reasonable.

The entry will be

Motions overruled.

STATE OF MAINE *vs.* GEORGE L. LORING.

Cumberland. Opinion October 27, 1923.

In determining the venue well known names and localities may be sufficient to fix the exact location of a seizure, and the arrest of a respondent, charged with unlawful possession of intoxicating liquors. The court and jury may take judicial notice of such facts. An excepting party must show that he is prejudiced by the ruling excepted to.

In the instant case the sheriff and three other officers in their examination in chief stated where they resided, and the offices they held in the county of Cumberland; one particularly described himself as a member of the liquor squad residing in Portland. It appeared that the respondent was arrested at his home in Portland. The pursuit of the respondent was in the vicinity of Longfellow Street and Deering Avenue. Forest Avenue is mentioned by a witness as being used in passing in the search. Another unnamed street is mentioned which was distant a thousand feet toward Union Station, and the time was said to be eleven o'clock, p. m., Portland time.

The foregoing names and localities are so well known by people in and out of the State, that there is and can be no uncertainty as to the exact location of the place of seizure, and arrest of the respondent. Of this the court and jury could, and no doubt did, take judicial notice. Jurors are not to be presumed ignorant of what everybody else knows. And they are allowed to act upon matters within their general knowledge, without any testimony on those matters.

In this case the respondent has not shown that he was prejudiced by the ruling complained of, as he is required by law to do.

On exceptions. On complaint for unlawful possession of intoxicating liquors the respondent was tried before a jury and the presiding Justice refused to grant a motion for a directed verdict for the respondent, and exceptions were taken.

Counsel for the respondent contended that the testimony did not sustain the venue; that is, that the evidence did not show that the unlawful possession took place within the limits of Cumberland County. Exceptions overruled. Judgment on the verdict.

The case is stated in the opinion.

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

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

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

HANSON, J. This case is before the court on respondent's exception to the refusal of the presiding Justice to instruct the jury to return a verdict of "not guilty" at the close of the evidence in the trial of a complaint against a respondent for the unlawful possession of intoxicating liquors.

The motion for a directed verdict was based, as it now appears, upon the ground that there was no evidence to warrant the jury in finding that the offense was committed in the county of Cumberland. No reason was stated at the trial, and court and counsel for the State were not informed of any special technical reason underlying the motion. King F. Graham, Sheriff of Cumberland County, was called by the State and was asked, "Q. Now you had occasion to go out in the Woodfords region on the evening of June 29th?" He answered in the affirmative. Defendant's counsel contends that his exception should be sustained, because the testimony in the case would not warrant the jury in finding from facts proven that this offense was committed in any particular town or city in the county of Cumberland, and urges that in a criminal case the record should show that the offense was committed in the county charged in the indictment, citing *State* v. *Jackson*, 39 Maine, 291.

Counsel further contends that "we are not confronted with the law as to judicial notice. If we were, this would be a matter for the court and not for the jury."

Sheriff Graham and the three other officers in their examinations in chief stated where they resided, and the offices they held in the county of Cumberland; one particularly described himself as a member of the liquor squad residing in Portland. It appeared that the respondent was arrested at his home in Portland. The pursuit of the respondent was in the vicinity of Longfellow Street and Deering Avenue. Forest Avenue is mentioned by a witness as being used in passing in the search. Another unnamed street is mentioned, which was distant a thousand feet toward Union Station, and the time was said to be eleven o'clock, p. m., Portland time.

The foregoing names and localities are so well known by people in and out of the State, that there is and can be no uncertainty as to the exact location of the place of seizure, and arrest of the respondent.

Of this the court and jury could, and no doubt did, take judicial notice. *State* v. *Thompson*, 85 Maine, 189; *Commonwealth* v. *Ackland*, 107 Mass., 211; *McCune* v. *State*, 42 Fla., 192; 89 A. S. R., 225. "Jurors are not to be presumed ignorant of what everybody else knows. And they are allowed to act upon matters within their general knowledge, without any testimony on those matters." *State* v. *Clancy*, 121 Maine, 83.

At the trial the defense was technical, even to the extent of withholding from the court the reason underlying the motion for a directed verdict. No question was asked the officers by respondent's counsel in cross-examination directed to a more definite description of the place of seizure. Every question was directed by respondent's counsel to an attempt to break down the State's testimony that the liquor seized was intoxicating liquor. That subject was a question for the jury and has been settled by the jury without objection by the respondent. The contentions of the respondent here are also purely technical, and counsel frankly admits it, and says that duty to his client urges him on. The spirit is commendable, but the object lacks the legal support required in a successful technical defense. In the instant case the respondent has not shown that he was prejudiced by the ruling complained of, as he is required by law to do. *State* v. *Dow*, 122 Maine, 448.

Exceptions overruled.
Judgment on the verdict.

FRANKLIN W. ALLEN

vs.

ROCKLAND WHOLESALE GROCERY COMPANY.

Knox. Opinion October 27, 1923.

Contract not completed by a meeting of the minds of the parties.

The plaintiff contended that there was a completed contract made between the parties which cannot now be evaded by the defendant. The defendant says there was no contract because there was no meeting of the minds upon the subject. An examination of the circular and letter in reply without any other evidence discloses that the minds of the parties did not meet.

On report. An action of assumpsit to recover two hundred and fifty-five dollars and interest for "stenographer's transcript" alleged to have been furnished to defendant by plaintiff upon a written order. Defendant filed the general issue and under a brief statement alleged fraud. The plaintiff contended that the correspondence between the parties constituted an express written contract, while the defendant claims that there was no "meeting of the minds" upon the subject matter involved in the alleged contract. At the close of the testimony, 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.

E. W. Pike, for plaintiff.

Charles T. Smalley, for defendant.

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

HANSON, J. Action of assumpsit, brought to recover the sum of two hundred and fifty-five dollars and interest for stenographer's transcript, alleged to have been furnished to the defendant by the plaintiff upon its written order therefor, and is before us on report.

The account annexed to the writ follows:—

OFFICIAL REPORTERS

FEDERAL TRADE COMMISSION

September 16, 1921

Unfair Competitive Methods in the Wholesale Grocery Trade
Before the FEDERAL TRADE COMMISSION No. 579
Rockland Wholesale Grocery Co., Rockland, Maine

To HULSE & ALLEN, Dr.
17 East 36th Street
New York

The rate of 15c per page has been fixed by agreement with the Federal Trade Commission.

It is frequently not recognized by our clients that bills rendered by us are not subject to credit terms, but are for services requiring immediate and often advance payment by us, and for which we in consequence should be promptly reimbursed. We therefor anticipate the earliest possible attention to your indebtedness.

For Official Stenographer's transcript of proceedings before the Federal Trade Commission.

Pages 1 to 1666	1 copies 1666 pages at 15 cents	
Exhibits 1 to 34	1 copies 34 pages at 15 cents	
	1700	255.00
	Int.	10.25
		265.25

The plaintiff's counsel offered and read in evidence the plaintiff's affidavit under the statute. He also offered the deposition of F. W. Allen, the plaintiff, to which the correspondence in the case is attached, and rested his case.

The charges are based upon the receipt by the defendant of a circular letter, September 9, 1921, offering "copies of the complete official report of hearings before the Federal Trade Commission,"

and the defendant's reply on September 14, 1921, that "we shall be pleased to receive a copy of the Reports of the Federal Trade Commission." The correspondence follows:—

"Unfair Competitive Methods in the Grocery Trade; Federal Trade Commission; docket number 579.

"Dear Sir: If you are interested in the above hearings, involving unfair competitive methods employed by wholesale grocers, and wish to obtain copies of the complete official report of these HEARINGS BEFORE THE FEDERAL TRADE COMMISSION, which are of unusual importance and interest to the grocery trade and which we will furnish, by agreement with the Commission, at the unusually low rate of fifteen cents per page, please advise us promptly so that we may make enough copies to supply you without delay."

In answer thereto, under date of September 14, 1921, the defendant wrote as follows:—

"We have your circular letter of September 9th. We shall be pleased to receive a copy of the REPORTS OF THE FEDERAL TRADE COMMISSION."

The plaintiff forwarded to defendant seventeen hundred pages of testimony being the first installment of data originating in a hearing before the Commission. These pages of testimony the defendant immediately returned, notifying the plaintiff they "did not order anything of the kind." "We supposed we were getting a pamphlet for a few dollars cost, we did not know we were ordering anything of this nature."

Objection was made to the admission of the deposition, while the letters attached were admitted. While there are serious defects in the deposition, there are none that prevent its consideration since so much of it relates to the correspondence already admitted by agreement. It is therefore in the case.

The plaintiff contended that there was a completed contract made between the parties which cannot now be evaded by the defendant. The defendant says there was no contract because there was no "meeting of the minds" upon the subject. An examination of the circular and letter in reply without any other evidence discloses that the minds of the parties did not meet. The plaintiff was thinking about the evidence taken by a stenographer, the other of a report the Commission makes of its decision. The plaintiff offered a "complete official report," and sent a partial report of the evidence. The defend-

ant says he expected a complete report, something in the nature of a pamphlet, and refused to receive a partial report of the evidence, unbound.

The wording of the circular as to the offer, and the reply, show clearly a misunderstanding, and the further correspondence between the parties fortifies the conclusion that however well intentioned, their minds did not meet.

The entry will be

Judgment for the defendant.

NAPOLEON LAROSE *vs.* MARK BERMAN.

Androscoggin. Opinion October 27, 1923.

A person is liable for trespasses of agents or servants committed with his knowledge or consent, or if ratified by him, or done by his direction or instigation, or while acting within the scope of authority conferred by him. Punitive damages permissible.

The presiding Justice rightly instructed the jury as to what constituted a wilful trespass, not that the defendant would be liable for punitive damages in any event if his agent acted wilfully, but only in case the acts complained of were authorized by the defendant.

The master is not responsible as a trespasser, unless by direct or implied authority to the servant he consents to the wrongful act. But if the master gives an order to a servant which implies the use of force and violence to others, leaving to the discretion of the servant to decide when the occasion arises to which the order applies, and the extent and kind of force to be used, he is liable, if the servant in executing the order makes use of force in a manner or to a degree which is unjustifiable.

It is a well-established principle of the common law, that in all actions for torts the jury may inflict what are called punitive or exemplary damages, having in view the enormity of the offense rather than the measure of compensation to the plaintiff.

On exceptions. An action of trespass quare clausum. The plaintiff for several years occupied as a tenant the second floor in a brick

block owned by defendant, situate on Main Street in Lewiston, the first or street floor being occupied by defendant and his son, as co-partners, as a boot and shoe store. Defendant claims that he retired from the partnership on January 13, 1922, dissolving the partnership, and that his son, Jacob, continued the business, occupying the store as his tenant. After the dissolution of the partnership, and, as defendant alleges without his knowledge, his son, Jacob, commenced to remodel the store, and went with a contractor into the tenement of plaintiff in his absence and against the protest of his wife, it is alleged, and broke five holes through the brick walls and put sixteen timbers in one room, twelve in another, and put the furniture in disorder. Plaintiff alleged that the son, Jacob, in committing the acts of trespass complained of, acted as the agent of the defendant, while the defendant contended that his son, Jacob, was not his agent, and that further he had no knowledge that this work was being done. Defendant excepted to an instruction by the court to the jury on the question of punitive damages, and also excepted to a refusal by the presiding Justice to give a requested 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, HANSON, PHILBROOK, MORRILL, WILSON, JJ.

HANSON, J. This is an action of trespass quare clausum and comes to the Law Court on defendant's exceptions.

The defendant had for many years owned a four-story brick building on Main Street, Lewiston. The street floor was occupied as a boot and shoe store and the three floors above by three families. The plaintiff with his family occupied the whole of the floor directly over the store and had been the tenant at will of the defendant for four years.

Until Jaunary 13, 1922, the defendant occupied the street floor in partnership with his son, Jacob. On this 13th day of January, they dissolved partnership, the defendant retiring from and the son remaining in the business. Thereafterwards, the son, Jacob, occupied the street floor as the tenant of the defendant. The plaintiff ever since his tenancy was in the habit of bringing his rent to the store

downstairs and continued so to do after the dissolution of January 13th, taking a receipt from whoever might be in the store at the time.

The defendant in the middle of June following, left Lewiston, going to Atlantic City, and did not return until August 13th. In the meantime, and during the absence of the defendant, the son Jacob, remodeled the front of the store. He employed a contractor and made all of the arrangements for the work. The contractor attempting to shore up the building, made preparation to insert timbers and beams through the front of the building and into the interior of the two front rooms of plaintiff's tenement, when he was denied permission by the plaintiff so to do. Whereupon the son entered personally the two rooms, moved the furniture about and directed the contractor to proceed with the work, which he did, thereby committing the acts of trespass alleged.

The declaration set forth the allegation that the acts of trespass were performed by *the agents* of the defendant, and also an allegation for punitive damages.

The presiding Justice submitted the following specific question to the jury: "If trespass was committed by defendant, was it committed wilfully?" This was answered in the affirmative.

The exceptions are two in number: First, to the instruction of the court in substance; that if the jury should find that the trespass was committed by the authorized agent, and if that agent acted wilfully the defendant would be liable for punitive damages.

Second, to the refusal of the presiding Justice to give the following requested instruction:—

"The defendant would not be subject to punitive damages if the acts of trespass were committed in this case by his servants or agents, unless the defendant authorized the acts, or unless they were within the scope of the authority to remodel the front of the store." The two exceptions are so related that they may be considered together.

The presiding Justice was instructing the jury as to what constituted a wilful trespass, not that the defendant would be liable for punitive damages in any event if his agent acted wilfully, but only in case the acts complained of were authorized by the defendant. Throughout the charge the presiding Justice again and again emphasized the necessity for the jury to find that the acts complained of must be found to be within the scope of the agent's authority. Some of the expressions follow:

"Was he, Jacob, the agent in whatever was done at that house of the defendant, his father?"

"I want you to pay your attention right directly to determining that one question, agency or no agency on the part of Jack Berman, for his father. If you find he was agent then the facts constitute a trespass. Then the question comes as to what the rights of the parties are there."

"If you find that the damage was wilfully and wantonly done, you have a right to go further. . . . . if you find that the trespass was committed by the defendant or by his authorized agent, acting for him." Then followed instruction in relation to punitive damages, which the court instructed the jury might be assessed, if they felt warranted in so doing. The presiding Justice in closing his charge instructed the jury that, "The plaintiff must as a part of his case, satisfy you by a fair preponderance of the testimony, that the relations between the defendant and his son were such that this was fairly in the scope of his agency, this entering in the way he did, doing those acts. . . . . That is a matter for you to decide, but it is law that the plaintiff must satisfy you that in the particular act in question, taking all the circumstances into consideration, the young man Jack Berman, was acting within the scope of his agency, that in handling all this property, including this going through the wall there, and putting these things in, he was within the scope of the actual authority of his father."

The charge is the only thing before us. It was very painstaking and clear upon the points raised, and was in harmony with settled law. The instruction as to punitive damages was correct. The presiding Justice had already covered the points raised in the second requested instruction, and of necessity had gone further and instructed the jury that "if they found that the damage was wilfully and wantonly done, you have a right to go further." It is very plain that the defendant was not injured or prejudiced by the refusal to instruct as requested.

That the defendant is liable for the act of his servant or agent under the facts and circumstances developed in the instant case is well settled. In *Howe* v. *Newmarch*, 12 Allen, 49, the rule controlling in cases such as this is stated in the following language: "The master is not responsible as a trespasser, unless by direct or implied authority to the servant he consents to the wrongful act. But if the master give

an order to a servant which implies the use of force and violence to others, leaving to the discretion of the servant to decide when the occasion arises to which the order applies, and the extent and kind of force to be used, he is liable, if the servant in executing the order makes use of force in a manner or to a degree which is unjustifiable. And in an action of tort in the nature of an action on the case, the master is not responsible if the wrong done by the servant is done without his authority, and not for the purpose of executing his orders, or doing his work. So that if the servant, wholly for a purpose of his own, disregarding the object for which he is employed, and not intending by his act to execute it, does an injury to another not within the scope of his employment, the master is not liable. But if the act be done in the execution of the authority given him by his master, and for the purpose of performing what the master has directed, the master will be responsible, whether the wrong done be occasioned by negligence, or by wanton or reckless purpose to accomplish the master's business in an unlawful manner." *Goddard* v. *Grand Trunk Ry. Co.*, 57 Maine, 202, and cases cited. *Hanson* v. *E. & N. A. Ry. Co.*, 62 Maine, 90. A person is liable for trespasses of agents or servants done with his knowledge or by his consent, given either before or after the act, or by his direction or instigation or acting within the scope of their authority conferred by him—so a master is liable if a trespass is the natural and probable result of orders given by him to his servant or if he ratifies a trespass committed by his servant or agent. 38 Cyc., 1040. The principal is liable to third persons in a civil suit for frauds, deceits, concealments, torts, negligence and other malfeasances and omissions of duty in his agent in the course of his employment, although the principal did not authorize, justify or participate in, or indeed know of such misconduct; or even if he forbade them or disapproved of them. In every such case, the principal holds out his agent as competent and fit to be trusted; thereby, in effect, he warrants his fidelity and good conduct in all matters of his agency. But although the principal is thus liable for torts and negligence of his agent, yet we are to understand the doctrine, with its limitations, that the tort or negligence occurs in the course of the agency. For the principal is not liable for the torts and negligence of his agent in any matter beyond the agency, unless he has expressly authorized them to be done, or he has subsequently adopted them for

his own use and benefit. *Stickney* v. *Munroe*, 44 Maine, 195, citing Storey's Agency, Section 452, 453. See *Leavitt* v. *Seaney*, 113 Maine, 119.

As to punitive damages. In *Goddard* v. *Grand Trunk Ry.*, supra, this court held, "that the right of the jury to give exemplary damages for injuries wantonly, recklessly, or maliciously inflicted, is as old as the right of trial by jury itself; and is not, as many seem to suppose, an innovation upon the rules of the common law. It was settled in England more than a century ago." In *Day* v. *Woodworth*, 13 Howard, 363, the court say: "It is a well established principle of the common law, that in all actions for torts the jury may inflict what are called punitive or exemplary damages, having in view the enormity of the offense rather than the measure of compensation to the plaintiff." "We are aware," the court continues, "that the propriety of this doctrine has been questioned by some writers; but if repeated judicial decisions for more than a century are to be received as the best exposition of what law is, the question will not admit of argument." See *Pike* v. *Dilling*, 48 Maine, 539, for full review of authorities.

The entry will be,

Exceptions overruled.

JOHN A. FERRIS' CASE.

Washington. Opinion October 27, 1923.

Pneumonia suffered by a fireman whose clothes had been wet while fighting a fire, which developed within four days after the fire, is not a result of an accident arising out of and in the course of his employment, under the Workmen's Compensation Act.

The Commission may be right in the conclusion that the predisposing cause of pneumonia from which Mr. Ferris unfortunately suffered was exposure during the fire. It may be equally true that the predisposing cause of pneumonia arose from other causes. In either event, the finding of the Commission that pneumonia was due to exposure is a finding of fact and is final, but the finding that Mr. Ferris is entitled to compensation both for medical attendance and for incapacity to work, according to the provisions of the Workmen's Compensation Act, is error in matter of law.

The finding that "the attack of pneumonia from which Mr. Ferris suffered was the result of an accident arising out of and in the course of his employment," was a finding of fact without evidence, and therefore reversible error.

It cannot be said to be unusual, or unexpected, or untoward, or unforeseen, that firemen get wet in winter as well as in summer. On the contrary, it would be unusual if they did not, each in their turn, get wet. Other firemen were wet at the same time and from the same causes. Can it be said that such occurrences are accidents? We think not, under the Act.

On appeal. The petitioner, a resident of Eastport, was employed in a furniture and undertaking store, and was a member of the Eastport volunteer fire department, and paid as fireman, twenty-five dollars a year.

On November 27, 1921, in the evening, claimant responded to a fire alarm, the Episcopal Church being on fire. While he was climbing a ladder which had been placed on one side of the church, a quantity of snow, saturated with water, came from the roof, striking him and wetting his clothes. He went home and changed his clothing and returned and got his clothing wet a second time. On December 1, 1921, a severe attack of pneumonia developed, incapacitating him for all work for a period of several weeks. The question at issue was as to whether the attack of pneumonia was the result of an accident arising out of and in the course of his employment as a fireman.

Upon a hearing the Chairman of the Industrial Accident Commission found in favor of the petitioner and respondents appealed. Appeal sustained. Decree reversed.

The case is stated in the opinion.

Petitioner appeared without counsel.

Andrews, Nelson & Gardiner, for respondents.

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

HANSON, J. This is an appeal from the decree of a single Justice affirming the decision of the Chairman of the Industrial Accident Commission. A statement of the case is taken from the following finding of facts by the Chairman of the Commission.

"On November 27, 1921, the petitioner, John A. Ferris was a member of the Eastport volunteer fire department. As a fireman he was paid an annual salary of $25 per year. His duties as fireman required him to respond to all calls for fires within the Eastport city limits, regardless of the hour of the day or night. His regular occupation was clerk in a furniture store in Eastport at which he earned a salary of $18 per week for six days work. Besides his work in the furniture store, he often assisted in undertaking work which often requires his services nights and Sundays and for which he received extra pay.

"On the evening of November 27, 1921, Ferris responded to a fire alarm call about 10 o'clock. The Episcopal Church of Eastport was on fire. A part of his duties at the fire that evening required him to climb a ladder which had been placed against one side of the Church. While he was climbing the ladder, a quantity of snow, which had been lying above him on the roof of the church and which had become saturated with water sprayed on the roof by the firemen, suddenly became loosened and came off the roof. As this snow descended it struck Mr. Ferris as he was ascending the ladder and thoroughly drenched him. Mr. Ferris was at once excused from duty and went home and changed his clothing and again returned to the fire where he worked for an hour or two longer. After he returned the second time his clothing became wet again from the spray and water being thrown on the fire by the firemen. The next day Mr. Ferris engaged in his regular work at the store but 'felt mean.' On the 30th of November he was obliged to give up working and go home and on December 1st

had developed a severe attack of pneumonia. As a result of his sickness he was incapacitated for all work for a period of several weeks.

"There is no dispute about the foregoing facts. The only question raised in the case is whether or not the attack of pneumonia from which Mr. Ferris suffered, was the result of an accident arising out of and in the course of his employment as a fireman, on November 27 and 28, 1921. We think it was, and that Mr. Ferris is entitled to compensation therefor."

In the first instance it will be seen the chairman found that "the attack of pneumonia from which Mr. Ferris suffered was the result of an accident arising out of and in the course of his employment as a fireman, on November 27, and 28, 1921." In his conclusions the reason for such finding is more fully set out in the use of the following language: "While so engaged he became suddenly drenched with slush from the roof of the burning building. He went home and changed his clothes and returned again to the fire to render further assistance, and through *exposure,* his clothing again became soaked. A severe cold at once developed and it was almost immediately followed by a severe attack of pneumonia. The *sudden and ususual exposure* was too much for his system."

"Based upon the evidence submitted, it is found that the attack of pneumonia which Mr. Ferris suffered was directly the result of the exposure experienced by Mr. Ferris at the fire on the night of November 27-28, 1921, and that he is entitled to compensation both for medical attention and for incapacity to work, according to the provisions of the Workmen's Compensation Act."

The chairman cites decisions of Commissions of other states in support of his conclusion which it will serve no useful purpose to discuss in the instant case, because such decisions were made under acts differing essentially from our Compensation Act. Our Act provides for compensation to an employee who receives a personal injury by accident arising out of and in the course of his employment. In such cases a liberal construction of the law is intended by the Legislature, and has been accorded by the Commission and by the court. In the instant case we are persuaded that the Commission has gone outside the letter and spirit of the statute when it holds that exposure "to sleet and water," or "slush from the roof," or "through exposure his clothing again became soaked," or that "the sudden and

unusual exposure was too much for his system," or that "the exposure experienced by Mr. Ferris at the fire," constitutes a personal injury by accident.

There was no accident within the meaning of the Act.

The Commission may be right in the conclusion that the predisposing cause of pneumonia from which Mr. Ferris unfortunately suffered was exposure during the fire. It may be equally true that the predisposing cause of pneumonia arose from other causes. In either event the finding of the Commission that pneumonia was due to exposure is a finding of fact and is final, but the finding that Mr. Ferris is entitled to compensation both for medical attention and for incapacity to work, according to the provisions of the Workmen's Compensation Act, is error in matter of law.

The finding that "the attack of pneumonia from which Mr. Ferris suffered was the result of an accident arising out of and in the course of his employment," was a finding of fact without evidence, and therefore reversible error. *Mailman's Case,* 118 Maine, 172; and cases cited. *Gauthier's Case,* 120 Maine, 73.

It cannot be said to be unusual, or unexpected, or untoward, or unforeseen, that firemen get wet in winter as well as in summer. On the contrary, it would be unusual if they did not, each in their turn, get wet. Other firemen were wet at the same time and from the same causes. Can it be said that such occurrences are accidents? We think not, under the Act.

Appeal sustained.
Decree reversed.

FRANK M. LINDSAY *vs.* BERTHA L. MCCASLIN.

MARTHA J. LINDSAY *vs.* SAME.

Washington. Opinion October 27, 1923.

The rule as to non-liability of the employer for the acts of a contractor does not apply where the contract directly requires the performance of a work intrinsically dangerous, however skilfully performed. Fire is inherently dangerous.

The denial of the motion for a directed verdict was clearly not error; that there was negligence on the part of some person or persons is clearly manifest. In these cases whether the negligence was that of an agent, or independent contractor, was the paramount question, and in either event it was for the jury to determine whether the work was performed in a negligent manner. It is further very evident that a contrary verdict is sustainable on the evidence.

With no fact in dispute as to the terms of the employment, it is well settled that the effect of the language used was a question of law for the court and not a question of fact for the jury. It follows that the exception taken to the instruction of the Justice presiding must be overruled.

The owner of blueberry land, or any land requiring burning, owes a duty to his neighbor which he cannot lay aside, or shirk, by leaving the work to a so-called independent contractor, and thus evade his legal duty so to operate his land that his neighbor will not be injured by his negligence.

On exceptions. These two actions on the case were brought under R. S., Chap. 30, Sec. 13, to recover damages suffered by plaintiffs in having had their buildings burned by a fire spreading from a fire kindled by one Everett M. Grant on adjoining land owned by defendant, plaintiffs claiming that said Grant acted as the agent of defendant, and acted negligently in kindling or setting the fire on defendant's land. Defendant contended that said Grant did the burning on her land without her supervision, direction or control, as an independent contractor, and was not her agent or servant. A verdict of $1,058.00 was rendered for Martha J. Lindsay, and one for $627.00 rendered for Frank M. Lindsay.

Counsel for defendant moved for a directed verdict for defendant in each case, which the presiding Justice denied, and defendant excepted. Defendant also excepted to an instruction by the court to the jury that said Grant was the servant and agent of the defendant. Exceptions overruled.

The case is fully stated in the opinion.

Reed V. Jewett and Gray & Sawyer, for plaintiffs.

H. L. Crabtree and C. B. & E. C. Donworth, for defendant.

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

MORRILL, J., concurring in the result.

HANSON, J. These cases were tried together. The plaintiff Martha J. Lindsay, on April 25, 1922, owned a lot of land in Harrington in Washington County, with buildings thereon, on the west side of the town road leading to Addison, and the plaintiff Frank M. Lindsay owned a somewhat similar piece of property on the same road about one half mile further south. The defendant on the same day was owner of certain land on which blueberries were cultivated, which land, known as the Pinkham lot, lay immediately north of Martha J. Lindsay's lot and separated from the same by a cross-road leading into said town road. Mrs. Lindsay also owned a narrow strip of land north of said cross-road, so that the defendant's lot, known as the Pinkham lot, was bounded on the south by said cross-road and also by the narrow lot of the plaintiff, Martha J. Lindsay.

The defendant, desiring to cultivate the blueberry land, entered into an agreement with one Everett M. Grant to burn the land. Mr. Grant, with men employed by him for the purpose, proceeded to carry out the contract. The second day of the burning, the fire spread beyond the land of the defendant to and over the lands of the plaintiffs, destroying the buildings of the plaintiffs. For the consequent damage these suits were brought. Verdicts were returned for the plaintiffs in both cases, and they are now before us on exceptions by defendants.

The record shows that Mr. Grant wrote the defendant asking her to employ him to burn the land. The defendant replied by 'phone, and she states "that I contracted with Mr. Grant to do the work for me, using his own time and judgment," and further, "He was to hire his men, as many as he needed to burn the land in a safe way; use his

own time and judgment. I knew nothing about the land or the work; and when he got through to send the bill to me." Mr. Grant's testimony is in substance the same as defendant's.

The defendants pleaded the general issue and by brief statement set up the defense relied upon, that "Everett Grant was burning her land without supervision, direction or control of the defendant and was not the defendant's servant or agent, but that he was doing such burning as an independent contractor, and that defendant kindled no fires on her land, referred to in plaintiffs writ."

At the conclusion of the testimony, counsel for the defendant moved for a directed verdict for the defendants. The motion was denied and exception was taken.

In his charge to the jury the presiding Justice gave the following instruction: "So as to give progress to the case I hold that he (Everett M. Grant) was not an independent contractor, but her agent and servant, so that whatever he did, she did," etc. To this instruction defendant's counsel seasonably excepted, and these two exceptions we are now to consider.

The first exception. The denial of the motion for a directed verdict was clearly not error. That there was negligence on the part of some person or persons is clearly manifest. In these cases whether the negligence was that of an agent, or independent contractor, was the paramount question, and in either event it was for the jury to determine whether the work was performed in a negligent manner. It is further very evident that a contrary verdict is sustainable on the evidence.

The second exception. Defendant's counsel in their brief, when urging the validity of the first exception, say, "The terms disclosed by the evidence on which Mr. Grant was engaged to burn the defendant's land contain all the elements necessary to make and constitute Grant an independent contractor—determining for himself in what manner the work should be done, engaging in an independent employment, using his own means, method and time, for doing the work—and the evidence in these respects *is not disputed or controverted.*" With no fact in dispute as to the terms of the employment, it is well settled that the effect of the language used was a question of law for the court and not a question of fact for the jury. It follows that the exception taken to the instruction of the Justice presiding must be overruled. *Mehan* v. *Walker,* 117 Atl., 609. New Jersey Ct. of

Errors and Appeals. When the contract of employment has been reduced to writing, the question whether the person employed was an independent contractor or merely a servant is determined by the court as a matter of law. *Richmond* v. *Sitterding,* Virginia Court of Appeals, 15 L. R. A., 446, and cases cited. If no written contract has been executed, the character of the relation between the parties is a question for the jury, when the evidence with respect to the essential and determinative facts is conflicting. Note to *Richmond* v. *Sitterding,* supra. In *Emerson* v. *Fay,* 94 Va., 60, 26 S. E., 386, it was laid down broadly that what constitutes an independent employment is a question of law, to be decided upon the facts as proved. Id. "If I employ a contractor to do a job of work for me, which in the progress of its execution exposes others to unusual peril, I ought, I think, to be responsible . . . for I cause acts to be done which naturally expose others to injury." Id. citing *Norwalk Gas Co.* v. *Norwalk,* 63 Conn., 495, 28 Atl., 32, quoting from the opinion of Seymour, J. in *Lawrence* v. *Shipman,* 39 Conn., 586. The rule as to non-liability of the employer for the acts of a contractor does not apply where the contract directly requires the performance of a work intrinsically dangerous, however skilfully performed. Id. 2 Dill. Mun. Corp., Section 1029. *White* v. *New York,* 44 N. Y. Supp., 454. If, however, the work is one that will result in injury to others unless preventive measures be adopted, the employer cannot relieve himself from liability by employing a contractor to do, or what it was his duty to do, to prevent such injurious consequences. In the latter case the duty to so conduct one's business as not to injure another remains with the employer. Id. citing *Bailey* v. *Troy & B. R. R. Co.,* 57 Vt., 252.

The testimony coming entirely from the defendant's witnesses, shows that the employment was by the day, not a contract for a sum certain,—the employees, including Mr. Grant, were paid by the day, Grant receiving the same as the others. It is clear that the defendant had not parted with her right to control the burning. She could have cancelled the contract, or stopped the work at any stage, had she been so disposed. The record discloses that the work was carelessly and negligently performed. The burning of land at any time when burning is possible, is attended by danger of its spreading beyond the limits of the owner's land to adjoining territory. It does not of itself cease when the line is reached. Fire is inherently dangerous. The

owner of blueberry land, or any land requiring burning, owes a duty to his neighbor which he cannot lay aside, or shirk, by leaving the work to a so-called independent contractor, and thus evade his legal duty so to operate his land that his neighbor will not be injured by his negligence. The necessity for greater care on the part of an owner has increased, due to the expansion of the blueberry industry. Such owners, and all others desiring to burn land, should have in mind the following provision of our statutes: "Whoever for a lawful purpose kindles a fire on his own land, shall do so at a suitable time and in a careful and prudent manner; and is liable, in an action on the case, to any person injured by his failure to comply with this provision." R. S., Chap. 30, Sec. 17. In *Woodman* v. *Metropolitan R. R. Co.*, 149 Mass., 334, a street railway corporation employed to lay a new track in a city street a contractor who so negligently enclosed the space where the new track was being laid that the ends of the rails lying there projected beyond the barrier into the street at a point where there was no cross-walk. A person crossing the street at this point after dark fell over the ends of the rails and was injured. The court held that the corporation was liable for the injury, and that the fact that the work was being done under an independent contract would not exonerate it from liability. The court in reaching this conclusion say, "It is argued that the work was done by an independent contractor. Assuming that there was evidence warranting that conclusion, we are of opinion that the fact would not exonerate the defendant. In some cases a party is liable notwithstanding the intervention of an independent contractor lawfully employed. A plain case is when he is made personally responsible by statute for the prevention of the cause of the damage complained of. *Gray* v. *Pullen*, 5 B. & S., 970." That the defendant was bound to see that due care was used to prevent harm was again emphasized by the same court following the principle recognized in *Woodman* v. *Metropolitan R. R.*, supra. *Wetherbee* v. *Partridge*, 175, Mass., 185.

This principle was followed, and the above cases quoted with approval, in *Keyes* v. *Baptist Church*, 99 Maine, 308.

We think the ruling and instruction of the presiding Justice were correct.

The entry will be,

Exceptions overruled.

WILLIAM N. HALL

vs.

CUMBERLAND COUNTY POWER AND LIGHT COMPANY.

Cumberland. Opinion October 30, 1923.

As a general rule a verdict will not be disturbed because of conflicting evidence, if the evidence supporting the verdict is reasonable and so consistent under the circumstances with the probabilities of the case as to raise a fair presumption of its truth when weighed against the opposing evidence. When it is overwhelmed by the opposing evidence a verdict cannot stand.

In the instant case an analysis of the testimony of the plaintiff and the two witnesses on whom he relies to support his contentions, considered in the light of the circumstances admitted or conclusively shown to exist, is so inherently improbable as an account of what occurred, and is so overwhelmed by the testimony of the defendant, much of which is from disinterested witnesses, that it is morally certain that the jury erred in its verdict.

On motion by defendant. An action to recover for personal injuries sustained by plaintiff resulting from a collision between a trolley car, operated by defendant and a motorcycle being driven by plaintiff which occurred in the Deering section of Portland on September 22, 1921. The case was tried to a jury who rendered a verdict of $2,500.00 for plaintiff, and defendant filed a general motion for a new trial. Verdict set aside. New trial granted.

The case is stated at length in the opinion.

Jacob H. Berman, Carroll B. Skillin and E. H. Wilson, for plaintiff.

Verrill, Hale, Booth & Ives, for defendant.

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

WILSON, J. An action to recover for personal injuries resulting from a collision between one of the defendant's trolley cars and a motorcycle which the plaintiff was driving. The jury awarded the plaintiff a verdict and the case comes before this court on a motion by the defendant for a new trial on the usual grounds.

As a general rule a verdict of a jury will not be disturbed by this court where the evidence is conflicting. A conflict of testimony, however, does not arise merely because one witness testifies contrary to another. There must be substantial evidence in support of the verdict, that is, "evidence that is reasonable and so consistent with the circumstances and probabilities in the case as to raise a fair presumption of its truth when weighed against the opposing evidence. When it is overwhelmed by the opposing evidence, a verdict cannot stand." *Moulton* v. *Railway Co.*, 99 Maine, 508, 509; *Smith* v. *Ins. Co.*, 85 Maine, 348; *McCarthy* v. *Bangor & Aroostook R. R.*, 112 Maine, 5; *Edgerly* v. *Thompson*, 121 Maine, 572, 575.

As to the manner in which the collision occurred there can be no question. The defendant's trolley car was proceeding southerly along its tracks on Forest Avenue, a main street or avenue leading from that section of the city of Portland known as Woodfords, to Congress Street, and was slowing up to take on passengers awaiting near a white post just southerly of a side street coming into Forest Avenue. As the defendant's car was passing the side street, the plaintiff on a motorcycle with a companion on the "tandem seat" from whom he was receiving instructions as to its operation, came into Forest Avenue from the side street to also go southerly toward Congress Street, and was suddenly confronted by a number of persons, several of them ladies, coming out from the sidewalk to board the defendant's car. In trying to avoid them he swerved his motorcycle to the left and came into collision with the fender attached to the front end of defendant's car and was carried along with the car nearly half a car length or at least some distance, with his left leg between the side of the fender and some part of the motorcycle, before the car came to a stop.

It is clear beyond peradventure that the defendant was not at fault so far as the collision is concerned.

The plaintiff, however, relies upon the evidence of two other witnesses besides himself, one of them being his companion, who was riding on the "tandem seat," and who was the owner of the motorcycle, and the other a friend who chanced to be a passenger on the trolley car at the time, to the effect that after the car had come to a stop and the plaintiff's companion had time to arise from the ground where he had been thrown by the impact and go ahead to the front of the car for the purpose of disengaging the motorcycle from the fender,

and the friend in the car had time after the collision to leave his seat and walk forward to the front vestibule or platform beside the motorman, the motorman either by mistake or design started the car ahead two or three feet. The jury's verdict must rest upon this evidence. The plaintiff claiming that it was the starting of the car after it had come to a stop following the collision, which in some way forced the side of the fender against the plaintiff's left leg and broke it.

A brief analysis of the testimony of these two witnesses shows it to be inherently improbable as an account of what occurred, considered in the light of the circumstances admitted or conclusively shown to exist; and their testimony as to the car starting while the motorcycle was engaged with the fender is overwhelmed by the testimony of every disinterested witness who saw the accident. Even the plaintiff himself who was sitting on the motorcycle engaged in some way with the car or fender is not willing to say he saw the car move ahead after its first stop following the collision. He only felt it by reason of the pain in his leg.

The testimony of the plaintiff's companion is that after going to the front of the car where in full view of the motorman he was trying to disengage the motorcycle from the fender and with the plaintiff sitting in the operator's seat also in full view of the motorman, with his left leg between the fender and the motorcycle, the motorman for some reason started the car ahead two or three feet.

That a motorman of ten years' experience in the operation of trolley cars should, after the first excitement of the collision must have subsided, attempt to move a car in either direction without first investigating or receiving directions from his conductor, is only less improbable than that the plaintiff after having come into collision with the car with an "awful rush," as one disinterested witness states, and been carried along for nearly half the length of the car with his leg between the side of the fender and the motorcycle without injury, and while the car and the motorcycle were in the same relative position have his leg broken by the car moving ahead two or three feet, or that his leg would be broken at all in the position as described by the plaintiff's witnesses by the car again starting ahead, it being between the side of the fender and the chain guard of the motorcycle which was, according to their testimony, carried right along beside the car.

The testimony of the plaintiff's witness who was riding in the car is no less incredible and his description of how the plaintiff's leg was

broken by the moving of the car ahead is equally vague and improbable. He states that he stepped from his seat after the collision and the car came to a stop and went up to the front platform and saw the plaintiff in the same position as described by the plaintiff and his companion and while standing there, the motorman gave a signal of "four bells" to notify the conductor that he was about to back the car and upon receiving an answering signal from the conductor, instead of backing the car in accordance with his signal, he started the car ahead; and although this unusual thing occurred and the witness was looking down through the door window at his friend caught between the motorcycle and the fender of the car and saw the fender bend his friend's leg under it until the toes of his foot were sticking up through the meshes of the fender, and also saw the apparent suffering of his friend, yet he says he never uttered one word of protest or exclamation.

The testimony of the plaintiff and his two witnesses as to the starting of the car or the giving of any signals to back the car is not only denied by the motorman and conductor and a third employee of the defendant who was on the front platform, but is either denied or at least was not observed or heard by any of the disinterested witnesses. Counsel urge that the testimony of the disinterested witnesses is only negative. An examination of their testimony discloses that while some of them admitted that certain things could have occurred without their seeing or hearing, the occurrences described by the plaintiff's witnesses clearly could not have occurred without their being seen or heard by some of those either in the car or outside waiting to board it, and not a single witness, other than the two friends of the plaintiff, saw the car start ahead or heard any signal given.

The following testimony in cross-examination of one of those waiting to take the car and only twenty-five or thirty feet from the point of collision, who, as he said, "was looking to see what was done and what the result of the collision was," cannot be said to be mere negative testimony:

"Q. And was it possible for that car to start and you not observe it?

"A. I should think not.

"Q. If it had done so, you would have seen it?

"A. Yes."

All the others who were waiting to take the car if not equally positive in their testimony, saw no starting of the car after it had come to a stop, or heard any signals, or any outcry.

Another witness, a passenger in the car who was sitting in the seat nearest the motorman, testified that he immediately rose and stepped up beside the motorman after the impact, looked out through the glass in the door and stood looking down upon the accident and that the motorman stood beside him also looking down, that the witness remained in this position until the plaintiff was removed; and he says there were no signals given by bells or any starting of the car ahead.

It is clear, we think, from the evidence presented that the injuries of the plaintiff must have occurred when the motorcycle, as one witness states, with an "awful rush" came around the corner of the side street and collided with the car, the result of which from the testimony of the plaintiff's own witnesses, in the natural course of events, must have brought the plaintiff's left leg against the side of the fender with great force.

If it was merely a question of accuracy of observation, or of veracity of witnesses, this court would not disturb the verdict; but when the evidence presented by the plaintiff is so inconsistent with what reasonable men would expect under the circumstances shown to exist; and the testimony of all the other witnesses as to whether the car was started ahead after the collision is overwhelming, and it is morally certain that the jury erred in its verdict, the verdict will be set aside.

Entry will be:

Verdict set aside.
New trial granted.

OGUNQUIT VILLAGE CORPORATION *vs.* INHABITANTS OF WELLS.

York. Opinion November 6, 1923.

Interpretation of Chapter 203 of the Special Laws of 1913, establishing the Ogunquit Village Corporation.

To require the town to pay money which it had before the Village Corporation was established, raised and also legally expended would involve an issue of notes or bonds, or a special assessment and no such procedure is authorized or contemplated by the Act.

The phrase "Actual net cost" of common schools used in the Act means gross cost less amount received from the State in respect to scholars and estates in the village and less proportionate part of income on town school fund if any.

The dates of payments by the town to the village are plainly stated in the Act. The time of payment by the district in respect to schools is left to inference. We determine that the payment by the district to the town is to be made on December 15th in each year and not earlier either by set-off or otherwise.

On report. A bill in equity seeking an interpretation of Chapter 203 of the Special Laws of 1913, incorporating Ogunquit Village Corporation. By agreement of the parties the cause was reported to the Law Court for final determination upon bill, answer, agreed statement of facts and the charter of the plaintiff corporation. Bill sustained.

The case is stated in the opinion.

Ray P. Hanscom and E. P. Spinney, for plaintiff.

Woodman & Whitehouse and Matthews & Stevens, for defendants.

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

DEASY, J. Chapter 203 of the Private and Special Laws of 1913 establishes within the town of Wells, in York County, the Ogunquit Village Corporation. The Act became effective July 1, 1913, subject to acceptance by the town. On October 9, 1913, it was accepted and became fully effective.

Differences of opinion having arisen as to the construction of certain sections of the Act, this bill is presented. The avoidance of a multiplicity of suits is relied upon as giving this court jurisdiction.

In the following opinion the town of Wells is referred to as "the town" and the Ogunquit Village Corporation as "the village."

Certain of the town's functions, so far as concerns the territory of the village, are by the Act in effect, transferred from the town to the village, including those relating to fire protection, roads, sewers and other sanitary works, parks, tree planting, public wharves and landings, police, water supply and public lighting.

No taxes are authorized to be assessed by or specifically in behalf of the village. But sixty per cent. of all town taxes (not including state and county taxes) collected from inhabitants and estates in the village is required to be paid to it by the town.

The portions of the Act which are in controversy are the following:—

SEC. 3. (in part). "With reference to the common schools which are within the territory of said corporation there shall be paid to the town of Wells by this corporation whatever amount is the actual net cost to said town of Wells for maintaining said common schools and schoolhouses, located within the limits of said corporation, reference being had to the amount raised therefor by taxation and the amount which said town of Wells receives from the State of Maine for the maintenance of common schools. Said village corporation shall annually pay to the town of Wells the sum of seven hundred dollars to be used by said town in maintenance of its high school."

SEC. 5. "The town of Wells shall pay over to the treasurer of said corporation out of the taxes collected from the inhabitants and the estates within the territory of the Ogunquit Village Corporation aforesaid, a sum equal to sixty per centum of all the town taxes, exclusive of the state and county tax, collected from said inhabitants and estates. Said sixty per centum shall be payable to said treasurer as follows, viz.: one-quarter of said amount on or before May fifteen of each year, one-quarter of said amount on or before July fifteen of each year, and the balance on or before December fifteen of each year. The amount of such sixty per centum in any year shall be determined by computing said sixty per centum upon the amount of money raised by taxation and appropriation upon the property within said Ogunquit Village Corporation the year previous."

SEC. 13 (in part). "Whatever sum or sums of money may be appropriated by said town to be used and expended within the limits of said corporation, during the year in which this charter is accepted, shall be deducted from the amount payable to said corporation for said year as provided in section five of this act."

The parties are at issue as to whether payments of the "sum equal to sixty per centum" (Section 5) begin in 1913. It is urged that if so the percentage would be based upon the amount raised by taxation in 1912, "the year previous," and thus before the incorporation of the village. This point, however, is by no means fatal. The intent of the Legislature will be given effect notwithstanding this objection. When Section 5 is read alone its meaning is perhaps obscure, but when Section 13 is read with it, the intent is plain. The percentage is to be paid in 1913. Otherwise Section 13 would be meaningless.

But the town cannot pay "out of the taxes collected" from the 1912 and 1913 assessment, money which it had expended before the village corporation came into being. To require this would be to try to make the mill "grind with the water that has passed." The town might have been, but was not specifically authorized to issue notes or bonds or to impose a special assessment, to compensate the village in respect to the part of the 1912 and 1913 tax which had been expended before October 9, 1913. In the absence of express provision it cannot be assumed that such measures were intended to be authorized. The sums to be paid in 1913 and 1914 were not six tenths of the assessment of 1912 and 1913 respectively, nor of the collection from such assessments, but in each case six tenths of the unexpended balance on October 9, 1913, the birthday of the village corporation.

Another contention is as to the meaning of the phrase "actual net cost" (Section 3). This of course means gross cost subject to some deduction. The deduction intended is undoubtedly the amount received from the State in respect to the scholars and estates in the village, and also the sum received as income on town school fund, if any, apportioned in same way.

It is argued that this involves a diversion of the school money contrary to the provisions of R. S., Chap. 16, Sec. 163. Not so. There is no necessary diversion of school funds and if there were, the Legislature which enacted the statute has power to abrogate it, or create exceptions to it.

The third disagreement relates to the time when payments are to be made to and by the village. The times when payments are due to the village are definitely fixed by the Act as May 15, July 15 and December 15 in each year.

On each of those dates there is due and payable by the town to the village a certain part of all town taxes assessed upon inhabitants and estates in the village for the previous municipal year, which, at that time, have been collected, less of course sums previously paid on same account. The part due and payable on May 15 is one quarter of six tenths or fifteen per cent. On July 15 the same percentage is payable, but including collections up to that date. On December 15 the balance is due and payable taking into account all collections to that time. Payments in 1913 and 1914 rest upon a different basis as above stated.

It is obvious that for months prior to December 15th the town will have in its treasury a considerable part of the fund which will eventually belong to the village corporation. We think it reasonable and in harmony with the probable intent of the Legislature that the village be permitted and required to make its payments on December 15th in each year and in no part before, either by set-off or otherwise.

On December 15th it should pay to the town the net cost of the common schools in the village for one year ending on that day (unless the parties agree upon a more convenient day)—and in respect to the high school the flat sum of seven hundred dollars.

The payment required to be made in 1913, however, should include only the part of the net cost of village schools accruing after October 9th. The seven hundred dollars to be paid on account of high school is to be apportioned in same way.

No express provision is made for the division of taxes collected after December 15 of the year following the assessment. However, to carry into effect the manifest purpose of the law, six tenths of such collections must be accounted for on the next succeeding settlement day.

Unless the parties agree, the case must be referred to a master to determine the amount due up to the date of the bill, August 23, 1916, according to the above principles.

Bill sustained.

MARION W. HAYDEN *vs.* ABRAHAM JOSEPH.

Kennebec. Opinion November 13, 1923.

Covenants in a lease to renew are recognized as real covenants, and the right of renewal to be conditional upon the property not having been sold by lessor, must be expressed in clear and adequate language, and not left to implication.

Covenants to renew have always been recognized as real covenants since "they add to the stability of the lessee's interest and afford inducement to permanent improvement."

In the instant case the language of the lease was not adequate to express an intent to make the right of renewal conditional upon the property not having been sold by the lessor, and such a condition should not be created by implication against the lessee.

Since the bill is brought by the original lessee, it is not necessary to decide whether the right of renewal enures to her assigns. Even though a covenant for a perpetual renewal, it is not necessarily invalid; the weight of authority being in favor of its validity.

On appeal. A bill in equity for specific performance. The defendant's predecessor in title leased to the plaintiff a tenement, consisting of a store and basement, for a term of five years "with the right of renewal for five year terms as long as she may want the same," but without expressly undertaking to bind the lessor's assigns by the covenant as to renewals.

The lease also contained an option to purchase in case the lessor at any time was willing to sell the entire property. The lessor conveyed the premises with others to the defendant subject to the plaintiff's lease which was recorded. The plaintiff demanded a renewal in due course of the defendant, which he refused to grant on the ground that it was a personal covenant of the lessor and did not bind the defendant. Appeal dismissed with costs. Decree of sitting Justice affirmed.

The case is fully stated in the opinion.

Harvey D. Eaton, for plaintiff.

McGillicuddy & Morey, Carl C. Jones and B. F. Maher, for defendant.

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

WILSON, J. A bill in equity for specific performance. One Joseph P. Sherden was the owner of a block situated in the city of Waterville consisting of stores or other tenements, and on June 18th, 1917, he leased and demised to the plaintiff one of the stores, with the basement and rear addition, for a term of five years with the right of extensions or renewals of said lease "for five year terms as long as she may want the same," including also the right to purchase the entire property in case the lessor should during the period be willing to sell, and the plaintiff be willing to pay therefor as much as anyone else.

On December 1st, 1919, Sherden conveyed the premises with other property to the defendant by deed with full covenants of warranty except as to "a lease to Marion W. Hayden which expires June 18, 1922."

The cause was heard by the sitting Justice, who held that Sherden and his assigns with notice, were bound to grant an extension or renewal of the lease to the plaintiff in accordance with its terms, and that the defendant was bound by these covenants. The defendant was thereupon ordered to execute and deliver to the plaintiff a renewal of the lease for a further period of five years upon substantially the same terms except as to the right of purchase.

From this decree the defendant appealed and contends that inasmuch as the covenant for renewals does not in so many words purport to bind the covenantor's assigns, that the defendant is not bound by the same.

The appeal must be dismissed. Covenants to renew have always been recognized as real covenants, or covenants running with the land. "They add to the stability of the lessee's interest and afford inducement to permanent improvements." Kent's Com., Vol. IV, 109*; Taylor's Landlord and Tenant, Sec. 332, Vol. 1, Page 386; *Piggot* v. *Mason*, 1 Page, 412; *Leppla* v. *Mackey*, 31 Minn., 75; *Laffan* v. *Naglee*, 9 Cal., 662; *Leominster Gas Lt. Co.* v. *Hillery*, 197 Mass., 267; *Hopkins* v. *McCarthy*, 121 Maine, 27, 29; 7 R. C. L., 1107, Section 22.

The plaintiff's lease was not only placed on record, but was also referred to in the conveyance to him by the lessor and expressly excepted from the covenants of warranty in the deed. He must, therefore, be held to have had notice of its terms and to be bound by all the real covenants therein contained.

The defendant also contends that the right of renewal is conditional upon the lessor not having sold the premises. If such was the purpose of the parties they did not use apt language to express their intent. The granting to the plaintiff of a preference in case the lessor became willing to sell the *entire property* was simply additional to the right to extend or renew the lease of the part occupied by her. There is no language indicating a purpose to make the right of renewal conditional upon the retention of the property by the lessor. Such a condition will not be created by implication as against the lessee.

It is further urged that if the covenant runs with the land, it also enures to the benefit of the lessee's assigns and creates a perpetuity and constitutes a restraint upon alienation. But covenants for perpetual renewals while not favored in law, "when they are explicit, the weight of authority is in favor of their validity." Kent's Com. Vol. IV, 109*; *Furnival* v. *Crewe*, 3 Atk., 83; *Cooke* v. *Booth Cowp.*, 819; *Willan* v. *Willan*, 16 Vesey, 84; *Rutgers* v. *Hunters*, 6 Johns, Ch. 215.

It is not necessary, however, to decide whether by the language of the original lease to the plaintiff the covenant in question is one of perpetual renewal which enures to the benefit of her assigns. This bill is brought by the original lessee. As to her right of renewal upon the same terms, we think there can be no question.

Appeal dismissed with costs.
Decree of sitting Justice affirmed.

ELMINA A. BROWN, In Equity, *vs.* WILLIAM H. CHADBOURNE.

Androscoggin. Opinion November 13, 1923.

The findings of fact by a single Justice are final unless clearly wrong, and findings of matters of law are also final, unless based upon erroneous rulings of law. A court of equity will not grant relief where there is a plain and adequate remedy at law.

The construction contended for by either party does not render the language of the deed wholly consistent and free from doubt. The burden, however, is on the plaintiff to clearly establish her right to the extraordinary remedy sought by her bill of complaint.

The plaintiff's evidence does not warrant this court holding that the findings of fact by the sitting Justice are clearly wrong, nor do we find that his decree was based on any erroneous ruling of law.

In respect to any timber already cut the plaintiff has an adequate remedy at law, and until she makes it clear that her rights are being infringed upon and grounds for equitable relief exist a court of equity will not grant her the extraordinary relief prayed for.

On appeal by plaintiff. A bill in equity seeking an injunction to restrain the defendant from cutting lumber on a farm now owned by the plaintiff, stumpage rights having been granted to the defendant by the plaintiff's predecessor in title. The issue raised involved the construction of the deed granting the stumpage rights to the defendant. A hearing was had on bill, answer, replication and evidence, and the sitting Justice dismissed the bill with costs. Plaintiff entered an appeal. Appeal dismissed with costs. Decree of sitting Justice affirmed.

The case is stated in the opinion.

Frederick R. Dyer, for complainant.

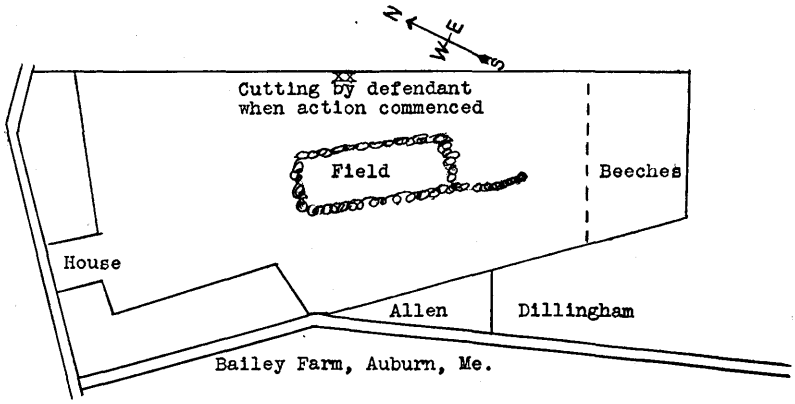
Tascus Atwood, for respondent.

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

WILSON, J. A bill in equity praying for an injunction restraining the defendant from cutting certain timber on a part of the plaintiff's

farm. The cause was heard by the sitting Justice who made certain findings and entered a decree dismissing the plaintiff's bill from which decree the plaintiff appealed.

The issue between the parties is as to the meaning of the language employed in a deed given by T. A. Bailey, the plaintiff's predecessor in title, to the defendant, conveying certain stumpage rights on what is termed the easterly part of the grantor's, now the plaintiff's, farm. The language employed in the deed is not well chosen, is indefinite and ambiguous. Nor is the construction contended for by either of the parties in all respects consistent. The sketch below will serve to illustrate the contentions of the parties:



The deed in question conveyed to the defendant in 1908 "all the oak, ash, hemlock, pine and basswood standing on what is known as my woodlot, said lot being the easterly part of my farm in Auburn, Me."

From the evidence presented the sitting Justice found that the easterly part of the farm and woodlot was not confined to the part southerly of the dotted line, supposed to represent a wire fence, and which part was largely beech growth and sometimes during the ownership of the plaintiff's predecessors in title referred to as "The Beeches"; that such woodlot included not only all land southeasterly of said dotted line, but also the land easterly and northeasterly of the enclosure marked "Field" on the plan and on which the cutting sought to be enjoined by the plaintiff was taking place when the plaintiff's bill was brought.

The plaintiff bases her construction of said deed largely upon the language conveying a second lot of stumpage in the following terms: "Also all of the black growth standing on said lot and bounded as follows: It being all standing in the pasture below the field on the north and on the south side by land of F. W. Dillingham and Lizzie Allen."

The plaintiff's contention being that the woodlot was confined to the part southeasterly of the dotted line and all northwesterly of that line was pasture and the only stumpage conveyed in the pasture was the black growth between the small field on the north and the Allen and Dillingham land on the south.

It is in evidence, however, that the cutting by the defendant during the lifetime and ownership of his grantor, and the plaintiff's grantor of the fee, was not confined to the land easterly or southeasterly of the dotted line, or to that part which could be fairly included within the "pasture below the Field on the north and the Allen and Dillingham land on the south"; and, too, the deed describes the pasture as being a part of "said lot," the only lot previously referred to in the deed being the woodlot.

While neither construction renders the language of the deed entirely consistent or free from doubt, the burden was on the plaintiff to clearly establish her right to this extraordinary remedy in equity. This court cannot say that upon the evidence in the case the plaintiff was entitled of right to the injunction prayed for in her bill restraining the defendant from cutting any timber on plaintiff's farm except the black growth on the pasture between the field on the north and the Allen and Dillingham land on the south; or that the finding of the sitting Justice that the cutting by the defendant northeasterly of the field, at least of the oak, ash, hemlock, pine and basswood timber was within the limits of the stumpage granted to him by the deed, and the woodlot therein referred to, is clearly wrong or based on any erroneous rulings of law. If any timber already cut is outside the limits of the defendant's grant, the plaintiff has her remedy at law; and until she can make it clear that her rights are being infringed upon and grounds for equitable relief exist, this court sitting in equity will not grant her the extraordinary relief prayed for.

Appeal dismissed with costs.
Decree of sitting Justice affirmed.

LOUISE ROYAL *vs.* EDWARD EVANS.

Waldo. Opinion November 17, 1923.

The question of compensation of the registers of deeds for making indexes is one between them and the counties, and not between them and their clerks.

In the instant case the plaintiff received the compensation for which she agreed to work and is not entitled to anything more.

On report on agreed statement. An action of assumpsit on an implied contract. The plaintiff was employed as a clerk by defendant in his office as the Register of Deeds for Waldo County at an agreed compensation which was paid to her weekly by the County Treasurer from the allowance for clerk hire. While thus employed she alleges that she performed work between January, 1915 and December 16, 1918 in preparing "a suitable card index" of the records, which Sec. 15, Chap. 12 of the R. S. required, which work she claimed was not included in her duties as clerk under the express contract, and that defendant personally owed her for such work under an implied contract. By agreement of the parties the cause was reported to the Law Court upon an agreed statement of facts for final determination. Judgment for defendant.

The case is stated in the opinion.

Charles S. Taylor, for plaintiff.

Dunton & Morse, for defendant.

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

MORRILL, J. The plaintiff claims to recover compensation for work in the Registry of Deeds of Waldo County, performed between January, 1915 and December 16, 1918 in preparing "a suitable card index" of the records, which Registers of Deeds are required to make by R. S., Chap. 12, Sec. 15, "without charge to the county."

During the period mentioned the defendant was the Register of Deeds for Waldo County, and the plaintiff was employed by him as a clerk in the office at an agreed compensation which has been paid to her weekly by the County Treasurer from the allowance for clerk hire in said office provided by law. She does not claim that her duties as clerk were in any way expressly limited or specified, or that she was expressly employed to do the work of indexing, or that the defendant expressly promised to pay her therefor. Her position is that the Register of Deeds personally owes her for this work because the statute requires him to make the index "without charge to the county"; therefore, her argument is that her compensation as clerk, which has been paid by the county, is exclusive of her work indexing, and that she is entitled to recover from the defendant on an implied contract.

This contention cannot be sustained. The statute, R. S., Chap. 12, Sec. 15, requiring the registers to make an index, far antedates the statute fixing their salaries and allowing fixed amounts for clerk hire in the several registries. Prior to the year 1905 the law had provided as early as 1853 (Chapter 40) that the registers should make "an alphabet to each volume of records, without charge to the county." In 1905 (Chap. 139, Sec. 1) the law was changed, requiring the registers to make "an alphabetical index to the records without charge to the county in the form known as ledger index, . . . or in lieu of said book shall make a suitable card index." Prior to the year 1905 registers of deeds, except in Androscoggin, Kennebec, and Penobscot counties were compensated by the fees of their offices, and it was provided that in the three counties named the salaries should "be received instead of the fees provided by law." R. S., 1903, Chap. 116, Sec. 6.

It is perfectly clear that the law of 1905 relating to indexes (Chap. 139, Sec. 1) retained the words "without charge to the county," to indicate that the fees of the office, where the registers were paid by fees, and the salaries in the three counties named, should include compensation for making the alphabetical index, or card index, as distinguished from the revised and consolidated index made every ten years, for the preparation of which the register was to receive a reasonable compensation to be approved by the county commissioners.

When later in the session of 1905 (Chapter 173) the Legislature placed all registers of deeds on annual salaries, with certain fixed allowances additional for clerk hire, it provided that "the sums above mentioned shall be in full compensation for the performance of all official duties and in lieu of all fees." The words "without charge to the county," in R. S., 1903, Chap. 11, Sec. 15, retained in P. L., 1905, Chap. 139, Sec. 1, was later retained by the Legislature in P. L., 1907, Chap. 144, and are now found in R. S., 1916, Chap. 12, Sec. 15. The words became superfluous after all the registers were placed upon salaries; but may have been still retained to make clear that while the salary covered compensation for making the current index, it was the intention that the registers who might be in office at the end of the ten-year periods should be paid for making the consolidated index.

However, the question of compensation of the registers for making indexes is between them and the counties, and not between them and their clerks.

The plaintiff has received the compensation for which she expressly agreed to work and is not entitled to anything more.

Judgment for defendant.

STATE OF MAINE *vs.* WILLIAM MALLETT.

Knox. Opinion November 22, 1923.

A motion to quash in criminal cases is addressed to the discretion of the presiding Justice whose ruling thereon is not exceptionable. Sec. 29, Chap. 127, R. S., constitutional.

R. S., Chap. 127, Sec. 29, which authorizes a warrant to issue for search and seizure of intoxicating liquor, when the complainant alleges that he believes that intoxicating liquors are kept and deposited for unlawful sale in this State, does not violate any constitutional guaranty against unreasonable searches.

On report. A search and seizure process under Sec. 29, Chap. 127 of the R. S. The case having been called for trial counsel for the respondent challenged the sufficiency of the complaint and warrant. By agreement of the parties the case was reported to the Law Court with the stipulation that in the event if the warrant should be adjudged bad, a nolle prosequi was to be entered, but if held sufficient, the respondent to stand convicted, unless the Law Court should otherwise order. Respondent guilty. Judgment for the State.

The case is sufficiently stated in the opinion.

Z. M. Dwinal, County Attorney, for the State.

Adelbert L. Miles, for the respondent.

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

PHILBROOK, J. This is a search and seizure case which originated before a magistrate under the provisions of R. S., Chap. 127, Sec. 29. When the case was called for trial in the appellate court, a motion to quash was presented and overruled. To this adverse ruling the respondent had no right of exceptions since the law is well settled that exceptions do not lie to the overruling of motions to quash in criminal cases. *State* v. *Maher,* 49 Maine, 569; *State* v. *Hurley,* 54 Maine, 562; *Hodge* v. *Sawyer,* 85 Maine, 285.

Thereupon the case was reported to the June (1923) Law Term of this court, under the provisions of R. S., Chap. 136, Sec. 27, authorizing questions of law in criminal cases, to be reserved on a report signed by the presiding Justice. The report, as thus signed, is as follows:

"The case having been called for trial and a question as to the complaint and warrant of sufficient importance having been urged by the respondent it was agreed to abide by the decision of the full court. If it should be adjudged bad, a nolle prosequi to be entered; if sufficient, the respondent to stand convicted, unless the law court shall otherwise order."

"The case is made up of the complaint and warrant, together with the agreement that the complaint contains the only statement of the fact or evidence before the judicial officer issuing the search warrant and is admitted to be the sole basis upon which this warrant was issued and that it was issued to search a private dwelling occupied as such."

The real contention of the respondent may be properly stated by an excerpt from his brief, in which he says: "In the instant case the complainant alleges that he believed that on a day certain, at a place certain, intoxicating liquors were and still are kept and deposited. Upon his mere belief the search warrant was issued, and he prays that due process be issued to search the premises where said liquors are believed to be deposited." Basing his contention upon certain federal cases, and cases in states other than our own, he claimed that an affidavit for search and seizure made merely upon the belief of the affiant is insufficient, and that a warrant for search and seizure issued thereon is invalid.

Under the general statute relating to criminal jurisdiction of magistrates, R. S., Chap. 134, and in Sec. 6 thereof, it is provided that "When complaint is made to any such magistrate, charging a person with the commission of an offence, he shall carefully examine, on oath, the complainant, the witnesses by him produced, and the circumstances, and, when satisfied that the accused committed the offence, shall issue a warrant for his arrest." Thus it will be seen that under this statute the belief of the complainant might not constitute a proper basis upon which to issue a warrant.

But in the case at bar, as we have already stated, the warrant was issued under the provisions of R. S., Chap. 127, Sec. 29, which reads

as follows: "If any person competent to be a witness in civil suit, makes sworn complaint before any judge of a municipal or police court or trial justice, that he believes that intoxicating liquors are unlawfully kept or deposited in any place in the State by any person, and that the same are intended for sale within the State in violation of law, such magistrate shall issue his warrant," &c.

The very wide difference between these two statutes is to be seen at a glance. In the former, before issuing his warrant, the magistrate must examine the complainant and his witnesses, under oath, and become satisfied that the accused committed the offense; in the latter it is mandatory that the warrant be issued upon sworn complaint based upon the belief of the affiant, provided he be a person competent to be a witness in civil suits.

Mr. Justice SPEAR, speaking for this court in *State* v. *Nadeau*, 97 Maine, 275, which was a search and seizure case under the liquor statute, after stating that the warrant was issued under that statute, said "The search and seizure process is in a class by itself." To this statement we adhere, and hence citations from courts in those jurisdictions where no statute like ours obtains, are, for the most part, inapplicable.

The complaint and warrant are in that statutory form which is declared by R. S., Chap. 127, Sec. 54 to be sufficient in law and none of these statutory provisions above referred to violate any constitutional guaranties.

It is our opinion that the contentions of the respondent cannot be sustained, and under the terms of the report he is to stand convicted, and the mandate will accordingly be,

Judgment for the State.

STATE OF MAINE *vs.* FRANK C. POWER.

Knox. Opinion November 22, 1923.

The prosecution of a motion for a new trial, addressed to the presiding Justice, and overruled by him, is a waiver of all exceptions in both criminal and civil cases.

Where the crime charged does not amount to a felony such motion can only be heard at nisi prius and exceptions do not lie to the refusal of the presiding Justice to grant a new trial.

The right to be heard on exceptions, waived by motion for new trial, cannot be revived merely because the motion proves to be ineffectual.

On motion and exceptions by respondent. A search and seizure process for intoxicating liquors. The case was tried before a jury and the respondent found guilty. An exception was entered by respondent to a ruling admitting certain testimony; also to a refusal to give requested instructions; also to a ruling overruling a motion in arrest of judgment. Respondent then filed a motion for a new trial which was overruled by the presiding Justice and an exception entered and allowed but not in claiming exception to the overruling of motion for new trial unless the Law Court should determine such ruling exceptionable. Motion and exceptions overruled. Judgment for the State.

The case is fully stated in the opinion.

Z. M. Dwinal, County Attorney, for the State.

Elisha W. Pike and Frank A. Tirrell, Jr., for respondent.

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

PHILBROOK, J. This case arises under one of the several statutes of this state designed to prevent the illegal sale of intoxicating liquors and is commonly known as a search and seizure case. By virtue of a warrant, based upon a complaint signed and sworn to by a

sheriff, and issued by a police court, certain premises occupied by the respondent were searched and intoxicating liquors found therein. From judgment against him in the police court the respondent appealed to the Supreme Court where trial by jury was had and verdict of guilty returned.

During the progress of the trial exceptions to the admission of certain evidence, and refusal of the presiding Justice to give requested instructions were noted.

After verdict was returned, and on the same court day, a motion in arrest of judgment was filed, overruled, and exceptions taken to that ruling.

Two days later a motion for a new trial was filed, addressed to the presiding Justice. That motion was heard by him, overruled and exceptions taken to that ruling.

This court has frequently held, both in criminal and civil cases, that the prosecution of a motion for new trial before the presiding Justice is a waiver of all rights of exception. *State* v. *Simpson,* 113 Maine, 27, and cases there cited. Thus the respondent deprived himself of any claim to be heard on any exceptions arising before his hearing on the motion for new trial.

But his exception to the overruling of the motion for new trial has no standing, for it is well-settled law in this state that in criminal cases, where the crime charged does not amount to a felony, such a motion can only be heard at nisi prius, and exceptions do not lie to the refusal of a presiding Justice to grant a new trial, it being a matter addressed to his judicial discretion. *State* v. *Simpson,* supra.

The right to be heard on his exceptions, which he deliberately and completely waived when he chose to prosecute a motion for a new trial, cannot be restored merely because his motion proved ineffectual.

Motions and exceptions overruled.
Judgment for the State.

WILLIAM L. PUSHOR, Executor, In Equity,

vs.

EVA M. HILTON et als.

Somerset. Opinion November 23, 1923.

The members of a voluntary unincorporated association, if the identity of the persons can be determined, may take by will the legal title in trust to a devise and bequest, the association itself being the beneficiary.

In the instant case the Lodge being a voluntary unincorporated association at the time the will took effect, the legal title passed to those members who constituted the Lodge at that time, because the name of a devisee or legatee need not be given. If the identity of the person or persons can be ascertained, as it admittedly can be in this case by the records of the Lodge, that is sufficient.

But the devise and bequest were not intended to those members in their individual capacity as their own property, but in trust, with the legal title in the members as the first trustees, to continue in their successors, and the Lodge itself as the beneficiary.

On report on agreed statement. A bill in equity seeking the construction of the residuary clause in the will of Sarah M. Roberts, late of Pittsfield. The Corinthian Lodge of Free and Accepted Masons, Lodge No. 95, of Hartland, Maine, a voluntary unincorporated association, was made the residuary devisee and legatee under the residuary clause in said will. The heirs contended that an unincorporated association cannot take a devise or bequest unless it is a charitable association, while counsel for the Lodge contended that the devise and bequest were good whether the Lodge was a charitable association or not. The cause by agreement of the parties was reported to the Law Court upon bill, answers, replications, and so much of the agreed statement of facts as was admissible as proof for hearing and decision. Bill sustained. Plaintiff's taxable costs and reasonable counsel fees of plaintiff and defendants to be allowed by the sitting Justice and paid from the estate. Decree in accordance with opinion.

The case is fully stated in the opinion.

J. W. Manson, for plaintiff.

William B. Pierce, for George L. Hilton, *Harry R. Coolidge,* for the other heirs, *Gower & Shumway,* for Corinthian Lodge of Free and Accepted Masons, No. 95, of Hartland, Maine.

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

CORNISH, C. J. This is a bill in equity asking for the construction of the will of Sarah M. Roberts, late of Pittsfield, deceased. After providing for the payment of all debts, funeral charges and expenses of administration, the testatrix made a bequest of $50.00 to each of her three brothers, and then disposed of the residuum as follows: "Fourth: I give, devise and bequeath, to the Corinthian Lodge of Free and Accepted Masons, Lodge No. 95, of Hartland, Maine, all the rest, residue and remainder of the estate of which I may die seized and possessed, wherever the same may be situated and of whatever the same may consist, whether real, personal or mixed. And it is my will that no conditions be imposed upon the Lodge in taking the above property except that it shall be applied for the benefit of Corinthian Lodge only. To have and to hold unto the Corinthian Lodge of Free and Accepted Masons, their successors and assigns forever.

The will was executed on August 16, 1915. Mrs. Roberts died on November 5, 1919, and her will was duly proved and allowed on January 20, 1920. It appears from the agreed statement of facts that Levi Roberts, the husband of the testatrix who had predeceased her, was a member of Corinthian Lodge. At the time of his decease they had one son who died without issue before his mother, so that at the time of making the will, and at her decease, Mrs. Roberts had neither husband nor child but only collateral relatives.

Corinthian Lodge during the membership of Levi, at the time of Mrs. Roberts' death, and continuously thereafter until its incorporation on June 21, 1920, was a voluntary unincorporated association, having a definite membership capable of being determined from its records at any given time, but changing somewhat from year to year by reason of loss of old and initiation of new members. It was chartered by the Grand Lodge of Free and Accepted Masons of the State of Maine on May 5, 1859, and like all other Masonic Lodges it was

duly organized by the choice of officers, was governed by a code of by-laws and by the constitution, laws and edicts of the Grand Lodge, held regular meetings and kept records thereof.

Such being the nature of the association the court is asked to determine the validity of the devise of real estate of the appraised value of $1,400.00 and the bequest of personal property of the appraised value of $4,736.25, or a total of $6,136.25, subject to the payment of debts amounting to less than $500.00.

Some points immaterial to this decision may be eliminated at the outset in order to focalize the issue which is whether this testamentary gift under the terms of this particular will is valid, the Corinthian Lodge being then a voluntary unincorporated association.

The fact that the Lodge was duly incorporated seven months after the death of Mrs. Roberts does not affect the question. The devise and bequest spoke as of the time of her decease and the legal and equitable rights of devisees or beneficiaries must be determined as of that date. Nor is the question of whether a Masonic Lodge is a charitable organization so as to validate bequests under the statute of 43 Elizabeth relating to charitable uses to be discussed. This court held in *Bangor* v. *Rising Virtue Lodge*, 73 Maine, 428, that a Masonic Lodge is not a charitable or benevolent institution so as to be exempt from taxation under R. S. (1871), Chap. 6, Sec. 6. That decision went no further, and it is unnecessary to consider the question under our view of the present case.

Nor need we consider the question whether a devise or bequest directly to a voluntary association can be upheld, a question upon which there is a divergence of views and a conflict of authority, the Supreme Court of Oregon going so far as to declare: "There is not a solitary reason for the holding of some Courts that gifts to nonincorporated associations are invalid except blind adherence to outworn precedents." *Hartman* v. *Pendleton*, 96 Or., 503. Unincorporated associations are recognized by statute in this State, R. S., Chap. 87, Sec. 29, and they have acquired a somewhat enlarged status since the decision of the United States Supreme Court in *United Mine Workers of America* v. *Coronado Coal Co.*, U. S. Sup. Court, decided June 5, 1922.

Coming now to the true construction of the terms of this will, the intention of the testatrix is apparent. Having no immediate family she was desirous of making the Masonic Lodge of which her deceased

husband had been a member the recipient of her bounty. That intention is clearly expressed and, as we think, in language legally effective, both as to real estate and personal property.

The first sentence in item four specifies the Lodge as the devisee and legatee, and the Lodge being unincorporated it follows that the gift was to those members who constituted the Lodge at the time the will took effect. It is familiar law that the name of a devisee or legatee need not be given. If the identity of the person can be ascertained then extrinsic evidence can be introduced to establish the fact. A bequest to the children of A is as valid as to the several children, specifying them by name. That is certain which can be rendered certain. *Bartlett* v. *King*, 12 Mass., 537. If the members of an association are definite, a deed to the association will be upheld as a conveyance to the members calling themselves by the association name, *Beaman* v. *Whitney*, 20 Maine, 413; *Byam* v. *Bickford*, 140 Mass., 31; The Golden Rod, 197 Fed., 837.

This principle applies here. As appears from the agreed statement, this voluntary association "had a definite membership capable of being determined from its records." There was no vagueness nor uncertainty about the matter. The men who called themselves by the name of Corinthian Lodge were accurately ascertainable from the records, so that a conveyance to the Lodge was the same as a conveyance to those members by their individual name who constituted the Lodge.

But it is also evident from the terms of the will that the devise and bequest were not intended to them in their individual capacity, thereby giving the residuum to these particular individuals as their own property. That would defeat the very purpose of the testatrix and of the will. That purpose was to create a trust, with the legal title in the then members as the first trustees and the Lodge itself as the beneficiary, to receive the benefits therefrom. After conveying the title in the first sentence of item 4, the second sentence disclosing the trust reads: "And it is my will that no conditions be imposed upon the Lodge in taking the above property, except that it shall be applied for the benefit of the Corinthian Lodge only." The idea of imposing conditions upon the taking presupposes some person or persons empowered to impose such conditions, and the person or persons so empowered would naturally mean those holding the legal title as trustees. The purpose of the testatrix was that the property should

be applied for the benefit of the Lodge only, not for individual benefit, nor for objects apart from the Lodge, but the Lodge should be the sole beneficiary. It is much the same as if the devise and bequest had been to John Doe and Richard Roe as trustees with the provisions that the Corinthian Lodge should be the sole beneficiary. This obviously would have been valid, and as we construe the will the method adopted, although somewhat less direct, is also valid. The final clause emphazises this view. It says: "To have and to hold unto the said Corinthian Lodge of Free and Accepted Masons, their successors and assigns." This is in the nature of an habendum to the grant to the trustees, and recognizing the fact that changes must take place from time to time in the personnel of the trustees under the first clause, provides that successors may act. This perhaps was unnecessary because equity does not allow a trust to perish for want of a trustee, either at the inception or during the execution of the trust.

Our answer to the questions propounded by the executor therefore is that clause four of the will of Sarah M. Roberts is valid both as to the devise of real estate and bequest of personal property as a gift in trust, although strictly speaking the plaintiff as executor has only to do with personal property and not with the real estate.

Bill sustained.

Plaintiff's taxable costs, and reasonable counsel fees of plaintiff and defendants to be allowed by the sitting Justice and paid from the estate.

Decree in accordance with opinion.

DAVID L. SINFORD *vs.* RALPH L. WATTS.

Washington. Opinion November 23, 1923.

A deed admittedly conveying title to upland construed not to include the flats between high and low-water mark.

Under the Colonial Ordinance of 1641-7 the owner of upland adjoining tide-water, prima facie owns to low-water mark, not exceeding 100 rods and subject to public rights of passage by boat; the flats are his unless the presumption is rebutted by proof to the contrary.

The "shore" is the strip of land lying between high and low-water mark. It is a band with two margins, an inner or landward margin corresponding with high-water mark and an outer or seaward margin corresponding with low-water mark. Whether the one margin or the other is meant depends upon all the calls in the deed and the particular circumstances and conditions of the case.

In the instant case the starting point, "Commencing on the shore" standing alone does not define itself, but as that starting point is fixed at 174 rods from the northeast corner of the Watts lot marked by a stake, and the measurement shows that from that northeast corner back to the high bank above the high-water mark is 171.3 rods and the high-water mark is estimated at twenty-five feet beyond that, while the mean low-water mark is 165 feet beyond that bluff, it is evident that the expression "Commencing on the shore" means the high-water and not the low-water mark.

The other calls in the deed substantiate this construction and lead to the conclusion that taken as a whole the deed does not include the flats.

On report. An action of debt to recover the penalty for the erection and maintenance of a fish weir in tide-waters in front of what plaintiff claims to be his shore or flats, without his consent, in violation of the provisions of Chap. 4, Sec. 125 of the R. S. The evidence was taken out before the presiding Justice without a jury, and then by agreement of the parties the case was reported to the Law Court to render such final judgment therein as the law and the evidence required. Judgment for defendant.

The case is stated in full in the opinion.

Gray & Sawyer and John F. Lynch, for plaintiff.

O. H. Dunbar, for defendant.

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

CORNISH, C. J. R. S., Chap. 4, Sec. 125, provides that no fish weir shall be erected or maintained in tide-waters below low-water mark in front of the shore or flats of another without the owner's consent under a penalty to be recovered in an action of debt by the owner of the shore or flat. This action was brought under that provision. The plaintiff is admittedly the owner of the upland and the issue is narrowed to this, is he also the owner of the flats adjoining the upland?

The answer to this question depends upon the construction of the deeds under which the plaintiff acquired title. Both parties claim title, the plaintiff to both upland and flats and the defendant to flats alone, from a common source, John Holway and Rufus K. Porter, who conveyed to Daniel Watts and George E. Watts in the year 1855. Many conveyances among members of the Watts family followed between the years 1855 and 1887, during which time the property was conveyed as an entirety the flats with the upland. On November 19, 1887, the defendant claims that a separation took place, the then owners of both upland and flats, H. L. Watts, George E. Watts and Rebecca E. Sanborn conveying to Lydia B. Gower the upland by a deed the terms of which are the same as those of the plaintiff's deed and thereby they necessarily retained in themselves the title to the flats. The Lydia B. Gower title has come down by mesne conveyances to the plaintiff, and the title to the flats, if not embraced in the Gower deed, was conveyed to the defendant in 1919 by the Watts heirs.

The plaintiff obtained title on April 17, 1915, from E. Payson Grimes. This deed specifies no boundaries but refers to and impliedly incorporates the description of the Gower lot conveyed by Frederick A. Gower and others to Grimes on February 26, 1908. The latter is therefore the important deed and the description is in these words: "A certain lot or parcel situated in Roque Bluffs, formerly Jonesboro . . . . bounded as follows: Commencing on the shore at the eastern line of land now or formerly of George and Jonah Watts, running by said line north 22 degrees west 174 rods; thence by the eastern line of land now or formerly known as Lot No. 6, 134 rods; thence running easterly by Varney's line now or formerly so-called,

105 rods; thence running south 10 degrees east to the shore; thence by the shore to the first mentioned bound; being the land now or formerly known as 'Seal Cove lot'."

In determining the construction of this deed, conveying property upon the seashore, certain general principles well defined and firmly settled in this State must be observed, and their binding force must be recognized so far as they are applicable. Under the Colonial Ordinance of 1641-7, the owner of upland adjoining tide-water prima facie owns to low-water mark (not exceeding 100 rods and subject to public rights of passage by boat). The flats are his unless the presumption is rebutted by proof to the contrary. Of course the owner of both may convey both, or he may convey either without the other. The question in a given case is what has he done. The shore is the strip of land lying between high-water mark and low-water mark. It is a band with two margins, an inner or landward margin corresponding with high-water mark and an outer or seaward margin corresponding with low-water mark. Whether in a given deed the one margin or the other marks the boundary depends upon all the calls in the deed and the particular circumstances and conditions of the case.

Let us examine and construe the provisions of the deed under consideration in the light of these general principles and of previous decisions of this court.

The first important question to be determined is the starting point of the boundary line. Is it at the outer or the inner margin of the shore? The first call is: "Commencing on the shore at the eastern line of land owned by George and Jonah Watts." This Watts land is Lot No. 5, and bounds the Seal Cove lot or the Gower lot on the west. It is admitted that the Watts lot runs to low-water mark. At what point then on the eastern line of the Watts lot shall the western boundary of the Gower lot under this deed begin? The description says, "on the shore at the eastern line." It does not say whether on the seaward margin of the shore, that is, low-water mark, or the landward margin, that is, high-water mark. If it said "Beginning at the sea at the eastern line" &c. it might be held that low-water was intended under the authority of *Snow* v. *Mt. Desert Island R. E. Co.*, 84 Maine, 14. If on the other hand the description began at a known monument on the upland and ran given courses and distances around to the shore and thence by the shore, the

shore itself would be excluded and the line would run only to high-water mark, under the authority of *Montgomery* v. *Reed,* 69 Maine, 510.

The words, "Commencing on the shore" standing alone, do not define themselves, therefore we must go to the topography of the land and other calls in the deed for interpretative aid.

From the surveyor's testimony and notes it appears that on the line between Watts and Sinford the height of land stops at a bank near high water. The surveyor testified on direct examination, "There is a high bank there. We went down over the bank and projected this line across the flats one hundred and sixty-five feet. . . . . The height of land stopped at the bank at high water and then the flats below the bank was one hundred and sixty-five feet to what we would call medium low water." On cross-examination he explained the location further: "On the western side of the lot it is fairly good growth, on a high bank thirty or forty feet from low water. The bank is very abrupt so that the high water makes up within twenty or twenty-five feet of being perpendicular from the bank to the upland, and that is wood land."

This high bluff would make a natural point of beginning, and when we consider the first call in the deed it leaves little doubt that that was the point intended. The call is: "running by said line" (that is the easterly line of land owned by George and Jonah Watts) "north 22 W, 174 rods." This first call runs along the easterly line of the Watts lot or lot 5, a distance of 174 rods, to its northeast corner, which is also the southeast corner of lot 6 lying northerly of lot 5, thence it runs 134 rods along the easterly line of lot 6.

This means that the starting point is 174 rods according to the deed, from the southeast corner of lot 6, to which the first measurement runs. That southeast corner is marked, according to the surveyor's notes, by a stake, and measuring back from that stake the distance to the bluff above the high-water mark is 171.3 rods, the high-water mark slightly beyond that, estimated at twenty or twenty-five feet, while the mean low-water mark is 165 feet beyond that or a distance of ten rods. It is evident from these measurements that the inland side of the shore was taken as the starting point and the first call carried the line 174 rods, or about that distance, as the mean high-water mark might be a matter of some uncertainty and therefore of judgment on the part of the surveyor,

to the northeast corner of the Watts lot. This fastens the starting point with nearly as great certainty as though it were marked by a spruce tree standing on the bank, as in *Whitmore* v. *Brown*, 100 Maine, 410.

This view is strengthened by the other calls in the deed. The boundary line continues northerly "by easterly line of lot 6, 134 rods, thence easterly by Varney's line 105 rods, thence south 10 degrees east to the shore." To which margin of the shore? Obviously to the high-water margin. The preposition "to" when used in this connection is a word of exclusion. *Bradley* v. *Rice*, 13 Maine, 198; *Bonney* v. *Morrill*, 52 Maine, 256; *Montgomery* v. *Reed*, 69 Maine, 510. The line stops when it reaches the shore and does not continue across the shore any more than if it ran to land of another owner. The final call: "thence by the shore to the first mentioned bound" further emphasizes the correctness of this construction and carries the line from the inland side of the shore where the easterly line stopped, along said inland side to the point of beginning.

Studying all the calls together in connection with the location of the lot, the court is of opinion that this description falls within a line of decisions under somewhat similar calls and circumstances, such as *Montgomery* v. *Reed*, 69 Maine, 510; *Brown* v. *Heard*, 85 Maine, 294; *Freeman* v. *Leighton*, 90 Maine, 541; *Proctor* v. *Maine Central R. R. Co.*, 96 Maine, 458; *Whitmore* v. *Brown*, 100 Maine, 410, and *McLellan* v. *McFadden*, 114 Maine, 242.

It does not come within the rule in *Snow* v. *Mount Desert Island R. E. Co.*, 84 Maine, 14, and in *Dunton* v. *Parker*, 97 Maine, 461, strenuously relied on by the plaintiff, where it was held that where both the termini of a boundary by the shore are at its outer margin the shore should be included. Here both termini are at the inner margin and the shore should be excluded.

The plaintiff urges further the force of the clause at the end: "Meaning to convey lot known as the Seal Cove lot." Such a clause following a particular description by metes and bounds, unless the contrary appears, does not enlarge the grant but ordinarily is intended as a help to trace the title. *Brunswick Sav. Inst.* v. *Crossman*, 76 Maine, 577; *Brown* v. *Heard*, 85 Maine, 294; *Perry* v. *Buswell*, 113 Maine, 399. Nothing appears here to take this case out of this general rule.

Our conclusion therefore is that the plaintiff has not proved title to the flats in question and therefore cannot maintain this action.

Judgment for defendant.

CHARLES K. DONNELL, In Equity *vs.* ISADORE F. SMITH et al.

Androscoggin. Opinion November 23, 1923.

That further litigation may be avoided, all parties in interest being before the court, in an equitable proceeding where the pleadings seek the determination of the rights of the parties in any given case, affirmative relief may be granted to defendant in matters growing out of the transaction.

In the instant case, a bill in equity asking for the specific performance of an oral agreement to convey real estate, the sitting Justice found the existence of the facts necessary to granting equitable relief to the plaintiff, but also found that the plaintiff had broken a warranty as to the condition of an automobile which was part consideration for the purchase, and as a part of his decree properly assessed damages in favor of the defendant in the sum of one hundred dollars.

On appeal. A bill in equity for specific performance of an oral agreement to convey real estate. As a part of the consideration for the purchase of the real estate plaintiff delivered to defendant a second-hand automobile expressly warranting it to be in good running condition. The defendant claimed that the automobile was not what it was warranted to be and asked for compensation for damages resulting from a breach of the warranty. The sitting Justice found that there was a breach of warranty and assessed the damages in the sum of one hundred dollars in the decree to be paid before conveyance could be required. Plaintiff appealed from the findings contending that the defendant's remedy for the alleged breach of warranty was by an action at law. Appeal dismissed. Decree of sitting Justice affirmed with additional costs.

The case is stated sufficiently in the opinion.

Clifford & Clifford, for plaintiff.

Harry Manser, for defendant.

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

CORNISH, C. J. This bill in equity was brought to enforce the specific performance of an oral agreement to convey real estate. The consideration of the sale consisted of part cash, the payment of certain outstanding mortgages and the delivery to the defendants of a second-hand automobile at a valuation of $800 with the express warranty on the part of the plaintiff that the car was in good running order. The defendants set up the warranty and a breach thereof in their answer and asked compensation therefor.

The sitting Justice found the existence of the oral contract to convey, the possession of the plaintiff thereunder, and the making of improvements by him to the amount of about $1,700, the terms of the consideration as claimed, the existence of the warranty of the automobile, and a breach thereof, with damages fixed at $100. He therefore entered a decree ordering specific performance, provided that before the deed was delivered and conveyance made to the plaintiff, said plaintiff should deposit with the Clerk of Court to be paid to the defendant the sum of one hundred dollars, the damage caused by the breach.

The cause is before the Law Court on appeal from this decree, but the only contention urged by the plaintiff is that the defense as to breach of warranty cannot be considered in this cause, that the plaintiff is entitled to specific performance free from any conditions, and the only remedy open to the defendants is by an independent action at law.

This contention cannot be sustained. The automobile clothed with its warranty was an integral part of the entire consideration. There was a single transaction between the parties and this transfer and warranty were involved in that transaction. This claim of one hundred dollars was not created by any independent contract, apart from the purchase and sale of the land. It was part and parcel of it as much as the discharge of the mortgages or the payment of the cash. The breach of the contract constituted a failure on the part of the plaintiff to perform his part of the contract and to pay the agreed price. It had the same effect as if the payment of the cash called for had been made in part in counterfeit money. It would be senseless to claim that under such circumstances the defendants must accept the spurious as real in this transaction, make conveyance, and then

be relegated to an action at law to recover the balance of real money due, with all the expense and uncertainties of litigation and the further uncertainty of collecting any judgment obtained.

A court in equity is not so helpless as that would indicate. It is a useful and healthy rule in equity practice and procedure that in order to avoid further litigation where all parties in interest are before the court and the power of the Chancellor has been sought by the pleadings in a given case to establish their rights, the decree may be so framed as to give affirmative relief to the defendant concerning matters arising from and connected with the transaction. This principle has been squarely recognized and applied in the very recent case of *Morneault in eq.* v. *Sanfacon et als.*, 122 Maine, 76. The authorities are there collected and analyzed, rendering further discussion here unnecessary. It is sufficient to say that this court hereby adheres to and reaffirms that doctrine as being in its nature highly equitable, and working out substantial justice to all parties.

The entry will be,

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

LIZZIE A. BURNHAM *vs.* WILLIS A. WING et al.

Androscoggin. Opinion November 23, 1923.

A husband joining in a deed with his wife, the grantor, in the testimonium clause only, not as a grantor properly, bars his rights of descent only.

In the instant case the husband by joining in the testimonium clause in the deed in which his wife was the grantor, although the clause read "joining in this deed as grantor and relinquishing and conveying all rights by descent and all other rights in the above described premises," did not convey an interest which he may have received by deed from his wife, but only his statutory rights in the estate of his wife. He thereby bars his rights of descent under Public Laws of 1895, Chap. 137, now R. S., Chap. 80, Sec. 8, but he is not a grantor in the full meaning of that word.

On exceptions. An action of trespass quare clausum fregit involving title to real estate. Both plaintiff and defendant claimed title from one Lucy A. Burnham who conveyed the land to her husband, who conveyed to Russell Lynn, and he in turn conveyed to defendants. Lucy A. Burnham also conveyed the land to plaintiffs, after the conveyance to her husband, and her husband joined in the deed relinquishing his rights by descent, but not as one of the grantors properly. Plaintiff claimed that the husband in joining in the deed of his wife, Lucy A. Burnham, conveyed all his interest in the real estate, including the interest conveyed to him under the deed from his wife, while defendants claim that in joining with his wife the husband conveyed only his rights by descent in his wife's estate.

The case was heard by the presiding Justice without the intervention of a jury who found for the defendants and plaintiff entered exceptions. Exceptions overruled.

The case is fully stated in the opinion.

Tascus Atwood, for plaintiff.

Franklin Fisher, for defendants.

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

CORNISH, C. J. Exceptions to the ruling of the Justice of the Superior Court for Androscoggin County ordering judgment for the defendants in an action of trespass quare clausum heard by him without the intervention of a jury. The ruling complained of is that the defendants prevail in their justification under the person having the better title. Both parties claim title from a common source, Lucy A. Burnham.

The defendants' chain begins with a deed from said Lucy A. Burnham to her husband James F. Burnham, dated June 16, 1914, and recorded October 6, 1915, thence to Russell Lynn and thence by Lynn to the defendants, under deed dated August 14, 1919, and recorded August 18, 1919.

The plaintiff rests her claim upon a warranty deed from said Lucy A. Burnham to the plaintiff dated July 12, 1916, and recorded September 19, 1916, in which deed she claims that James F. Burnham also effectively joined as grantor, and that this deed being on record before the conveyance to Lynn, and therefore Lynn having con-

structive notice thereof, James F. Burnham's title passed to the plaintiff under the deed of July 12, 1916, and not to Lynn and thence to the defendants.

The sole question therefore is whether James F. Burnham conveyed his interest in this estate obtained by deed from his wife when he signed his wife's deed to the plaintiff so that in effect it became their joint deed. We think not.

The person purporting to be the grantor, at the beginning of the instrument is, "I, Lucy A. Burnham." All the covenants of seizin and warranty are made by the same person and by her alone. Then follows the testimonium clause, and it is on this that the plaintiff hangs her hopes, viz.: "I the said Lucy A. Burnham and J. F. Burnham, husband of the said Lucy A. joining in this deed as grantor and relinquishing and conveying all rights by descent and all other rights in the above described premises have set our hands and seals this twelfth day of July in the year of our Lord one thousand nine hundred and sixteen." Both signed and sealed the deed. If the husband thereby conveyed the property jointly with his wife as co-grantor, then the plaintiff should recover, otherwise not.

We think the true meaning of the testimonium clause in this form is explained by the history of the change in the wife's interest in her husband's real estate and the husband's in the wife's wrought by Chap. 137 of the Public Laws of 1895, now R. S., Chap. 80, Sec. 8. Prior to that time the wife had only a right of dower in the lands of her husband, and the husband a right of curtesy in the lands of his wife, in this State, and it is common knowledge that the testimonium clause then generally read:

"In witness whereof, I, the said grantor and.....wife of the said.....in testimony of her relinquishment of her right of dower in the above described premises." After the passage of the Act of 1895, abolishing the right of dower in the wife and of curtesy in the husband and substituting rights by descent, it is also common knowledge that the testimonium clause was changed to read as follows:

"I the said.....and .....wife of the said.....joining in this deed as grantor and relinquishing and conveying all rights by descent and all other rights in the above described premises" &c. This is the printed form in common use with slight variations. It was the form used in this case. The purpose of the change was

apparent. The Act substituted a right and interest by descent for a right of dower or curtesy and the new clause is intended to bar merely the statutory rights under the new law as the old clause was intended to bar the statutory rights under the old law. R. S., Chap. 80, Sec. 9, expressly provides that "A husband or wife of any age may bar his or her right and interest by descent, in an estate conveyed by the other, by joining in the same" &c. This is what was intended here, and nothing more. The husband did join in the deed relinquishing and conveying all rights by descent and all other rights. The words "as grantor" cannot change this result by making the husband in effect a co-grantor with the wife.

Such a construction would lead to endless trouble and confusion. Doubtless many thousand deeds like this under consideration have been given in this State and if the plaintiff's contention is correct, then these husbands and wives are liable as grantors upon the covenants of warranty, and more confusing still not a single one of them is indexed in our registries of deeds as grantor. Only the parties named as grantors in the beginning of the deed are so indexed. To hold that those intending to bar rights of descent are also grantors would unsettle a large number of titles in this State. The words "as grantors" uselessly printed in the testimonium clause cannot be given such an improper and wrongful effect.

The ruling of the Superior Justice was without error.

Exceptions overruled.

HERBERT THOMAS *vs.* EZRA A. CARPENTER.

Waldo. Opinion November 23, 1923.

All claims arising out of one and the same contract must be included in one action, if not, recovery on one bars recovery on all others.

The contract in this case was an entirety. Without deciding whether the forfeiture was in the nature of a penalty, the liability therefor existed when the breach as to payment occurred. Both actions are based upon the breach of different provisions in the same contract, and contract rights and obligations cannot be so split in litigation. The plaintiff must embrace all existing claims in a single action and that action is presumed to cover all the damages sustained by him.

On report on agreed statement. An action to recover a forfeiture provided in a contract for cutting, sawing and sticking lumber, for non-fulfillment of the conditions of the contract, there having been a breach of such conditions by the defendant, and an action brought and judgment for damages resulting from the breach recovered and paid. Judgment for defendant.

The case is sufficiently stated in the opinion.

Arthur Ritchie, for plaintiff.

Dunton & Morse, for defendant.

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

CORNISH, C. J. On July 23, 1919, the parties to this action entered into the following written agreement:

"It is agreed that said H. E. Thomas shall cut, log, saw and stick up in a good place to load on wagons or truck all the soft wood lumber on the lot known as the A. K. Jackson lot in Belfast . . . Said timber to be cut down to six inches in diameter, all the above to be done in a good workmanlike manner. Said Thomas to begin on this job not earlier than September first and then to do above

job as per this contract, and said lumber to be scaled correctly. . . . . Said Carpenter to pay said Thomas the sum of thirteen dollars per thousand for doing said job, and pay said Thomas once a week as per bill to be sent to said Carpenter each Monday. Either party not fulfilling above agreement shall forfeit one hundred dollars."

From the agreed statement, under which this case comes before the Law Court, it appears that the plaintiff completed his work on or before March 14, 1921, and sent a bill to the defendant at that time for sawing 27,080 feet of lumber at the contract price of $13 per thousand, amounting to $352.04, with a credit of $106 and leaving a balance of $246.04 due. The defendant claimed that he had paid the plaintiff for all lumber sawn under the contract and refused to pay the bill. Thereupon, on December 13, 1921, the plaintiff brought suit to recover the amount unpaid and at the January Term, 1922, of the Supreme Judicial Court for Waldo County recovered judgment for debt and costs in the sum of $291.77, which judgment was subsequently paid by the defendant. On November 8, 1922, which was after recovery by the plaintiff and payment in full by the defendant in the first suit, the plaintiff began the pending action of assumpsit to recover the sum of one hundred dollars specified as a forfeiture for non-fulfillment of the agreement and claimed in his writ as liquidated damages.

The action cannot be maintained. Without considering the first point raised in defense that the forfeiture was in the nature of a penalty and not as liquidated damages, we rest our decision upon another and conclusive reason.

The contract between the parties was an entirety. Under it each was bound to perform certain acts. The chief act to be performed by the defendant was to make the weekly payments upon bills rendered by the plaintiff. This he failed to do. He thereby, according to the contention of the plaintiff, broke the contract and subjected himself to the suit and the judgment which followed. But he also, according to the contention of the plaintiff, subjected himself to the payment of the one hundred dollars forfeiture specified in the same agreement. That liability ripened through the failure to make due payments, existed in full force, if at all, when the first suit was brought on December 13, 1921, and should have been included in that action.

The plaintiff's first suit was based upon defendant's breach of one provision in the contract, the non-payment of the contract price at the agreed time. The second and pending action is founded on defendant's alleged breach of another provision of the same contract, non-payment of the forfeiture. Both actions are based upon the breach of different provisions in the same identical contract, and contract rights and obligations cannot be so split in litigation. One suit must determine all. A plaintiff is not permitted to have several successive actions for currently existing breaches of the same contract nor for existing breaches of separate provisions of the same contract. He must embrace all existing claims in a single action and that action is presumed to cover all the damages sustained by him. *Alie* v. *Nadeau*, 93 Maine, 283; *Maine Central R. R. Co.* v. *National Surety Co.*, 113 Maine, 465.

This principle is applicable here, and precludes recovery.

Judgment for defendant.

LUELLA H. DUNTON *vs.* RALPH H. DUNTON.

Sagadahoc. Opinion November 24, 1923.

The maxim, "He who comes into equity must come with clean hands," observed, and the doors of the equity court closed against the plaintiff.

In this case the sitting Justice found that the defendant did receive and have in his possession fifty bonds belonging to the plaintiff and ordered him to account to her for them.

Upon the evidence this finding cannot be sustained. Either the defendant had sixty-seven bonds belonging to the plaintiff or he only received forty bonds from the source alleged by plaintiff and which were his own property.

Regardless of the number, it follows from the evidence that either the bonds in question were a gift to the plaintiff and received with the knowledge and consent of the defendant or were delivered to the defendant as his property in consequence of a threat of prosecution for alleged seduction of the plaintiff and the alienation of her affections.

The testimony of the plaintiff as to the circumstances under which the bonds were alleged to have been given to her is so inherently improbable that any decree based upon it in the face of any opposing testimony cannot be said to have any substantial evidence to support it.

Either the bonds in question were given to the husband in settlement of a valid claim or both he and the plaintiff were guilty of a threat of blackmail and of extortion, or the bonds were a gift to the wife, induced by relations condoned and winked at by the defendant.

Upon the first assumption the bonds are the sole property of the husband, and upon either of the other assumptions the plaintiff does not come into this court with clean hands. Another court may adjust the relations between these parties, but upon the evidence presented, a Court of Equity will not dip its hands in the slime.

On appeal. A bill in equity brought by plaintiff against her husband to recover seventy-five thousand dollars worth of bonds in the possession of her husband, alleged to be the property of plaintiff, and also to have the husband declared trustee as to certain real estate standing in his name and alleged to have been purchased by him with funds belonging to the wife.

A hearing was had upon bill, answer and proofs, and the sitting Justice entered a decree sustaining the bill and found that plaintiff was the owner of fifty $1,000 State of New York Canal Improvement $4\frac{1}{4}\%$ Bonds, and also certain real estate, as set forth in the plaintiff's bill, now in the name, possession and control of defendant. Defendant entered an appeal. Appeal sustained. Decree of sitting Justice reversed. Bill dismissed.

The case is fully stated in the opinion.

Frank A. Morey and Walter S. Glidden, for plaintiff.

William R. Pattangall and Ralph O. Dale, for defendant.

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

WILSON, J. A bill in equity brought by a wife against her husband under Sec. 6, Chap. 66, R. S., to recover certain personal property in the possession of the husband and alleged to be the property of the wife, and also to have the husband declared trustee as to certain real estate standing in his name and alleged to have been purchased by him with funds belonging to the wife.

The cause was heard below and a decree entered by the sitting Justice upholding the contentions of the plaintiff except as to the amount of the property claimed by her, from which decree the defendant appealed to this court.

The plaintiff and defendant were married in 1903. In 1909, the plaintiff was introduced to a man of wealth and prominence in whose office her husband was employed, who apparently became infatuated with her and bestowed upon her from time to time presents of considerable value, and for nearly six years, a regular monthly stipend of two hundred dollars. In 1915, influenced by some motive, he delivered to the defendant either for the plaintiff or the defendant a large sum of money in the form of securities. The reason for the transfer of the securities, for whom intended and the amount being in dispute are the issues in these proceedings.

The plaintiff alleges and testified that in March, 1915, at a prearranged meeting in a room in a hotel in Portland, her admirer in the presence of and with the consent of her husband for no reason except his friendship for her and because of the serious malady with which he was then afflicted and from which he did not expect to recover, proposed to transfer to her on his return from a trip of several months which he was then about to undertake on account of his health, property to the amount of seventy-five thousand dollars; that on his return four months later in July, 1915, he delivered certain securities to her husband which were deposited in a safety deposit box taken in her husband's name, where they were kept until her husband disposed of some of them and applied the proceeds to the purchase of certain real estate, of which she now seeks by her bill of complaint to have him adjudged trustee for her benefit.

The defendant on the other hand charges her wealthy admirer with the intent of seducing his wife and the alienation of her affections, if criminal relations had not already and for a long time existed between them, and says that instead of his presence at the hotel in March, 1915, being prearranged, he surprised them and discovered conditions that conclusively indicated that his wife, if not already on terms of criminal intimacy with this man, was at least about to yield to his solicitations; and that after a discussion of the situation in which prosecution was threatened, the seducer of his wife assuaged his injured feelings by agreeing to pay him a large sum of money to keep the matter quiet, or, at least agreed to "make it right" on

return from a proposed trip, which he did by finally arranging to pay forty thousand dollars, and in fulfillment of this agreement purchased and turned over to the defendant forty bonds of the denomination of one thousand dollars each, though in fact their cost and market value considerably exceeded forty thousand dollars.

The sitting Justice apparently did not find from the evidence that the story of either of the parties was true in all respects, but found that the defendant did receive fifty bonds intended for the plaintiff and not seventy-five as claimed by her and which the court by its decree in effect orders the defendant to account for.

Giving to the findings of fact by the sitting Justice their usual effect, we think such a decree cannot stand upon the evidence submitted. Either she received or her husband received for her at least sixty-seven bonds as shown by a certain memorandum in the case, which at their market price, together with certain other items, made a total of seventy-five thousand dollars, or the defendant received forty bonds of the market value of about forty-four thousand dollars as "hush money."

Even if her story of what occurred at the hotel and the occasion for the meeting there were susceptible of belief, there is no basis for holding that she received only fifty bonds. It is unnecessary to discuss in detail the improprieties of the relations between these parties. Sufficeth it to say, that the reasons assigned by the plaintiff for the gift of so large a sum to her in consideration of the relations alleged to have existed are so inadequate and her story of the entire affair so inherently improbable, that in the face of opposing evidence a finding based upon it may be said to be without any substantial evidence to support it.

Without commenting upon, or deciding, whether the testimony of the defendant is any more credible, it may be safely said that either it is substantially true, or that both he and the plaintiff were guilty of a conspiracy to blackmail and of extortion, and that the funds sought to be recovered in these proceedings are the fruits of their unlawful acts, or were a gift induced by relations winked at and condoned by the defendant.

Upon either assumption the plaintiff can obtain no relief in this court. In the first instance the husband claims the securities were transferred to him in settlement of a valid claim for the seduction

of his wife and the alienation of her affections. Upon either of the other assumptions the plaintiff cannot be said to come into this court with clean hands.

After living together for seven years since the incident at the hotel, in complete harmony, during which time a child has been born to them, it now appears that these proceedings have followed a separation and charges and counter charges constituting grounds for divorce. A court having jurisdiction over divorce after determining the truth of such charges may settle the future status of these parties and make such decrees as to property as may be just and proper.

Upon the evidence here presented, however, a Court of Equity will not dip its hands in the slime.

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

EMPIRE CREAM SEPARATOR COMPANY *vs.* GEORGE H. CURTIS.

Androscoggin. Opinion November 24, 1923.

The verdict of the jury clearly wrong and set aside.

The only defenses urged by the defendant are: one amounting to recoupment, though not pleaded, and a collateral agreement to take back all unsold machines, entered into after the contract of sale.

The evidence to sustain the second defense is wholly inadequate, and clearly of the nature of "dealers talk," and, further, the alleged collateral agreement was without any consideration, and was evidently disregarded by the jury; as upon this defense, if sustained, the plaintiff could in no event have recovered more than two hundred and forty-six dollars.

The jury's verdict must have been based on a right of recoupment for an alleged failure to furnish aid in selling the machines in accordance with the agreement of sale, and that if this defense were available under the pleadings the damages allowed by the jury for the breach and recoupment are clearly excessive.

Hence upon any view of the case the verdict was clearly wrong.

On motion for a new trial. An action of assumpsit on account annexed to recover for certain milking machines and accessories, sold and delivered to defendant. Plea the general issue. The case was tried before a jury and a verdict for eight hundred and fifty-one dollars and ninety-eight cents was rendered for plaintiff, the amount claimed in the writ being three thousand ninety-eight dollars and sixty-one cents, and plaintiff filed a general motion for a new trial. Motion sustained. New trial granted.

The case is stated in the opinion.

William H. Newell, for plaintiff.

Frank A. Morey, for defendant.

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

WILSON, J. An action of assumpsit to recover for certain milking machines and accessories alleged to have been sold and delivered to the defendant during the year 1920, to the amount of three thousand and ninety-eight dollars and sixty-one cents.

It is admitted that items to the amount of seven hundred and twenty-six dollars and thirty cents should be deducted from the above amount for goods either not delivered to the defendant, or returned and accepted by the plaintiff, leaving a balance claimed by the plaintiff to be due of twenty-three hundred and seventy-two dollars and thirty cents plus interest from November 13th, 1920.

The jury awarded a verdict for eight hundred and fifty-one dollars and ninety-eight cents. The case comes before this court on the plaintiff's motion for a new trial on the usual grounds.

The defendant pleaded the general issue, but according to the report of the evidence it is undisputed that the items sued for, with certain exceptions agreed upon, were sold and delivered to the defendant. The only defenses to the action urged by the defendant were either one of recoupment for failure to carry out an alleged contract under which it is claimed the machines were sold, or a failure to take back all of the machines and accessories which the defendant was unable to sell in accordance with an alleged agreement entered into after the contract of sale.

The evidence of an agreement to take back unsold machines is clearly insufficient to make out a defense on this ground. The

testimony relied upon to establish this defense apparently being nothing more than dealers' talk made long after and collateral to the contract of sale and delivery of the machines, and by a salesman whose authority to bind the plaintiff is not proven, nor does the alleged agreement to take back unsold machines appear to be supported by any consideration. The jury evidently disregarded the defendant's contention on this point, since, if allowed at all, the total amount which the plaintiff could recover on the evidence was two hundred and forty-six dollars, the amount of goods actually sold by the defendant.

The jury's verdict must have, therefore, been based on the defense of recoupment for an alleged failure to furnish assistance to the defendant in demonstrating and selling the machines. But even if this defense were available to the defendant under his pleadings, *McCormick* v. *Sawyer*, 108 Maine, 405, the sum allowed as damages for the alleged breach and in recoupment was clearly excessive. The evidence does not warrant any such reduction in damages for failure to furnish a man to assist in demonstrating and selling the machines, assuming such a breach to have been shown. Hence the verdict upon any view of the case is clearly wrong and must be set aside.

Motion sustained.
New trial granted.

LUCY A. HUTCHINSON'S CASE.

Penobscot. Opinion November 24, 1923.

Where an employer files an assent to the Workmen's Compensation Act as to a part only of his employees upon the ground that the work in which they are engaged is a separate business and files an insurance policy as to such employees, which assent and policy is approved by the Industrial Accident Commission, the employer cannot be held to be an assenting employer except as to the employees engaged in the work covered by the assent, nor the insurance carrier be held beyond the terms of its contract of indemnity.

The assent of the employer in the instant case and the insurance policy filed covered only such men as were engaged on what is described in the evidence as Job Plan 3083.

The finding of the Commissioner that the deceased was at the time of the accident engaged in work connected with Job Plan 3083 is not sustained by any evidence introduced before him at the hearing, and unless it can be properly sustained by information obtained by him on a view of the plant, the appeal must be sustained.

A decision, however, based in any part upon evidence obtained upon a view cannot stand. The Act expressly provides that his decisions must be based upon evidence presented before him. A view may be proper under certain conditions, but it can only be had for the purpose of better understanding the evidence when presented. His final findings must be grounded on evidence presented under such circumstances as afford full opportunity for comment, explanation and refutation by an opposing party.

In order that no injustice may be done, however, and evidence if any there be tending to show that the deceased was engaged in work relating to Job Plan 3083, the case will be remanded for further hearing.

On appeal. A petition by Lucy A. Hutchinson, as dependent widow, under the Workmen's Compensation Act, for compensation for the death of her husband, Fred A. Hutchinson, who was killed at the Veazie Power Plant while in the employ of the Bangor Railway & Electric Company, September 8, 1919. The question involved was whether the claimant's husband at the time of the accident causing his death was engaged in employment which brought him within the provisions of the act, that is, was the employer an "assent-

ing employer" as to the work being performed by husband of claimant at the time of the injury resulting in death. A hearing before the Chairman of the Industrial Accident Commission was had and compensation awarded, and an appeal entered by respondents. Appeal sustained. Case recommitted to Commissioner for further hearing.

The case is fully stated in the opinion.

Albert G. Averill and W. H. Waterhouse, for petitioner.

Andrews, Nelson & Gardiner and Ryder & Simpson, for respondents.

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

WILSON, J. The Bangor Railway and Electric Co., is a public utility having its principal place of business in the city of Bangor and operates a street railroad and also supplies several cities and towns with electric current for light, heat and power.

In 1918, for the purpose of increasing the efficiency and output of one of its power plants located in the town of Veazie, it began on a plan of reconstruction of the power station, which plan, when fully completed, would include the erection or reconstruction of fifteen concrete flumes on the Veazie side of the Penobscot River, the installing therein of water wheels, the relocating of old and the installing of additional generators, and the replacing of the old switchboard controlling the output of the electric current with a modern and improved system of transformers and switches enclosed in a series of brick cells to which wires ran from the generators and which cells were also connected with the meters or meter panels in the power house.

The work was to be done, not under one plan and as a single unit, but under several plans and in separate units or jobs as they were termed in the evidence; not by outside contractors, but by the Company itself employing some of its own regular employees and such transient workers as might be necessary.

For instance, one, and apparently the first unit of construction undertaken, included the erection or reconstruction of the flume numbered 1 on the Company's general plan, the installing of a water wheel therein and the connecting up of the water wheel with the generators in the power house. Included in this "job," or as a separate unit of construction, the evidence does not disclose, was the erection, for the purpose of replacing the old switchboard, of a series

of brick cells, numbered from 1 to 34 inclusive on the Company's plans, and the installation therein of the necessary transformers and switches. Another job or unit as a part of the general plan of reconstruction of this power plant was the erection of additional brick cells with transformers and switches, twelve in number and numbered from 35 to 47 inclusive on the Company's Drawing numbered 3392 marked Respondent's Exhibit 4. This job or unit was designated on the Company's books and referred to in the evidence as "Job number 3082."

Another job or unit, designated on the Company's books as "Job number 3083," included the erecting or rebuilding of flumes numbered 2, 3 and 4 on the Company's plan and the installation of three new water wheels therein, and the relocating and connecting up of the generators in the power house with the new water wheels.

The work of reconstructing flumes from 5 to 9 and installing additional generators was later designated by "Job number 3088," and that of installing twelve more brick cells with transformers and switches it appears has also been treated by the Company as a unit in its general plan of construction and been given the job number of 30100. The remainder of the work may also have been further divided into units, but that is immaterial in the consideration of this case.

The work of reconstructing flume No. 1 and the installing of a water wheel therein and its connection with the generators in the power house had already been completed prior to the summer of 1919, as had also the erection of the brick cells, now numbered from 1 to 34 inclusive on the Company's plan, with the necessary transformers and switches and connections with the proper meter panels.

Up to June, 1919, respondent Company was not an assenting employer under the Workmen's Compensation Act as to any of the two hundred and fifty employees. On June 19, 1919, however, in anticipation of the somewhat unusual and hazardous character of the work to be done in reconstructing flumes 2, 3 and 4, the installation of water wheels therein and the relocating of the generators in the power house above, it filed its assent to become subject to the Compensation Act, which assent in writing specified the place of employment as Veazie, Maine, and the nature of the employment as, "Construction under Plan 3083, Bangor Railway & E. Co." "Average number of Employees—15." With this written assent,

as provided by the Act, it also filed an insurance policy which describes the location of the employment as the "Power Plant of the Company at Veazie, Me., Job Plan 3083"; and further describes the nature of the work, as "Concrete Work—Piers, Abutments for Bridges, Retaining Walls, Water Conduits, and other structures." The pay roll to include those engaged in making, setting up, and taking down frames, scaffolds, and false work, blasting, and drivers and drivers' helpers. The policy also contains the express provision that, "It is understood and agreed that this policy does not cover any work carried on by the above assured other than that described in Job Plan 3083 of the above corporation for work done at power plant in Veazie, Maine."

The assent and policy were approved by the Industrial Accident Commission and a certificate issued to the Company as an assenting employer under Paragraph III of Section 6 of the Act, thus in effect approving the division of its business and treating the work of constructing the flumes, installing the water wheel and relocating and connecting up the generators as a separate business.

Assuming this division of its business to be proper under Section 3 of the Act, as otherwise the Company cannot be held to be an assenting employer at all, and inasmuch as the insurance carrier cannot be held beyond the terms of its contract of indemnity, unless the deceased at the time of the accident was engaged on work covered by Job Plan 3083, or connected with it within the meaning of the contract of indemnity, the petition must be dismissed. *Fournier's Case*, 120 Maine, 191; *Michaud's Case*, 121 Maine, 537.

The petitioner's counsel apparently assents to this, and urges before this court, as the basis of the award, that the accident occurred while the deceased was examining wires connecting the generators with the transformer and switches in the brick cells and argues that this work was part of the work to be done under Job Plan 3083.

It is not quite clear, however, on what ground the award is placed, whether as the Commissioner states in one paragraph, that the work being done by the deceased "was a part of and incidental to the work contemplated under Job Plan 3083," or because, as he states in another, the deceased "was engaged in work directly connected with the development of the plant as set forth in Job Plan 3083"; the second conclusion being much broader than the first.

The first might follow from the finding in the decision that the work of constructing the brick cells "being done," the next step in the natural order was to install in flumes 2, 3 and 4 three S. Morgan Water Wheels and connect thereto the electric generators and connect those in turn with the switches on the already newly constructed "brick switch cells." The "brick switch cells" being covered by Job Plan 3082, and if this work was "done" and "already constructed" as indicated in the language of the decision above quoted, then wiring the generator up to the switch cells may be so connected with Job Plan 3083 as to be covered by the assent and the insurance policy in this case. If such be the finding of the Commissioner and he also found that the work on which the deceased was engaged was the inspection of the wires leading from the generators to the switch cells and there is any evidence in the case to support these findings, the award must stand.

The award, however, goes on to state that "It was in connection with the wiring in of the new brick switch cells made necessary by the addition of three new water wheels installed under Job Plan 3083 . . . . that Mr. Hutchinson was killed." This language is broad enough to include practically all the work of wiring connected with the new switch cells, as well that of connecting them with the distributing system as connecting them with the generators. If the final award is based in part on any finding that all the work of wiring in the switch cells is connected with the development of the plant and therefore with Job Plan 3083, then we think it clearly wrong.

Neither the assent of the Company nor the contract of indemnity can be construed to cover any electrical work except such as may be connected with the relocating of the generators and, as one witness testified, in connecting them with the rest of the system, which might include their connection with the transformers and switches in the new brick cells, but no more.

We must assume, therefore, that in stating in his decision that "From the evidence submitted at the several hearings and from information gained from personal observation on two visits to the power plant" it is found that the work being done by Mr. Hutchinson on the morning he was killed was a part of and incidental to the work contemplated under Job Plan 3083," and from his findings or assumptions that the work covered by Job Plan 3082 was "done".

and that the newly-constructed brick switch cells were "already completed," that the Commissioner must have found as a fact that Mr. Hutchinson at the time of the accident was engaged in inspecting the wires running from the generators to the brick cells.

Such a finding, however, is unsupported by the evidence presented at the hearings and reported to this court. The only testimony on this point is that by the other employees of the Company, and is all to the effect that the work on which the deceased was engaged was solely under Plan Number 3082 and had nothing to do with Plan 3083, that work under Job Plan 3082 had not been fully completed, and that it was while inspecting the wires connecting the switch cells with the meter panels, which also appear to be shown on Exhibit 4 in this case, that he received the current through his body resulting in his death. Any finding that he was connecting up or inspecting wires connecting the switch cells with any of the generators is entirely without evidence in the printed case to support it; and unless it can be properly sustained by information obtained upon the visits of the Commissioner to the plant, the appeal must be sustained.

It may be entirely proper for the Commissioner with the consent, or, unless waived, in the presence of the parties, to view the locus of the accident, not for the purpose of obtaining information or evidence on which to base his award, but for the purpose of better understanding the evidence presented to him at the hearing, as in case of views by a jury.

The act we think in terms prohibits his obtaining information to be used as evidence in this manner. Section 34 expressly provides that his decision is to be based on evidence presented at the hearing before him. As this court said in Gauthier's Case: "The Commissioner's final findings must be grounded on evidence presented under such circumstances as to afford full opportunity for comment, explanation and refutation."

As there was no evidence presented at the hearing which would warrant a finding that the deceased was engaged in any work connected with Job number 3083, we must assume the Commissioner must have obtained some information on his visits which he believed warranted him in finding that the work on which the deceased was engaged at the time of the accident was connected in some way with the wiring from the generators; but a decision based in part upon information or evidence thus obtained is not warranted by the

Act. Whether such evidence exists and could be presented at another hearing we do not know, but in order that no injustice may be done the petitioner, we deem it equitable to recommit the case to the Commissioner for further hearing in order that definite evidence, if such exists, may be properly presented on this point as to whether the wires being inspected by the deceased at the time of his death, were those connecting the generators with the switch cells as is now contended by the petitioner.

Appeal sustained.
Case recommitted to Commissioner for further hearing.

STATE *vs.* WILLIAM KING.

Somerset. Opinion November 24, 1923.

In a trial for attempted rape upon a child nine years of age the testimony of the mother as to details of a complaint made to her by the child a week after the commission of the act complained of is not a part of the res gestae.

In this case the admission of the evidence of the mother as to the details of the complaint made to her by the child cannot be sustained as a part of the res gestae. The alleged complaint was made not immediately after the last commission of a series of acts of the nature described, but at least a week afterwards; not voluntarily, but in response to certain inquiries by the mother suggested by an incident entirely disconnected with the offense charged. It was at most a mere narrative of a past transaction.

Nor can the admission of the testimony of the mother be sustained upon the ground that it would have been admissible in rebuttal to corroborate the complainant after impeachment, and hence its admission was not prejudicial error.

The evidence does not disclose any impeachment of the complainant's testimony. Mere denial by the respondent does not constitute such impeachment as will permit in corroboration of the complainant's testimony the introduction through another witness of the details of her complaint.

The admission of such testimony cannot help but affect the minds of jurymen in some degree. The respondent has the right to insist that his conviction shall

be in accordance with the established rules of evidence. To establish such a loose rule as that invoked by the State at the trial may be fraught with grave danger.

On exceptions. The respondent was convicted on an indictment for an attempt to commit a criminal assault upon a girl nine years of age. During the trial exceptions were taken to the admission of testimony by the mother of the child giving the details of a statement made to her by the child about a week after the last assault. A general motion for a new trial was also filed. Exceptions sustained.

The case is fully stated in the opinion.

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

Pattangall, Locke & Perkins and Gower & Shumway, for respondent.

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

WILSON, J. The respondent was tried and convicted on an indictment for attempt to commit a criminal assault upon a girl nine years of age. The case is before this court on appeal from the denial by the presiding Justice at *nisi prius* of a motion for a new trial on the ground that the verdict was against the law and the evidence, it being contended by respondent's counsel that the evidence did not disclose any attempt to ravish the child, and also upon exceptions to the admission of testimony by the mother of the child in the course of the State's direct evidence giving the details of a statement made to her by the child about a week after the last alleged assault took place.

If the case rested upon the appeal alone this court would not disturb the verdict. A jury heard the evidence and believing the story of the little girl, as corroborated by her mother, it may well have found that the respondent not only took indecent liberties with her person, but further attempted to take advantage of her innocence and carnally know her.

It is with reluctance, considering the evidence in the case, that we sustain the exception to the admission of the testimony of the mother giving the details of the girl's statement to her. The respondent, however, has the right to ask that his conviction be obtained in accordance with the established principles of law. Testimony in

prosecutions for rape, that shortly after the alleged assault took place the prosecutrix related to a third party the same story in detail which she told on the witness stand cannot help but have some effect on the minds of a jury. Where the statement is not admissible as a part of the *res gestae*, nor is within any of the rules permitting hearsay evidence, it is almost inevitable that the admission of such testimony from the third party will prove prejudicial to the rights of the respondent.

The rules governing the admission of statements or complaints of the prosecutrix in cases of rape have received widely varying applications in the different jurisdictions. As one authority prefaces his discussion of the subject, it is as perplexing as any in the law of evidence. Much of the confusion seemingly has arisen from a failure to appreciate the principles underlying the rules governing the admission of this class of evidence.

A discussion of these principles may be found in Chamberlayne on Law of Evidence, Vol. IV, Secs. 3034-3043; Wigmore on Evidence, Vol. II, Secs. 1134-1140; Vol. III, Sec. 1760, 22 R. C. L., pp. 1212-1217; 41 L. R. A., (N. S.), 858, Note; Greenleaf on Ev., 16 ed., Vol. 1, Sec. 469, b.; Vol. III, Sec. 213, 33 Cyc., 462.

There is practical unanimity of opinion, that the fact that such a complaint was made is always admissible as a part of the State's evidence in chief, if the prosecutrix takes the stand, in corroboration of her evidence, but not the details of the complaint. It is, of course, also agreed that where the complaint is made under such circumstances as to bring it within the rule of *res gestae* that the details of the complaint may be admitted under that rule and as evidence of the facts related. The weight of authority also seems to support the rule that where the prosecutrix has taken the stand and her testimony has been impeached, evidence of the details of her prior statement of what occurred may be received in corroboration of her testimony given on the stand, but not as evidence of the facts stated. Greenleaf on Evidence, Vol. I, Sec. 469, b.; Chamberlayne on Law of Evidence, *supra*; *State* v. *Mulkern*, 85 Maine, 106; *State* v. *Knapp*, 45 N. H., 148; *State* v. *Niles*, 47 Vt., 82; *Com.* v. *Cleary*, 172 Mass., 175; *Com.* v. *Tucker*, 189 Mass., 457, 480.

It has been in the application of these rules, however, wherein the confusion has arisen, especially in extending the *res gestae* rule to include such statements made at varying intervals after the

assault took place, and in receiving not only the complaint but the details in corroboration of the prosecutrix's story either without impeachment as in Connecticut, *State* v. *Kenney*, 44 Conn., 153; in Michigan, *People* v. *Gage*, 62 Mich., 271; and in a few other states, but upon varying degrees of impeachment, with reference to which no fixed rule can be drawn from the decided cases.

The evidence of the mother in the case at bar to whom the little girl first told the story of the alleged assault was offered by the State as a part of the *res gestae*, but it was clearly beyond the scope of this rule as hitherto defined by this court. *State* v. *Maddox*, 92 Maine, 348. The statement in this case was not even voluntary, or made under the stress and excitement of the act complained of, but was elicited a week after the last of a series of such acts occurred and in response to questions suggested by an entirely disconnected incident, and was clearly no more than a mere narrative of what had occurred.

Counsel for the State cites *People* v. *Gage*, 62 Mich., 271, in support of the extension of the *res gestae* rule in this class of cases where the complainant is a girl of tender years and was under the inhibition of fear induced by threats or otherwise. But an examination of that case discloses that while some language was used indicating an application of the *res gestae* doctrine, the evidence was really admitted under the rule of corroboration through similar prior statements; and it was so held in later decisions of that court. *Peoples* v. *Hicks*, 98 Mich., 86, 89.

While a few courts have extended the *res gestae* and we think beyond its proper limits, to permit the introduction of the details of a complaint and a small minority have permitted the introduction of the details of the complaint under the corroboration rule, especially in cases where the complainant was below the age of consent the great weight of the authorities is against such a loose application of these rules; and even the Michigan Court admits in *Peoples* v. *Hicks*, supra, in speaking of *Peoples* v. *Gage*, on which the State's counsel in the case at bar relies, that such an extension borders on dangerous ground.

We see no reason advanced by any of the decided cases why this court should extend the doctrine laid down in *State* v. *Mulkern*, supra, which is as liberal as any adopted by either of the other New England States, except Connecticut, or should enlarge the rule of

res gestae as defined in *State* v. *Maddox*, supra, in order to admit this class of evidence even though the complainant be of tender years.

It is not necessary to decide in this case what kind or degree of impeachment is necessary in order to permit the introduction of such testimony in corroboration of the complainant's story on the stand. It is sufficient for the purpose of deciding this case to hold that the mere contradiction by the respondent of the complainant's story is not sufficient, as that would render such evidence admissible in practically every case. There does not appear to be any other form of impeachment of the testimony of the little girl in the case before us; no evidence even of prior inconsistent statements, or evidence that her testimony on the stand was of recent contrivance, or given under any threats or bias or prejudice. *Com.* v. *Jenkins*, 10 Gray, 485, 489. Nor was her testimony impeached by the cross-examination, which only resulted in confirmation of her direct testimony in every particular. There are no grounds on which it could have been received in corroboration of her testimony even in rebuttal, nor was it offered for that purpose, but in direct, and apparently as a part of the *res gestae*. If there had been sufficient impeachment of her testimony, so it might properly have been received in rebuttal, the mere fact that it was received on direct and offered as a part of the *res gestae*, might have removed it from the realm of prejudicial error, but such does not appear to be the case. The entry must, therefore, be

Exceptions sustained.

MARY ANN KELLEY'S CASE.

Kennebec. Opinion November 26, 1923.

Under the Workmen's Compensation Act, when there is no direct or primary evidence of an industrial accident and the conclusion that such an accident occurred is reached by inference, such inference must be reasonable and natural. If so it matters not that some other tribunal might with equal logic and reason draw a different conclusion.

The petitioner's deceased husband was a blacksmith axe maker. He died from gangrene superinduced by diabetes. The defendants deny that his death was caused or accelerated by an industrial accident. The only evidence of such an accident, worthy of consideration, is that of a witness who saw the deceased while working at a forge step back rather suddenly and utter an oath. The witness at the same time saw a ten-pound metal die lying on the floor near the deceased. He did not see it fall. The deceased made at the time no complaint of pain or injury to the man working with him, or to any other person. His work was not interrupted. He worked all that day and the next. He died some months later. The Chairman based his finding upon the inference that the metal die fell on the foot of the deceased producing an injury that caused or hastened his death. In the opinion of the court the inference was neither reasonable nor natural.

On appeal. A petition under the Workmen's Compensation Act of Mary Ann Kelley as dependent widow of Justin Kelley, who, it is alleged, while in the employ of Emerson & Stevens Manufacturing Company, at Oakland, Maine, was injured by a metal die falling and striking on the top of his right foot and later gangrene developed in the foot and on July 5, 1921, about four months after the alleged accident, he died. Upon a hearing the Chairman of the Industrial Accident Commission awarded compensation, and respondents entered an appeal, contending that the case showed no evidence upon which the finding of the Chairman could be based. Appeal sustained.

The case sufficiently appears in the opinion.

Andrews, Nelson & Gardiner, for claimant.

Hinckley & Hinckley, for respondents.

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

MORRILL, J., concurring in result.

DEASY, J. Petition for compensation under R. S., Chap. 50, as amended.

The petitioner alleges that her late husband Justin Kelley, a blacksmith axe maker, died as the result of an industrial accident. Quoting the petition: "While working at the anvil a die came out and fell on his foot."

Mr. Kelley's death occurred about three months after the alleged accidental injury. The cause as stated in the death certificate was "gangrene of toe," the contributing cause "diabetes."

The defendants deny that the deceased suffered any accidental injury and say that the gangrene was a not unusual manifestation of his diabetic condition.

At the hearing before the Chairman of the Commission the burden was upon the petitioner to prove her case. *Westman's Case*, 118 Maine, 133.

She had the burden of proving that the metal die fell on her husband's foot, and that the injury thus occasioned caused or hastened his death. The Chairman found the burden sustained.

If supported by any legal evidence the finding must stand. If not it must be reversed inasmuch as a finding of a material fact without evidence is an error of law.

The evidence is of three classes.

(1) Hearsay—Hearsay is entitled to no weight. Its admission however, is harmless unless the decree is based upon it.

(2) Upon the question as to whether the condition of the man's foot was caused or aggravated by trauma, the medical testimony is neutral. One doctor indeed gives as his opinion, "I think it was from trauma" but he admits that there was no possible way that he could tell and frankly bases his opinion upon what the patient told him.

(3) Casings' testimony—Warren Casings testified that a day or two before Kelley stopped work "As I was going by him (Kelly) I saw him step back and I saw this die on the ground." He says that as Kelley stepped back he uttered an oath. Other testimony

showed the weight of the die to be about ten pounds. From this testimony the Chairman draws the conclusion that the die fell a distance of about three feet and struck on Kelley's foot, producing an injury which caused or hastened his death.

Casings' testimony is not disputed. Indeed there is no conflict of primary testimony in the case. The question that the court has to consider is whether the Chairman's inference is a rational and natural inference from the proved facts. If so the decree must stand even though a different inference might with equal logic and reason be drawn by some other tribunal. *Mailman's Case,* 118 Maine, 179.

If a ten-pound die had fallen a distance of three feet and struck on Kelley's foot producing an injury so severe as to cause or accelerate his death, the probability is so strong as to be almost a certainty that his work would have been for a brief period at least, interrupted and that he would have, at the time made some complaint of injury to the foot, or at all events have mentioned the matter to his fellow workmen.

But there was no interruption. He worked all that day and the next. He did not at the time complain of injury to the foot, nor mention it to the man working with him at the same forge.

No issue is raised of the credibility of testimony. The question is whether under these circumstances it may reasonably be inferred that the die which the witness Casings saw lying on the floor had fallen upon Kelley's foot producing an injury of such severity as to cause death. We think that the inference is strained and not reasonable.

In many cases accidental injury has been held inferrable from slight circumstances without direct testimony, but never we believe where as in this case all the facts and circumstances taken together are inconsistent with such inference.

Appeal sustained.
Decree reversed.

HARMON MCPHEE BY ERNEST T. MCPHEE *vs.* WALLACE S. LAWRENCE

AND

ERNEST T. MCPHEE *vs.* SAME.

Kennebec. Opinion November 30, 1923.

The admissibility of photographs, whether verified or not, is addressed largely to the discretion of the presiding Justice, whose ruling thereon is not subject of exception, in absence of an abuse of discretion. The admission of unidentified photographs not considered proper.

In this case the admission of the identified photographs was within the discretion of the court and therefore proper. But the use of other unidentified photographs, their retention by the jurors during a long trial, and taking the same from the court room to their homes, was not proper.

The actual influence of such photographs is not, and cannot be known. The impressions they make on the minds of jurors, whatever the same may be, cannot be said to be founded upon legitimate testimony.

On exceptions and motion by defendant. Two actions by agreement tried together; the first, an action on the case for personal injuries to Harmon McPhee resulting from the alleged negligence of the defendant in the operation of an automobile; the second, a similar action by the father of the minor who was injured to recover expenses resulting from the injuries. The two cases were tried to a jury and a verdict of $8,533.50 was returned for Harmon McPhee, and a verdict for $2,500 was returned for Ernest T. McPhee.

Defendant excepted to the ruling of the presiding Justice in admitting certain unverified photographs, and also filed a general motion for a new trial. Exceptions sustained. Verdict in each case set aside.

The case is fully stated in the opinion.

Ernest L. Goodspeed and George W. Heselton, for plaintiff.

Andrews, Nelson & Gardiner, for defendant.

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

HANSON, J. These two cases were tried together; the first, an action on the case for personal injuries to Harmon McPhee, who brings this action by Ernest T. McPhee, his father and next friend, due to the alleged negligence of the defendant in the operation of an automobile; the other for the expenses resulting from the injuries claimed. Verdicts were returned for the plaintiffs, and the cases are before us on exceptions and general motion by the defendant.

While there are many exceptions, it is necessary to consider but one. The first exception relates to the admission of certain identified photographs as exhibits and certain other photographs not identified, and the use and retention of the latter by the jury under objection. The exceptions state the facts involved as follows: "In the course of the trial certain photographs of the scene of the accident, and its immediate environs, taken some months after the accident, were offered in evidence. Objection was made by counsel for defendant to the introduction of this evidence, on grounds stated in the record.

"A large number of photographs, neither marked or identified, were distributed, two each, to each member of the jury, who, under objection, were allowed to receive and retain them."

The use of the identified photographs was within the discretion of the court and therefore proper. *Rodick* v. *Maine Central Railroad Company*, 109 Maine, 530. But the use of other unidentified photographs, their retention by jurors during a long trial, and taking the same from the court room to their homes, was not proper. The actual influence of such photographs is not, and cannot be known. The impressions they make on the minds of jurors, whatever the same may be, cannot be said to be founded upon legitimate testimony. Each juror having possession of such photograph is liable to draw a wrong conclusion based upon his view of the same, or may assume therefrom a fact to be proved which the admissible evidence does not warrant, and thus unwittingly be carried beyond the limits of his duty, and a miscarriage of justice follow. That such may or might be the effect is sufficient, we think, to invalidate a verdict, where as in the instant case such use of unidentified photographs

occurred, especially so, as out of twenty-six photographs in the possession of the jury but three of the number had been passed upon by the court. We think this exception should be sustained.

It is unnecessary to consider the motion.

Exception sustained.
Verdict in each case set aside.

HOWARD L. GOOD *vs.* PERLEY S. BERRIE.

Aroostook. Opinion November 30, 1923.

A master is liable for the negligent and tortious acts of his servant done in the scope of his employment.

In this case the verdict is not considered to be manifestly wrong upon the evidence. The questions involved were questions for the jury under proper instructions. Whether the going to the ball game was a detour, with or without intent to do business for his master, and to use some part of the time to attend a baseball game, or whether, without business purposes of his master or himself, he had attended ball games outside his authorized territory, and was bent "on a frolic of his own," are questions which could only be answered by the jury from all the facts and circumstances of the case.

Somewhere, at some time that evening, Gillis resumed the agency admitted by the defendant, and continued in his employment for several weeks after this action was brought. When and where he resumed his agency were questions for the jury. Whether or not he was acting within the scope of his employment at the time of the collision was also a question of fact for the jury.

The automobile used by Gillis was the property of the master, the servant in addition to his other admitted duties was the driver, and as to third persons it was his legal duty to drive properly, and when driving for the master, the master is liable for his negligent and tortious acts done in the scope of his employment.

On motion for a new trial by defendant. This is an action on the case for damages sustained by plaintiff to his automobile resulting from a collision with the automobile of defendant while being driven by one Gillis, an employee of defendant. A jury rendered a verdict of $494.25 for plaintiff and defendant filed a general motion for a new trial. Motion overruled.

Charles P. Barnes, for plaintiff.

Shaw & Cowan, for defendant.

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

HANSON, J. Action on the case to recover damages for injuries to property sustained by the plaintiff in an automobile collision, which occurred at about seven o'clock p. m., July 29, 1921. The jury returned a verdict for the plaintiff for $494.25, and the case is before us on defendant's general motion.

The plaintiff was driving his car, a Franklin five-passenger, weighing about twenty-three hundred pounds. An employee of the defendant, one Gillis, was driving the defendant's automobile, a Ford touring car, weighing about nineteen hundred pounds. Defendant is the owner and proprietor of a store in Houlton, selling pianos and other musical instruments, and, in February before the accident, and continuously thereto, and thereafterwards until the November following, defendant employed Mr. Gillis "to sell pianos, phonographs, and other musical merchandise, to the public, out on the road as well as in the store." Gillis was to report at the store in Houlton each night, and at the time of the accident was on his way south. The plaintiff was traveling north. The automobiles collided at a point one and one half miles from Monticello village, and in the town of Monticello. During the afternoon of the day of the collision, Gillis attended a ball game at Monticello, and later in the same afternoon attended another game in the adjoining town of Bridgewater, and was returning from the Bridgewater game when the accident occurred. The plaintiff claimed that the collision occurred on the east, or his right side of a state road. The defendant claims that the automobiles collided on the west side of the road, defendant's lawful side of the highway.

The defense was the general issue, and consisted of two propositions:—(1) That the accident was due wholly, or in part, to the negligence of the plaintiff. (2) That Gillis, at the time of the accident, was not acting in the course of his employment by the defendant, and in the course of his duty as agent of the defendant.

In his charge to the jury, to which no exception was taken, the presiding Justice submitted the following question:

"Was Gillis, at the time of the accident, acting in the course of his employment by the defendant, and in the course of his duty as agent of the defendant?" The answer was, "Yes."

The issue was presented clearly under proper instruction by the presiding Justice, and the jury passed upon the questions raised. We have examined the record closely and we are not persuaded that the verdict of the jury is manifestly wrong. The defenses raised were questions for the jury under proper instructions. Whether the going to the ball games was a detour, with or without intent to do business for his master, and to use some part of the time to attend a baseball game, or whether, without business purposes of his master or himself, he had attended ball games outside his authorized territory, and was bent "on a frolic of his own," are questions which could only be answered by the jury from all the facts and circumstances in the case. It is very evident that whatever the nature of his business, if he had business aside from that on the baseball ground, he had accomplished the same, and was at the moment of the accident returning by the ordinary traveled way in the direction of his master's store at Houlton. He was within the limits of the town of Monticello at the time of the collision, where he had authority to be, and to act for the defendant that day. He was apparently on the way to the home of Mr. Hoyt, with whom he had left a phonograph for trial. Somewhere, at some time that evening, he resumed the agency admitted by the defendant, and continued in his employment for several weeks after this suit was brought. When and where he resumed his agency were questions for the jury. Whether or not he was acting within the scope of his employment at the time of the collision was also a question of fact for the jury. *Schulte* v. *Halliday*, 54 Mich., 73. The last named case holds that the finding of the jury is conclusive. Note to *Richie* v. *Walker*, 63 Conn., 155.

In *Richie* v. *Walker*, supra, a servant was sent by his master with the latter's team to procure a load, and deviated from the most direct course home for the purpose of seeing about the repair of his own shoes, and the court held that such deviation was not of itself sufficient to show that he had so far departed from the execution of the master's business as to relieve the master from liability for his negligent management of the team. In reaching a conclusion the court say: "To decide the question in a case like the present, the trier must take into account, not only the mere fact of deviation, but its extent and nature relatively to time and place and circumstances, and all the other detailed facts which form a part of and

truly characterize the deviation, including often the real intent and purpose of the servant in making it. Without spending any more time upon this point, we think the above question is one of fact in the ordinary sense, and that the case at bar clearly falls within the class of cases where such question is strictly one of fact to be decided by the trier." In *Legace* v. *Belisle Bros.*, Supreme Court of R. I., June, 1923, where defendant's servant was permitted to use defendant's truck for his private business, and in returning to his regular employment digressed somewhat from his customary route, and while so doing collided with plaintiff's truck, it was held that whether the accident occurred in the course of employment was a question for the jury.

The automobile used by Gillis was the property of the master, the servant in addition to his other admitted duties was the driver, and as to third persons it was his legal duty to drive properly, and when driving for the master, the master is liable for his negligent and tortious acts done in the scope of his employment. "If a coachman, driving his master, and being ordered not to drive so fast, disobeys and thereby occasions an injury, the master is responsible, because he is still driving for his master, though driving badly." *Brown* v. *Copley*, 7 Mann. & Granger, 566; E. C. L., 566, by Caswell, J. *Stickney* v. *Munroe*, 44 Maine, 195; *Goddard* v. *Grand Trunk Railway*, 57 Maine, 202, and cases cited; *Young* v. *Maine Central R. R. Co.*, 113 Maine, 118.

The defendant conceded in his testimony that if the servant procured business for him outside the limits of Monticello, he would accept the same. The servant was not called by the defendant. His testimony would have thrown some light on the issue, and would have explained the reason for his visit to Bridgewater at least. It is clear that the purpose of his detour, whatever it was, had been accomplished, and that he was back in the town of Monticello and driving the master's automobile in the direction of the master's place of business when the collision occurred. The testimony justified the jury in so finding, and further to find that the servant at the time of the collision was acting in the course of his employment, and in the course of his duty as agent of the defendant.

We think the verdict is amply sustained by the evidence.

Motion overruled.

ROMUALD PARADIS *vs.* CEDRIC JUDKINS.

Oxford. Opinion November 30, 1923.

Upon all the evidence the verdict not clearly, palpably wrong, hence must stand. Plaintiff guilty of contributory negligence.

The jury found that the defendant is not liable, and we cannot say from the whole record, as a matter of law, that the verdict is clearly, palpably wrong. We do not approve some of the measures taken by the defendant in his zeal in the performance of his duty. If the testimony rested there, our conclusion would be different. There is, however, another element to be considered which no doubt impressed the jury, and that is the alleged due care, and lawful use of the highway on the part of the plaintiff. Having in mind the occurrences so fully detailed in the evidence, the many lights, the great speed on approaching the chain, the greater speed developed on seeing the lights, seeing the officer and the men with him, all creating a situation where he must have known he would not be in danger of bodily harm if he stopped, as an innocent man would have stopped, yet he drove forward regardless of consequences. To the resulting damage his own want of due care contributed in a large measure.

On motion for a new trial by plaintiff. An action to recover damages which plaintiff alleged he suffered by reason of a chain being stretched across the highway in the town of Upton, by the defendant, a deputy sheriff, on which highway plaintiff was traveling in his automobile, and his automobile came in contact with said chain as he drove along the road. A jury returned a verdict for defendant and plaintiff filed a general motion for a new trial. Motion overruled.

The case is sufficiently stated in the opinion.

Albert Beliveau, for plaintiff.

Alton C. Wheeler, for defendant.

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

HANSON, J. Action on the case. The plaintiff sued to recover damages for an alleged personal assault by the defendant, a deputy sheriff. The jury returned a verdict for the defendant. The case comes before us on the plaintiff's general motion for a new trial.

The orginal declaration as amended sets out "that the plaintiff . . . . on the tenth day of August, A. D. 1922, at Upton in the County of Oxford, was then and there lawfully driving and operating a certain Nash runabout automobile on the road leading into Upton from the town of Erroll, New Hampshire; and the plaintiff alleges that the defendant unlawfully and without any authority whatsoever did then and there stretch in and across said road, at a short distance from said town of Upton, a big and heavy iron chain; and plaintiff avers that the said defendant then and there fastened said chain to trees or telephone posts on either side of said road; and the plaintiff alleges that he had no knowledge or notice of said chain being stretched or laid across said road, as aforesaid, and that, while he was operating, as aforesaid, his Nash runabout automobile lawfully, legally and at a moderate rate of speed, up the hill going into said Upton, on said road as aforesaid, he then and there came in contact and struck the aforesaid chain, laid or stretched across said road, as aforesaid, by the defendant unlawfully and without any authority . . . . that because of coming in contact and colliding with said obstacle, the plaintiff was then and there severely and seriously injured; . . . . and plaintiff alleges that the injuries caused to and suffered by the plaintiff were due wholly to the unlawful, illegal and unauthorized act of the defendant . . . . and were not due in any way to the negligence or carelessness of the plaintiff who, at all times, was in the exercise of due care and caution."

There was a lantern in the road at some distance from the obstruction. There was another lantern with the red light exposure open and in view before him, the chain was covered by a small tent, the light in front of the tent, the lights on the automobile were turned on and showing clearly, and in addition the defendant stood in the highway waving a flash-light. The plaintiff testified that the only light visible to him was the "searchlight" in the hand of the defendant, and this he saw while two or three hundred feet distant from the officer who stood near the chain. It was two o'clock in the morning. The case shows that the plaintiff's light could be seen while he was at least a mile distant. He was driving at a rapid rate of speed, and there was testimony which the jury were authorized to believe that, on nearing the first lantern, he increased his speed, ran directly over that lantern, and with still increasing speed ran

directly for the red light attached to the chain, breaking the chain, and on his own showing the car stopped forty feet beyond the chain.

The plaintiff contended that he did not see the first light in the highway, or the second light on the chain, and that he was pursuing his way lawfully and in the exercise of due care. The jury did not believe his story. We are persuaded that the finding of the jury is fortified by the evidence. The questions were submitted to the jury under instructions to which no exception was taken. We must assume that the instructions were proper. The jury found that the defendant is not liable, and we cannot say from the whole record, as matter of law, that the verdict is clearly, palpably wrong. We do not approve some of the measures taken by the defendant in his zeal in the performance of his duty. If the testimony rested there, our conclusion would be different. There is, however, another element to be considered which no doubt impressed the jury, and that is the alleged due care, and lawful use of the highway on the part of the plaintiff. Having in mind the occurrences so fully detailed in the evidence, the many lights, the great speed on approaching the chain, the greater speed developed on seeing the lights, seeing the officer and the men with him, all creating a situation where he must have known he would not be in danger of bodily harm if he stopped, as an innocent man would stop, yet he drove forward regardless of consequences. To the resulting damage his own want of due care contributed in a large measure. In view of all the evidence the verdict must stand.

Motion overruled.

FRED F. LAWRENCE, Bank Commissioner, In Equity

vs.

LINCOLN COUNTY TRUST COMPANY.

Lincoln. Opinion December 8, 1923.

A depositor, as a general rule, who is indebted to the bank, is entitled to set off the amount to his credit against his indebtedness even though the bank is insolvent. But in case of segregation of depositor's notes under R. S., Chap. 52, to secure a savings account, the deposit cannot be set off against such segregated notes.

In the instant case the bank holds such segregated notes in trust to secure the savings account. Its liability to depositors is not as such trustee. Hence the right of set-off does not apply. Neither does the right of set-off apply in case of a deposit marked "special" and intended by the depositor to be used in payment of such note, even though such intention be known to the treasurer of the bank, provided that the deposit remains under the exclusive control of the depositor and subject to withdrawal by him.

A vote authorized the segregation of notes as provided by statute. The segregated notes were not stamped. No record was made in any so-called investment book. The daily balance ledger was however adopted as an investment book by stamping upon it the words "segregated for savings acct." and bracketing after these words on each page certain listed assests including notes.

The court does not approve the procedure adopted but holds that it is not so defective as to defeat the purpose of the Legislature and the intention of the bank to provide security for all savings depositors.

On report. A petition in equity brought by the Receivers of the Lincoln County Trust Company in the name of the Bank Commissioner seeking from the court instructions as to the discharge of their official duties.

The main question involved was whether, as between the bank and the depositors, the deposits of the various depositors who had given notes to the bank, or were responsible on notes, either as makers, endorsers or sureties, should have offset as against their liability to the bank to the amount of their deposit. A hearing was had upon the petition of the Receivers, and by agreement of

the parties the cause was reported to the Law Court on an agreed statement of facts, the Law Court to render such decision thereon, and give such instructions as may be equitable and proper. The receivers were instructed as defined in the opinion.

The case is fully stated in the opinion.

Walter S. Glidden, for petitioning receivers.

Arthur S. Littlefield, for respondent depositors.

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

MORRILL, J., dissenting.

DEASY, J. Walter S. Glidden and W. C. Day, Receivers of the Lincoln County Trust Co., on May 9, 1923, made application for instructions as to "whether they shall allow to the makers, sureties and endorsers upon notes due or payable to said Lincoln County Trust Co., the amount of the respective deposits" of said makers, etc. Certain depositors in the Trust Co., who are also liable upon notes held by it, appeared and were heard and are herein referred to as intervenors. Upon hearing, the matter was reported to the Law Court.

The relation between a trust company or national bank, and the depositors and borrowers with whom it deals, is ordinarily that of debtor and creditor. The right of set-off applies precisely as it does between individuals. "As a general rule a depositor who is indebted to the bank is entitled to set off the amount to his credit against his indebtedness even though the bank is insolvent." 7 Corpus Juris, 652, and 3 R. C. L., Page 588, and cases cited in each. But an important change in this relation is wrought when a trust company proceeding by authority of R. S., Chap. 52, Secs. 90-1-2, as amended, segregates and sets apart certain assets as security for savings depositors.

The statute, omitting non-essential parts, is as follows: "Every trust company soliciting or receiving savings deposits . . . shall segregate and set apart and at all times keep on hand so segregated and set apart assets at least equal to the aggregate amount of such deposits.

"Such assets so segregated and set apart shall be held for the security and payment of such deposits, and shall not be mingled with the other assets of the company, or be liable for the debts or other obligations thereof until after such deposits have been paid in full. . . . .

"Such segregated assets shall be so held and recorded as to identify them as the assets held for the security of such deposits. All notes . . . . representing such assets shall be plainly stamped 'Savings Department,' provided however that in lieu thereof it shall be lawful to record in the investment book a description of assets so held sufficient to identify them."

The theory of the intervenors is that the assets required to be segregated do not include notes of depositors at their full face, but at their face less deposits of the makers and indorsers.

For example, a bank has a note for $5,000 given by A, who has a deposit of $2,000. The bank segregates the note as security for savings deposits.

The theory of the intervenors is that such segregated note is today security for $3,000 only, though tomorrow if the deposit is withdrawn the security may become $5,000, and the next day if the maker should deposit $5,000 the security would utterly vanish. In the last analysis our problem is to determine the meaning of the word "assets" as used in the statute above quoted. Doubtless the Legislature might have employed the term as meaning a balance subject to constant fluctuation. It can hardly be presumed that this was the intended meaning.

In the frequently published bank statements the term "assets" includes notes, not balances between notes and deposits of makers. All deposits are listed as liabilities.

Appended to the printed case, that we are now considering, is a leaf from the daily balance ledger used by the Lincoln County Trust Co., being in form the same commonly used by banks. Under the heading "Assets" there are listed the same loans which are segregated as security. The sum carried out after the word "loans," and intended so to be carried out, is obviously not the balance after deducting deposits of makers. These and all other deposits are set down as liabilities.

The word "assets" as ordinarily used by bankers includes notes at their face less payments, if any, and less depreciation if they have

been charged down, but without deducting deposits of persons liable on such notes.

It is probable that the Legislature used the term "assets" in the sense in which it is commonly used. It is improbable that it intended to have set off as security for savings depositors, balances subject to daily and hourly fluctuations beyond the bank's control.

The true theory is that the bank holds segregated assets for the savings depositors. As a holder of segregated notes it is a trustee. As a debtor to depositors it is not. The corporation is the same; the capacity is different. Therefore, the principle of set-off does not apply.

The eminent counsel for the intervenors relies with confidence upon the statute regulating set-off of demands. R. S., Chap. 87, Sec. 75. The statute, omitting words not germane to the present discussion reads: "A demand originally payable to the defendant in his own right . . . . may be set off."

If the statute provided that *all* demands originally payable to the defendant in his own right should be set off absurdity of result would preclude literal construction. "Mutuality is implied in the word set-off." *Collins* v. *Campbell*, 97 Maine, 27.

"A cardinal rule in the interpretation of statutes of set-off requires that there be a mutuality of demand both as to the quality of the right and the identity of the parties." *Hunter* v. *Henning*, 259 Penn., 347; 103 Atl., 61.

A demand against the plaintiff individually though "originally payable to the defendant in his own right" cannot be set off if the plaintiff sues as administrator or trustee. In order that a demand may be set off it must be a demand against the plaintiff, or if the plaintiff be merely nominal or representative, then it must be against the real plaintiff.

Set-off whether a set-off of demands under the statute or a set-off of judgments at common law is a right which the defendant may interpose against the plaintiff *in interest*. Judgments may be set off "when the parties in interest are the same." *Pierce* v. *Bent*, 69 Maine, 385; *Moody* v. *Towle*, 5 Maine, 416.

"The defendant in an action by a trustee in his capacity as such has the same rights as regards set off that he would have against the cestuis que trust." 25 A. & E. Ency., 533. "The relation of

a trust company to its depositors in the savings department is that of a trustee to his cestuis que trust." *Keiley* v. *Commissioner*, 239 Mass., 298.

A trust company holding in trust for the savings depositors a note which has been segregated for the purpose brings suit upon it for the benefit of such depositors. If the theory were true that what is segregated is the fluctuating balance between the amount of the note and the deposits of makers its and indorsers, set-off should be allowed because after such allowance all of the trust fund represented by the note would be recovered.

But if as this court holds, it is the note that is segregated and held in trust, set-off cannot be allowed in a suit brought for the benefit of the savings depositors for several cognate reasons: (1) the demand sought to be set off is not against the plaintiff in the capacity in which he sues, (2) the demand is not against the plaintiff in interest, and (3) such allowance would defeat in part the recovery of the trust fund.

All this is not important so long as the bank is solvent. In such case the depositor does not need to resort to a plea of set-off. He can draw his deposit and pay his note.

And in case of insolvency, denial of set-off does not injure the savings depositor if the segregated assets are sufficient to secure the payment of all.

But insolvency plus deficiency of security make set-off important. To allow it, however, would deplete the trust fund and in part defeat the purpose of the law.

Few of the cases cited are pertinent. Indeed, it seems that but few cases directly in point have been decided by courts. Some cited cases have reference to the ordinary relations between banks and their customers when there has been no setting apart or segregation of assets as security. It is conceded that in such cases the right of set-off obtains precisely as between individual debtors and creditors.

Other authorities presented relate to savings banks. It is uniformly held that savings bank depositors who are debtors to the bank have no right of set-off. The reason is that savings bank depositors are not creditors of the bank, except in a limited sense. They occupy a position, sui generis, but resembling that of stockholders. *Coggswell* v. *Bank*, 59 N. H., 43; *Lewis* v. *Institution for Savings*, 148 Mass., 235.

Trust Company depositors are denied the right of set-off against their segregated notes, but for a different reason. A trust company is a debtor to its depositor. As holder of its depositor's notes it is also a creditor. If both debtor and creditor in the same right, in the same capacity, the principle of set-off must apply. But it holds segregated notes in trust. Its liability to depositors is not as trustee. Hence the right of set-off does not apply.

Turning to the authorities bearing upon controverted issues in this case: *State* v. *Brobston*, 94 Ga., 95, 21 S. E., 146, is confidently relied upon by counsel for the intervenors. The Georgia statute provides in substance that when a bank is a depository of public funds the State shall have "a first lien on all the assets" of the bank. It was held that the lien attaches only to balances due on notes after deducting deposits of makers. This case lends some support to the theory of the intervenors in the meaning that it ascribes to the word "assets." If the Georgia statute provided that certain assets should be segregated and set apart as security for public deposits and if the Georgia Court had decided that notes so segregated as security were subject to be reduced even to the vanishing point by deposits, upon which the State has no lien, the case would be directly in point.

All other authorities that have come to our attention deny the right of set off to the *commercial* depositor as against his note in the savings department. As to whether *savings* depositors are entitled to set off the authorities are not entirely uniform.

Upham v. *Bramwell*, (Ore.), 210 Pac., 706, 25 A. L. R., 932.

This case holds (1) that a depositor having a note in the commercial department is entitled to set off. That this is true goes without saying. (2) that a savings depositor having a note in the savings department also has the right to set off, but (3) that a commercial depositor having a note in the savings department has not the right.

The Massachusetts cases are opposed to the theory of the intervenors so far as concerns commercial depositors. They do not pass upon the rights of savings depositors.

Kelley v. *Com'r of Banks*, 239 Mass., 298, 131 N. E., 855. Debtor to savings department cannot have commercial deposit set off.

Trust Co. v. *Rosenbush*, 239 Mass., 305, 131 N. E., 858. Same rule applied as in Kelley case notwithstanding depositor's note was discounted in commercial department and without his knowledge transferred to savings department.

Tremont Trust Co. v. *Baker*, (Mass.), 137 N. E., 915. Same rule applied as in Kelley Case notwithstanding agreement by bank to allow set off.

The Massachusetts statute differs from that of Maine in that the former requires savings deposits to be kept distinct from other deposits and invested separately, and in that savings depositors have as security only assets derived from investments of savings deposits.

It is not easy to perceive that these differences affect the right of set off. In both states the same corporation is creditor of, and in debt to, the same person at the same time. But as creditor it is a trustee; as debtor it is not.

Lippett v. *Thames Loan & Trust Co.*, 88 Conn., 190, 90 Atl., 369. Debtor to savings department cannot have his deposit in either commercial or savings department set off.

The Connecticut statute is much like that of Massachusetts. It segregates savings department investments, and such investments only, as security for savings depositors. The reason for the decision in the Lippett Case is that "The depositors in this (savings) department were the equitable owners of the savings (segregated) assets." This is but another way of stating that the Trust Company held the notes in trust for the savings depositors. A note held in trust is not subject to have set off against it a debt of the trustee unless it is a debt for which he is liable as trustee.

Both reason and authority are opposed to the theory that commercial depositors are entitled to have their deposits set off against their segregated notes.

The same rule we think must be applied in case of savings depositors. The savings depositor who is also a debtor must share proportionately with his co-depositor who is not a debtor. As to this, however, as above appears, the authorities are not entirely uniform.

But every reason for denying set-off to commercial depositors applies to savings depositors. The solution of the problem harks back to the original question, the meaning of the word "assets" as used in the statute, which aims to provide "security." Does it include merely the elusive balance, or does it mean the appraisable note? We hold the latter to be the true meaning. The trust com-

pany held the notes as trustee. It owed its depositors but not in its capacity of trustee. There is no mutuality in "the quality of the right." Set-off must be denied.

"The relation of a trust company to its depositors in the savings department is that of a trustee to his cestuis que trust, while its relation to its depositors in the commercial department is that of a common law debtor." *Kelley* v. *Commissioner,* (Mass.), supra.

"The depositors in this department were the equitable owners of the savings assets . . . . Each depositor had an equal right to his proportional share of all the funds of this department." *Lippett* v. *Trust Co.,* (Conn.), supra. See note 25 A. L. R., 938.

Answering a minor question propounded by the receivers we hold that a depositor's intention to apply a certain deposit marked "Special" to the payment of his segregated note does not entitle such depositor to the right of set-off, even though such intention is made known to the treasurer, provided the deposit remains under the exclusive control of the depositor and subject to withdrawal by him.

The intervenors further contend that the Lincoln County Trust Company failed to legally and effectually segregate and set apart any notes. As before stated, if there were no legal segregation the right of set-off exists as it does between any debtor and creditor.

Two votes were passed by the executive committee or directors providing for the segregation of assets to secure savings depositors. One passed in 1919 covered "stocks and bonds, all loans including mortgage and chattel." The other passed in 1922 covered "all stocks and bonds, mortgage, collateral and time notes."

The segregated notes were not stamped "Savings Department." No record was made in any so-called investment book. To carry the votes into further effect the bank caused to be stamped on each page of its daily balance ledger under the heading "Assets" the words "Segregated for savings acc't," which words were bracketed against the following items of assets . . . . "Stocks and Bonds, U. S. Bonds, Loans on Collateral and Chattels, Loans on Mortgages of R. E., Other Loans."

This method is crude. It cannot be commended. But the act should receive a liberal construction. The savings depositors for whose security it was passed were not responsible for the bank's loose methods. The purpose to segregate assets plainly appears. The items to be segregated are indicated with reasonable certainty.

No one of the specific objections nor all combined are fatal: It is objected that a trust company cannot legally set apart all of its assets as security for savings depositors. The Lincoln County Trust Co., did not undertake to do this. Assets having a book value of more than $36,000 were not so set apart.

True, it did not record a description of segregated loans. All loans being segregated such specification was not essential for the purpose of identification.

It had no investment book, so called. But it adopted the daily balance ledger as an investment book.

It is objected that it attempted to segregate non-existing assets. Not so. The weekly entry upon the bank's improvised investment book as plainly related to existing assets as would a formal record made at the same time in an investment book in the most approved form. In either case the record is made as authorized by votes properly including and relating to assets to be acquired.

While we do not approve the procedure adopted we think that it is not so defective as to defeat even in part the purpose of the Legislature and the intention of the bank to provide security for all savings depositors.

The receivers are instructed as above.

MORRILL, J. Dissenting. I concur with all the conclusions of the opinion, except on the main question of an actual segregation of assets, as claimed by the receivers, for the security of the savings deposits. After a careful study of the case I cannot escape the conclusion that the officers of Lincoln County Trust Company never legally made such segregation. As all my associates think otherwise I should hesitate to express my views except by a mere statement of non-concurrence, did I not think that the case shows not only no segregation, but a persistent disregard of the provisions of law enacted for the protection of both savings and commercial depositors in trust companies, which should not be permitted to pass unnoticed.

I think that we agree that a mere vote to segregate is not sufficient; that the securities must be actually set aside for the purpose indicated, and must not thereafter "be mingled with the other assets of the company," while such segregation continues; they should be kept in a class by themselves and accounted for as other trusts. I do

not see how there can be such actual legal segregation unless the securities are designated, or a definite, permanent record is made, as plainly directed by statute.

The use of the rubber stamp, once a week, by a clerk in transferring the ledger balances from one leaf of the trial balance loose leaf ledger to the leaf for the following week, lacks all the elements of a permanent record. The five items of assets alleged to be segregated were printed on the trial balance sheet consecutively in the following order, "Stocks and Bonds," "U. S. Bonds," "Loans on Collateral and Chattels," "Loans on Mortgages of R. E.," "Other Loans"; and were numbered 1, 2, 4, 5, 6; between the items "U. S. Bonds" and "Loans on Collateral and Chattels" a blank line numbered 3 appears. Upon at least two copies of the case furnished the court the fac simile of the trial balance sheet, showing the method of using the rubber stamp, shows that the stamped bracket does not include the item, "Other Loans," and that the stamp used was not long enough to include that item; if used so as to include "Other Loans," the item "Stocks and Bonds" could not be included.

The description of the results shown on the books by the use of the rubber stamp indicates the loose, inexcusable banking methods adopted.

An analysis of the condition of the bank on March 14, 1923, when it closed its doors, shows: Savings Deposits $366,955.13

OTHER LIABILITIES

Certificates of deposits	$ 300.00
Demand deposits	79,764.60
Bills payable	10,000.00
	$90,064.60

Assets claimed to be segregated:

Stocks and bonds	$304,043.31
Loans, coll. and chattels	10,515.00
Loans on mortages of R. E.	53,165.88
	$367,724.19
Other loans	116,262.88
	$483,987.07

Other assets:	
Banking house	$24,000.00
Other real estate	7,231.50
Cash on deposit	2,305.45
Cash on hand	2,653.19
	$36,190.14

It will be observed that the items of Stocks and Bonds, Loans on Collateral and Chattels, and Loans on Mortgages of Real Estate exceed by $769.06 the amount of Savings Deposits, an entirely reasonable amount; add the item "Other Loans," and the total exceeds the savings deposits by $117,031.94. Sec. 90 of Chap. 52 of the R. S. does not fix any maximum amount of assets to be segregated; it provides that they shall be "at least equal to the aggregate amount of such deposits." In the absence of such statutory maximum the court perhaps cannot say as a matter of law that an overlay in value of nearly 33⅓% of the savings deposits, although apparently excessive, is unlawful.

In my opinion, however, the law does not contemplate any such segregation in bulk of different classes of assets, or, as here, of the entire invested assets of the bank except the real estate; in the instant case the only remaining assets are the banking house, other real estate, cash on deposit and cash on hand. To such a proceeding the provision that the "assets so segregated . . . . shall not be mingled with the other assets of the company" (R. S., Chap. 52, Sec. 91) has no application. It is safe to say that the Legislature never intended to authorize the directors to give the savings depositors a prior lien upon all the invested quick assets of the company, leaving the equity to the commercial depositors.

The following section (Section 92) to my mind makes this clear; it provides:—"All notes, certificates of stocks, bonds and other securities representing such assets shall be plainly stamped 'Savings Department'; provided, however, that in lieu thereof it shall be lawful to record in the investment book a description of assets so held sufficient to identify them." The first method of identification was not followed. The opinion seems to proceed on the theory that the use of the rubber stamp may be considered equivalent to the second method. This is the first time, I think, that a daily trial balance sheet, showing mere balances of the various ledger accounts

making up the total assets and liabilities of the bank, was ever regarded as an "investment book," in which could be recorded a description of segregated assets. The statute clearly indicates that each item, each bond, or mortgage, or note, so segregated, shall either be stamped or so recorded in the investment book which necessarily lists each investment.

It may be said that this construction of the statute is too strict, that it unduly clings to the letter of the law and disregards its spirit; that a construction should be adopted, if possible, which will render the statute effective in the present case for the security of the savings depositors. Upon this ground, as I understand the opinion, it sanctions, but does not approve, the procedure of the bank.

With such loose banking methods shown, nothing should be presumed, or receive sanction, upon liquidation of the bank, which will favor one class of depositors as against another. While the law as to segregation should receive a liberal construction in the interest of the savings depositors for whose security it was passed and who are not responsible for the bank's loose methods as the opinion well says, its administration should be just towards the commercial depositors, who likewise are not responsible for the bank's loose methods, and who equally with the other depositors may have been misled.

To demonstrate the position in which the commercial depositors will be placed if this alleged segregation of assets is recognized, it is only necessary to refer to the bank's report of January 6, 1923, presumably verified by an official examination of the bank. In that statement no mention is made of segregated assets. If the alleged segregation had been given effect, assets carried on the books at $507,137.53 would be regarded as held as security for the payment of savings deposits of $370,206.16; and for the immediate payment of $50,000 borrowed money and $88,469.92 commercial deposits, there remained only cash on deposit, on hand, and overdrafts, amounting to $28,432.45, a bank building carried at $24,000, and other real estate carried at $7,251.50, a total of $59,683.95.

On March 14, 1923 the bank closed its doors; but in the meantime it had reduced its bills payable to $10,000 in part at least by applying to the payment thereof assets, which it is now maintained were segregated, from which it realized more than $20,000. I refer to this latter fact merely to show that so far as the bank was concerned

this alleged segregation was colorable only and a mere evasion of the law. If the alleged segregation is given effect, assets carried on the books at $483,987.07 must be first applied to the payment of savings deposits of $366,955.13; and there will remain cash on hand and on deposit ($4,958.64) a banking house carried at $24,000, and other real estate carried at $7,231.50 (total $36,190.14) available for payment of borrowed money $10,000, and commercial deposits of $80,064.60. It is true that the above figures show an equity above the amount of savings deposits; but how much of that equity will remain upon sale of the securities, it is impossible to tell without an inspection of a list of the securities; the shrinkage may, and probably will be large.

I have said that the action of the bank was a mere evasion of the law. I ought to add that so far as the official statements of the bank's condition show, the Banking Department has not recognized or approved the action of the bank. The various reports of the condition of the trust company at the annual examinations are not made a part of the case; but I have examined them for any light which they may throw on the question. These reports do not disclose any item of assets segregated for the security of savings depositors; they make no mention of segregated assets. That such items, if they existed, should so appear, is obvious; it is as important for the information of stockholders and depositors as other items which usually appear, such as "Trust Department" and "Trust Investments," "Sinking Funds for Corporations" and "Sinking Fund Investments." These reports are for publication. Sections 85, 87. The only inference to be drawn from this state of facts is that the Banking Department having supervision of segregated assets and authority to order the reduction of the figure at which they are carried on the books (Section 90), either knew nothing of the alleged segregation or did not recognize it as complying with the law. The commercial depositors under these circumstances could have no means of knowledge of any such segregation as is now claimed, and the savings depositors were not deceived, or lulled into a false belief that assets had been segregated for their security.

I am, therefore, of the opinion that upon this proceeding for the equitable distribution of the assets, all depositors should share proportionately in all assets, subject to the principles of set-off declared in the opinion, so far as applicable.

MARTIN O'MALIA *vs.* CHARLES THOMAS.

Androscoggin. Opinion December 13, 1923.

When a clear vision discloses a stretch of unobstructed road the motorist may drive on any part of it. But when he turns to the left of a traffic line greater care on his part is required.

In this case the mere fact that the defendant was driving on the left side of the traffic line does not prove him to have been negligent.

In overtaking and passing a slowly moving vehicle it is generally necessary to turn to the left of the road center and greater care should be exercised by the motorist.

The jury committed no manifest error in finding that the defendant's want of due care was the sole cause of the accident.

On motion by defendant. An action to recover damages for personal injuries sustained by plaintiff by being hit by the automobile of defendant on the first day of September, 1922, on Main Street in the city of Lewiston opposite the main entrance gate of the grounds of the Maine State Fair Association, defendant's car being driven by its owner, the defendant. The general issue was pleaded, and the case tried to a jury who returned a verdict of $2,069.00 for plaintiff and defendant filed a general motion for a new trial. Motion overruled.

The case is stated fully in the opinion.

Louis J. Brann, for plaintiff.

Pulsifer & Ludden, for defendant.

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

DEASY, J. Automobile accident case. Verdict for plaintiff. Defendant brings the cause forward by motion on the usual grounds.

The jury evidently found and was justified in finding that the defendant on September 1, 1922 was driving northerly over the state road thirty-five feet wide passing the fair grounds in Lewiston; that he was driving at a rate of speed which under the circumstances

was reckless; that he turned to the left of the center of the road as marked by a white traffic line; that upon reaching the end of the line which terminated in a painted "ball" he was driving wholly on the left of it; that he then drove still further to the left and within five or six feet of the extreme western edge of the road struck the plaintiff causing the injury sued for. The plaintiff testified that when the defendant's automobile struck him he had just alighted from a truck which was standing at the edge of the road, and that he had his hand upon the truck. The jury were abundantly justified in finding this testimony true.

The testimony shows that the accident occurred not southerly of the ball as erroneously indicated by the rough plan used at the trial, nor abreast of it as the defendant's counsel in his brief seems to assume, but some slight distance to the north of it.

We need not say that the mere fact that the defendant was driving on the left hand side of the traffic line does not prove him to have been negligent. In overtaking and passing a slowly moving vehicle it is generally necessary to turn to the left of the road center. When a clear vision discloses a stretch of unobstructed road the motorist may drive on any part of it. But when he turns to the left of a traffic line greater care on his part is required.

The defendant attempts to explain the collision by saying that the car of Mr. Keegan, Superintendent of the Water Works, had come off the fair grounds and entered upon the macadam road ahead of him, and that to avoid running into the Keegan car he ran over the plaintiff.

But the jury seems to have rejected this testimony. Other evidence apparently reliable is to the effect that at the time of the accident the Keegan car was slowly approaching the roadway, but had not reached it.

It is plain that an ordinarily prudent and careful person, similarly circumstanced, would have kept in the middle of the road or seasonably slowed down, or both. The jury committed no manifest error in finding that the defendant's want of due care was the sole cause of the accident.

The defendant's learned counsel does not in his brief complain of the damages awarded. We see no reason for holding them excessive.

Motion overruled.

GEORGE W. BROWN *vs* NORMAN TRUE et al.

Cumberland. Opinion December 13, 1923.

Where a contract is entire and a part of it within the statute of frauds, it is unenforceable as a whole, and no action can be maintained to enforce the part which would not have been affected by the statute if it had been separate and distinct from the other part.

The test of entirety of the contract is whether the parties assented to all the promises as a single whole, so that there would have been no bargain whatever if any promise or set of promises had been left out. Such was the case here.

The promise to give a mortgage was within the ban of the statute declaring the nonenforceability of an action "upon any contract for the sale of lands, tenements or hereditaments or of any interest in or concerning them." R. S., Chap. 114, Sec. 1, Paragraph IV. Therefore no recovery can be had upon the promises to give the notes.

On exceptions by plaintiff. An action to recover the sum of thirty-five thousand ($35,000) dollars under an oral contract alleged by the plaintiff to have been made with the defendants to pay him that amount in connection with transactions relative to the sale of the Preble House and other adjoining real estate, owned by the Portland Savings Bank, situate in the city of Portland. Defendants pleaded the general issue and under a brief statement set up the statute of frauds. At the conclusion of the evidence of the plaintiff, on motion by the defendants, the presiding Justice ordered a nonsuit, and plaintiff excepted. Exceptions overruled.

The case is fully stated in the opinion.

William R. Pattangall and Raymond S. Oakes, for plaintiff.

Chapman & Brewster, Woodman, Whitehouse & Littlefield, for defendants.

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

CORNISH, C. J. On plaintiff's exceptions to order of nonsuit. On August 25, 1921, the plaintiff, a real estate broker, cancelled

certain written agreements that he had previously made with the defendants in regard to the proposed purchase of certain real estate owned by the Portland Savings Bank and the division of the profits to be realized from the sale thereof.

In consideration of this cancellation and of all services rendered, brokers' commissions, &c., the plaintiff entered into an oral contract on the same day with the defendants whereby if the Keith theatre property, which was a part of the property owned by the Savings Bank in the city of Portland, was purchased and sold by them for $235,000 he was to receive $35,000, if sold for less, then he was to receive $25,000, said sums to be paid to the plaintiff in promissory notes of the defendants in the sum of $2,500 each, the first note to be due in six months from date and the others maturing one each six months until the full amount was paid; all of said notes to bear interest at six per cent. and be secured by a mortgage on the Preble House property subject to an existing mortgage for $260,000. There is a slight difference as to some of the details between the recollection of the plaintiff and the unsigned memorandum made by the attorney for the defendants on the evening of the day the agreement was made, which memorandum was introduced in evidence by the plaintiff. But these differences have no bearing upon the issue here, which is whether an action at law for breach of this oral contract can be maintained when the defendants have invoked by their pleadings the Statute of Frauds. Reduced to its simplest terms the obligation on the part of the defendants was that they would give the plaintiff $25,000 or $35,000 in promissory notes running over a series of years and all secured by a mortgage of real estate.

Is such an oral contract void in the sense of being unenforceable under the Statute of Frauds? The defendants contend that it is, and the presiding Justice took their view. The plaintiff while granting that an oral contract for the sale of lands or any interest in or concerning them does not support an action at law, and that an agreement as to giving a mortgage might of itself be void, at the same time urges that the stipulations on the defendants' part in this contract are separable and independent, and the agreement as to giving the notes can be divorced from the agreement as to the mortgage, and an action at law be maintained for breach thereof. The primary and determining question therefore is whether the contract under consideration is entire. If entire, that is an end of the case

because the rule is firmly fixed that "if the contract is entire and part is within the statute, it is unenforceable as a whole, and no action can be maintained to enforce the part which would not have been affected by the statute if it had been separate and distinct from the other part." 25 R. C. L., Page 704, Sec. 347. "A contract though within the statute as to some portion of the performance promised by the defendant may not be so as to the remainder. Such a contract is nevertheless unenforceable, since the contract is an entirety and the fact that part cannot be enforced involves the unenforceability of the whole." 1 Williston Contracts, Sec. 532, Page 1028.

What is the true legal signification of the term "entire" contract as used in this connection? It is not employed in contradistinction to divisible. The contract may consist of different parts or items, that is, may be divisible and yet be entire. The promisor may engage to do one thing or to do two or more things. The first is obviously entire, the second is also entire, if the two or more things or parts are so interdependent, so interwoven, that the parties must be deemed to have contracted only with a view to the performance of both, and a distinct agreement as to the performance of one thing as apart from the other cannot reasonably be inferred from the transaction as a whole.

The essential test laid down by Professor Williston as to whether a number of promises constitute one contract or more than one is this: "It can be nothing else than the answer to an inquiry whether the parties assented to all the promises as a single whole, so that there would have been no bargain whatever if any promise or set of promises were struck out. . . . . Did the parties give assent to the whole transaction or did they assent separately to the several things." 2 Williston Con. Sec. 863.

As illustrating this general rule the following cases may be cited in all of which the oral contract was held to be entire. Where before marriage the spouses orally agreed that neither should claim any interest in the estate of the other, including both real and personal property, *Rainbolt* v. *East*, 56 Ind., 538; agreement to give by will both real and personal property, *Gould* v. *Mansfield*, 103 Mass., 408, *Horton* v. *Stegmyer*, 175 Fed., 756, 20 A. C., 1134 and note; for sale of both real and personal property, *Meyers* v. *Schemp*, 67 Ill., 469, *Pond* v. *Sheehan*, 132 Ill., 312, *Becker* v. *Mason*, 30 Kan., 697, *Duteil*

v. *Muggins*, 192 Ky., 616, 20 A. L. R., 361; to purchase a cargo of coal then in Philadelphia at a stipulated price and to pay freight to Boston, *Irvine* v. *Stone*, 6 Cush., 508; to hire a shop for a year at a certain rent and to pay the landlord the amount to be expended by him in fitting it up, *McMullen* v. *Riley*, 6 Gray, 500; for sale of a business, stock in trade, fixtures and good will and the vendors' leasehold interest in the premises, *Sarkisian* v. *Teele*, 201 Mass., 596; to loan $10,000 and give a mortgage on real estate as security, 91 Kan., 812.

It must be borne in mind that we are discussing here only oral contracts which are wholly executory, as was the one in the pending case, and not those which have been partly executed. A different rule under some circumstances may obtain in those cases.

Applying the definitions, tests and illustrations above given the contract in this case must be construed as entire. It is evident that the parties assented to both the promises on the part of the defendant as a single whole and it is highly probable that no bargain whatever would have been made if either promise had been omitted. On the plaintiff's view the defendants' promise was to give the fourteen notes of $2,500 each, with interest at six per cent. and secured by a mortgage of real estate. The notes and the mortgage were welded together, formed one inseparable unit, and must stand or fall together. Neither was sufficient to meet the requirement of the contract without the other, neither was contemplated by the parties as a compliance without the other, and it is not too much to say that the giving of security had compelling influence in bringing about the contract.

It is significant that the plaintiff in his pleadings has taken the same view, for in each of his four counts he recites the giving of the mortgage as well as of the notes as an integral part of the agreement, and the suit is brought to recover damages for breach of the entire agreement. As the Massachusetts Court in one case has said: "The special count in the present case sets forth the whole agreement of the parties. Part of that agreement being within the statute of Frauds is void, and therefore the contract as alleged was not proved and could not be proved. The plaintiff therefore cannot recover on that count." *Irvine* v. *Stone*, 6 Cush., 508-512. In the case at bar the whole agreement is set out in every count.

The entirety of the contract being established, the next step is to invoke the legal principle that one part of it, the promise to give the

mortgage, comes within the ban of our statute declaring the non-enforceability of an action "upon any contract for the sale of lands, tenements or hereditaments or of any interest in or concerning them." R. S., Chap. 114, Sec. 1, Par. IV. A mortgage of real estate in this State is in form a warranty deed with a condition subsequent specifying the means and manner of defeasance. Legal title passes at once to the mortgagee upon delivery, *Gilman* v. *Wills*, 66 Maine, 273; *Allen Co.* v. *Emerton*, 108 Maine, 221, 224; *Agricultural Chemical Co.* v. *Walton*, 116 Maine, 459. It follows that an oral agreement concerning the giving or discharging of a mortgage comes within the statute. *Leavitt* v. *Pratt*, 53 Maine, 147; 1 Williston Con., Section 491, and cases. It is for the same reason that an assignment of a lease of real estate must be in writing, *Kingsley* v. *Siebrecht*, 92 Maine, 23; *Inderlied* v. *Campbell*, 119 Maine, 303, and an agreement to give a bond for a deed, *Lawrence* v. *Chase*, 54 Maine, 196; *Long* v. *Woodman*, 58 Maine, 49. They all concern an interest in real estate.

The learned counsel for the plaintiff have urged a line of cases where the stipulations in the contract were clearly separable, independent and multiple, and therefore these cases are distinguishable from the case at bar. These come under the rule well stated in a Washington case cited in plaintiff's brief: "If the several stipulations are not so interdependent but that a distinct engagement as to any one stipulation may be fairly and reasonably extracted from the whole, then there may be a recovery in such distinct engagement, whenever it is clear of the Statute of Frauds, though the other stipulations are in violation of the statute." *Godefroy* v. *Huff*, 93 Wash., 371, Ann. Cases, 1918, E. 494.

These decisions do not fit here where the contract, as we have seen, was entire and the stipulations interdependent.

The technical defense must therefore avail, although it would be more satisfactory to have the case decided upon its merits. However, this result follows from what under similar circumstances has been characterized as a "rash reliance upon a promise which the statute declares void."

Exceptions overruled.

KENNEBEC HOUSING COMPANY *vs.* CHARLES H. BARTON.

SAME *vs.* HENRY J. COLLINS.

SAME *vs.* ERNEST L. GOVE.

SAME *vs.* EDWARD L. GRONDIN.

SAME *vs.* EDMOND D. NOYES.

Kennebec. Opinion December 12, 1923.

A prospectus issued by the authority of the officers of a corporation may be relied upon by a person in subscribing for stock, and if it contains a false representation, and the subscription is made by reason thereof, such representation is binding upon the corporation; but in this class of instruments some high coloring and exaggeration is allowable. When offers to receive subscriptions are made by the company, accepted by the persons to whom the offers are made, and an absolute, unconditional subscription for a definite number of shares is made by each subscriber, with an express promise to pay the par value of the shares, an allotment is not expressly or impliedly required.

In this case, although the word "purchase" was used in the instruments signed by defendants, the transaction is not to be construed as a sale, but is a subscription to the capital stock. It was so understood by the parties.

The instruments, on which these actions are based, are not mere naked subscriptions; they are contracts made between the corporation soliciting the subscriptions, and the signers who expressly promised unconditionally to pay for the stock at its par value.

Such promises once made are binding, and the promisors cannot now invoke conditions; there is sufficient consideration in the obligation of the company to deliver the shares.

Acceptance of the subscriptions, if necessary, may be inferred. Where, as in the instant case, the corporation solicited the participation of each defendant in the enterprise, and each defendant accepted the offer of shares, and expressly promised to take and pay for a specific number, the elements of mutual assent and consideration were present and the contract was complete when the so-called "pledge card" was signed and delivered to the solicitor authorized to receive it.

Upon the issue of fraud and misrepresentation on the part of the plaintiff, it is incumbent on each defendant to prove that he signed his contract relying

upon representations of existing facts, material to the subject matter of the contract, made by authorized agents of the plaintiff; that such representations were false to the knowledge of the party making them, or, being susceptible of knowledge, were stated as true; that the representations were made to induce each defendant to subscribe, and that each defendant relied upon the representations, in making his subscription.

Mere promissory expressions and predictions, conjectures or other statements as to the future, and future policy of the corporation not determined upon, are not sufficient to sustain the defense.

The principle that the alleged misrepresentation must relate to existing facts, and not matters of opinion, belief or judgment, applies to a prospectus; and if its language fairly construed in the light of the attendant circumstances known to, or open to the knowledge of, the parties, imports only the opinion or judgment of the officers, it is not available to defeat the subscription.

Although the language used refers to the present, yet if the statement relates to future conditions, or to matters and conditions which cannot be foreseen, and therefore by reason of the subject matter must be a matter of opinion or judgment, the subscriber is not warranted in relying on it.

Where two unconnected sentences are selected from a prospectus and alleged to be false, those sentences should be construed with the context and with the remainder of the prospectus.

The court does not find it necessary to pass upon the defendant's contention that the statements of the prospectus relied upon as false, related to existing facts and were not mere matters of opinion and judgment on the part of the officers, because those statements clearly were not relied upon by the defendants in making their subscriptions.

A careful consideration of the entire record convinces the court that the controlling influence with the defendants in making their subscriptions was a desire to participate in an undertaking for the benefit of the community.

On report. Five actions of assumpsit to recover from the several defendants the amount of their subscriptions to the capital stock of the plaintiff company. The defendants pleaded the general issue and under a brief statement alleged fraud, misrepresentation and misconduct. At the conclusion of the evidence, by agreement of the parties, the cases were reported to the Law Court, upon so much of the evidence as was legally admissible, the court to pass upon all issues of law and fact and to render such final judgment in each case as the law and the evidence required. Judgment in each case for the plaintiff, for the amount of the subscription, with interest on one fourth thereof after ten days from the date of the subscription, and on the balance from February 27, 1920.

The case is stated at length in the opinion.
Harvey D. Eaton, for plaintiff.
Bradley, Linnell & Jones, for defendants.

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

PHILBROOK, J., did not participate.

MORRILL, J. These actions are based upon five contracts of the defendants individually to pay for shares of stock in the plaintiff corporation; they were before us on a former occasion (122 Maine, 374), presented upon exceptions by defendants to a ruling accepting the report of a referee who had found for the plaintiff, basing his findings upon the issue of fraud and deceit. The cases are now presented to us upon a report of all the evidence submitted to the referee, for such final judgment as the law and the evidence require.

The pleadings of each defendant present eight distinct defenses, stated as follows:

1. That defendant never subscribed for nor promised to pay for any shares in the plaintiff company.

2. That the signature of said defendant was procured and affixed to said subscription card by fraud and misrepresentation on the part of the plaintiff company, its agents and servants, and the defendant as soon as he learned of the same notified the plaintiff company through its officers and agents that he withdrew his subscription.

3. That the defendant subscribed to said shares of stock on certain conditions to be performed by the plaintiff which conditions were conditions precedent to any liability on the part of the defendant, and which have not been performed by the plaintiff.

4. That a radical and fundamental change was made by the plaintiff without the consent of the defendant in the character of the original enterprise by which the defendant became released from any promise.

5. That the enterprise undertaken by the plaintiff was a total failure.

6. That the affairs of the plaintiff have been recklessly and negligently managed by it, its directors and officers by reason of which all subscribers will lose all money invested in said enterprise.

7. That the plaintiff through its directors and officers has made secret agreements to release other subscribers from their subscriptions, and although a vote was passed to enforce by legal action every unpaid subscription only five suits were brought and entered in court, whereas many others have failed and refused to pay their subscriptions and no action has been taken against them.

8. That the defendant's promise to take shares, if any, was without any consideration.

Upon examination of the entire record which is now before us for the first time, it is apparent that none of the defenses relied upon in support of the former exceptions, are tenable. The fifth and sixth specifications are manifestly unsound as defenses and are apparently abandoned; the seventh is without support in the record. We will first consider the first, third, fourth, and eighth grounds of defense.

The plaintiff was organized under the general laws of this State by eleven associates residing in Waterville, on November 28, 1919; the purpose of the corporation was "To acquire and hold real estate and manage, improve, lease and sell the same, having in view especially the increase and improvement of housing facilities in Waterville, Winslow, Vassalboro, Benton, Fairfield, and Oakland, Maine."

The capital stock was fixed at $200,000, of which $6,500 was subscribed at the meeting of organization. The organization of the corporation resulted from activities of the Waterville Chamber of Commerce and was "a sort of community affair" as characterized by Mr. Noyes, one of the defendants. Early in January, 1920 a concerted effort was made by the officers of the corporation to obtain subscriptions to the capital stock. Notice was given in the local newspaper, and a prospectus was issued over the names of the officers. The subscriptions now in controversy were solicited and obtained by two of the directors, Mr. Libby and Mr. Staples, and each was in the following form:

"KENNEBEC HOUSING COMPANY.

Pledge Card.

I Agree to Purchase Ten Shares of Stock of the Kennebec Housing Company.

Par value, $100. Total $1,000. 25% to be paid 10 days from date, and the balance as voted by the board of directors when needed.

Dated Jan. 13th, 1920

Sign here C. H. BARTON."

Although the word "purchase" is used in this instrument, it is not to be construed as a sale, but as a subscription to the capital stock. *Lincoln Shoe Mfg. Co.* v. *Sheldon*, 44 Neb., 279; 62 N. W., 480. *Wickwire* v. *Warner*, 174 N. Y. Supp., 811. *Ottawa &c. Railroad Co.* v. *Black*, 79 Ill., 262. *Shipman* v. *Portland Const. Co.*, 64 Ore., 1, 21; 128 Pac., 989. It was so understood by the parties, and counsel for defendants apparently so contends.

But the instrument is not a mere naked subscription; it is a contract made between the corporation soliciting the subscription, and the signer who expressly promised unconditionally to pay for the stock at its par value. The obligation of the signer of such an instrument, as distinguished from the obligation of a mere subscriber, without an express promise to pay, must be considered as settled. In the latter case "he assumes only the obligations imposed by law on such subscriber. He is understood to have agreed to assume a certain percentage of the responsibility of the enterprise, on condition that the amount of the responsibility be made certain and the remaining percentage be assumed by responsible parties. . . . . But a person may in his subscription voluntarily assume any other obligations not forbidden by law. He may waive any and all of the conditions implied by law in a naked subscription. He may impose other conditions, or he may promise payment for his shares without any condition. His promise once made will be binding, there being in such cases sufficient consideration in the obligation of the company to deliver the shares. In such cases, the express promise is to be enforced by an action thereon, and not by an action on a promise implied by law only." *S. & A. Railroad Company* v. *Kinsman*, 77 Maine, 370. In the instant cases the promises were unconditional, and the promisors cannot now invoke conditions; the actions are upon the express promises to pay, and not on promises implied by law, and may be maintained as upon other express promises.

It is strenuously insisted that the contracts in question had not been accepted, and that therefore the element of mutual assent and consideration in each case is wanting. But acceptance may be inferred, *K. & P. Railroad Co.* v. *Jarvis*, 34 Maine, 360, 362; and the record discloses sufficient evidence from which acceptance by the corporation, if necessary, may be inferred. In fact, however, the offer came from the corporation; it voted to open subscriptions for stock; it appointed a committee to solicit subscriptions; it incurred

liabilities relying upon prospective subscriptions; its officers issued an authorized prospectus of the undertaking and published it in the local paper for the purpose of obtaining subscriptions; it solicited the participation of each defendant in the enterprise, and each defendant accepted the offer of shares, and expressly promised to take and pay for a specified number. The elements of mutual assent and consideration were present and the contract was complete when the so-called "pledge card" was signed and delivered to the solicitor authorized to receive it. Upon payment the corporation was bound to deliver the number of shares.

It is also insisted that there was no allotment of shares to the defendants by the company. But an allotment was not necessary. Here were offers to receive subscriptions made by the company, accepted by the defendants to whom the offers were made, and an absolute, unconditional subscription for a definite number of shares by each defendant, with an express promise to pay the par value of the shares. Under such circumstances the subscriptions did not expressly or impliedly require any allotment.

These considerations dispose of the first, third and eighth specifications of defense as untenable. The fourth specification, alleging "radical and fundamental change in the character of the original enterprise," whereby the defendants were released from any promises, is not supported by the record. The facts relied upon in support of this contention were mere statements of opinion as to the future policy of the corporation. There has been no change in the declared purposes for which the plaintiff corporation was organized.

The remaining specification of defense, the second, alleges fraud and misrepresentation on the part of plaintiff and a withdrawal of his subscription by each defendant as soon as he learned of the same. Upon this issue it is incumbent on each defendant to prove that he signed his contract, relying upon representations of existing facts, material to the subject matter of the contract, made by authorized agents of the plaintiff; that such representations were false to the knowledge of the party making them, or, being susceptible of knowledge, were stated as true; that the representations were made to induce each defendant to subscribe, and that each defendant relied upon the representations, in making his subscription. Mere promissory expressions and predictions, conjectures or other statements as to the future, and future policy of the corporation not determined

upon, are not sufficient to sustain the defense; such statements are mere matters of opinion, on which one party can exercise his judgment as well as the other; if a prospective subscriber relies upon them, he does so at his peril.

These principles are too well established to require citation of authorities, and eliminate from consideration here many alleged misrepresentations as to which much testimony has been taken.

Eliminating statements of this character made by canvassers the defense must rest upon the language of the prospectus already referred to. From this prospectus counsel select two sentences and thereon strenuously argue to sustain their contention of deceit. We quote them in full:

"MATERIALS.

"Practically all lumber and other material necessary for the construction of fifty houses has already been bought at prices which average about two thirds the ordinary market price of such articles. . . . ."

"FINANCING.

"Stock subscriptions already offered without solicitation and the personal guaranty of the Directors is the basis of the business already done. . . . ."

In considering the alleged misrepresentation, we may take it as conceded that the prospectus in which the statement is found, and an advertisement in the Waterville Sentinel of January 13, 1920 containing a similar statement, were issued with the authority of the officers of the corporation, and that the defendants had knowledge of them. A prospectus so issued by the authority of the officers of the corporation may be relied upon by a person in subscribing for stock, and if it contains a false representation, and the subscription is made by reason thereof, such representation is binding upon the corporation; but in this class of instruments some high coloring and exaggeration is allowable. The sanguine hopes of the promoters of the enterprise naturally find expression in the prospectus. 1 Cook on Corp., 6 Ed., Sec. 143. 1 Morawetz on Priv. Corp. 2 Ed., Sec. 100.

The principle that the alleged misrepresentation must relate to existing facts, and not matters of opinion, belief or judgment, applies to a prospectus, and if its language fairly construed in the light of the attendant circumstances known to, or open to the knowledge of, the parties, imports only the opinion or judgment of the officers, it is not available to defeat the subscription. 1 Morawetz Priv. Corp., 2 Ed., Sec. 99. And although the language used refers to the present, yet if the statement relates to future conditions, or to matters and conditions which cannot be foreseen, and therefore by reason of the subject matter must be a matter of opinion or judgment, the subscriber is not warranted in relying on it. *Bish* v. *Bradford,* 17 Ind., 490. *Brownlee* v. *R. R. Co.,* 18 Ind., 68. *Hallows* v. *Fernie,* L. R., 3 Ch. App. (1867-68) 467. *Railroad Co.* v. *Anderson,* 51 Miss., 829.

The question presented, then, is whether the alleged misrepresentations related to existing facts, or were mere matters of opinion and judgment on the part of the officers. Counsel for defendants contend for the former view. If it were necessary for the decision of the case to pass upon their construction, we should hesitate to hold it tenable. In the first place, the statements quoted do not purport to speak in terms of exactness. The whole project was in an undeveloped and incipient state; it was impossible to determine the amount of materials required for any specified number of houses; no plans for houses had been adopted; no architect had been engaged; no locations for the operations had been selected; building operations could not begin for at least three months; these facts were known to all subscribers; the record presents evidence that the quantity of rough lumber required per house would vary from about 10,000 feet to 18,000 feet, depending upon the type of house. Nor could the statement as to the average cost of materials be other than an estimate, a matter of opinion; the statements only give expression to the theory and opinion of the officers that by quantity buying substantial saving in the cost of the houses could be secured, as stated at length in the prospectus. The sentences under consideration should be construed with the remainder of the prospectus; equally with the context, they reflect the opinions, sanguine hopes and expectations of those interested in promoting an undertaking for the benefit of the community; and we think it should have been so understood by defendants, if indeed they gave any thought to it at the time.

We do not, however, deem it necessary to pass upon defendants' contention as to the statements of the prospectus, because the statements now alleged to be fraudulent, clearly were not relied upon by the defendants in making their subscriptions. Upon this branch, or element, of the case the burden is also upon the defendants, and they have failed to sustain it.

It is easy now, in the light of the difficulties in which the undertaking became involved, to say that had they known that this fact or that fact was, as it later proved to be, they would not have subscribed; but the test is, were they induced to subscribe by a fraudulent misrepresentation. A careful consideration of the entire record convinces us that the controlling influence with them was a desire to participate in an undertaking for the benefit of the community. The testimony of the defendants themselves shows that any attempted withdrawal of their subscriptions was not on account of fraudulent misrepresentations.

Mr. Barton testifies that the reason for giving his notice of withdrawal was lack of confidence in Mr. Morse.

The only inference to be drawn from Mr. Noyes' testimony is that he demanded his card because of dissatisfaction with the annual election.

Mr. Grondin testifies that he withdrew because he "didn't like the way it was being run—poor management."

Mr. Collins did not attempt to withdraw his subscription and evidently relied upon his own judgment in subscribing. Nor does Mr. Gove appear to have withdrawn his subscription; he subscribed because it was represented to be a good business investment.

It is therefore the opinion of the court that the defense fails, and judgment must be rendered in each case for the plaintiff, for the amount of the subscription, with interest on one fourth thereof after ten days from the date of the subscription, and on the balance from February 27, 1920.

Mandates in accordance with this opinion.

CHARLES H. CULLINAN, Admr. *vs.* ARTHUR TETRAULT.

Penobscot. Opinion December 14, 1923.

Where two persons are engaged in a joint enterprise, the negligence of one, while acting in furtherance of that enterprise, which contributes to the personal injury of the other occasioned by the negligence of a third party, is imputable to the injured party; and such injured party cannot maintain an action against such third party to recover damages for such injuries.

In this case the act of the defendant in leaving his store in charge of a boy, who was manifestly incompetent to be so left in charge, was in violation of R. S., Chap. 20, Sec. 10, and plainly negligent.

For the injuries suffered by the plaintiff's intestate by reason of the sale of poison instead of a harmless preparation, by the clerk in charge of the store, the defendant is liable in damages, provided the deceased was not himself in fault, or negligence on the part of his companion, Freeman, cannot be imputed to him.

The evidence clearly establishes that the conduct of Freeman, who made the purchase, was negligent.

The deceased and his companion, Freeman, were engaged in a joint enterprise, and Freeman's presence in the defendant's store was in furtherance of that joint enterprise, which continued until the fatal drinking was ended. The conduct of Freeman in the store is imputable to the deceased.

On report. An action to recover damages for personal injuries sustained by plaintiff's intestate, alleging that defendant's servant negligently sold to one Freeman, a friend and companion of intestate, oil of checkerberry, a poisonous preparation, in place of essence of checkerberry, which was taken by plaintiff's intestate resulting in his death. The general issue was pleaded by defendant and under a brief statement the negligence of the plaintiff's intestate was set up. At the conclusion of the evidence, by agreement of the parties, the cause was reported to the Law Court upon so much of the evidence as was legally admissible, for the determination of the rights of the parties, with stipulations that in case the defendant is liable, the case to be remanded for the assessment of damages, and if plaintiff not entitled to recover, judgment to be rendered for defendant. Judgment for defendant.

The case is stated at length in the opinion.

Charles J. Hutchings and George E. Thompson, for plaintiff.

Benedict F. Maher and Pattangall & Locke, for defendant.

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

MORRILL, J. This is an action to recover for personal injuries sustained by plaintiff's intestate through the alleged negligent sale by defendant's servant to one Freeman of a poisonous preparation known as oil of checkerberry, in place of essence of checkerberry; the poison was taken by deceased and resulted in his death.

The case is reported to the Law Court for determination of the legal rights of the parties, upon so much of the evidence as is legally admissible; the certificate of the presiding Justice is in the usual form. All technical questions of pleading are deemed to be waived. *Whitman* v. *Allen,* 123 Maine, 1. *Pillsbury* v. *Brown,* 82 Maine, 450, 455. The question is presented, whether on all the evidence, giving it the weight and effect that a jury ought to give it, plaintiff is entitled to judgment. *Tatro* v. *Railroad Co.,* 108 Maine, 390.

The defendant, a druggist in Augusta, had occasion to be absent from his store on the twentieth day of July, 1921, from about 6:05 in the evening for about one hour and a half; during that period the store was open and left by defendant in charge of a boy, Edmund Auger, a few months more than seventeen years old; this boy lived in the block in which the store was located and worked in the Edwards cotton mill; he left school when in the seventh grade; for about three years he had worked at times for defendant, sweeping the store, doing errands, selling cigars, soda and ice cream, on an average about two hours a week. He was manifestly incompetent to be left in charge of the store, and the action of the defendant in that respect was in violation of R. S., Chap. 20, Sec. 10, and plainly negligent; and this is so, notwithstanding he had instructed Auger not to sell medicines and drugs.

On the twentieth of July, 1921 the deceased and one Clifford E. Freeman, former acquaintances, met at a regimental reunion in Augusta; about five o'clock in the afternoon they left the muster field and went directly to Tetrault's drug store where the boy, Auger, was in charge. The deceased remained on the sidewalk while

Freeman entered the store. The testimony of Freeman and Auger does not differ very materially as to what took place.

Freeman says:

"I told him—I asked him if he had any essence of checkerberry.

"Q. Did you say anything else to him at that time?

"A. No.

"Q. Did he make any reply to that question that you put to him?

"A. He said yes, he did.

"Q. Go on and state what you said to the clerk and what he said to you?

"A. So he says 'We have got some checkerberry here to clean your teeth with.' I says 'I don't want to clean my teeth.' He says 'Why don't you drink jakey.' I says, 'I will if you have got it.' 'Well,' he says, 'we haven't got it,' so he produced this bottle and he says 'smell of it'; I smelled of it and I says 'It smells like the essence of checkerberry' and he poured me out four ounces.

"Q. Did he deliver you the checkerberry in a four ounce bottle?

"A. Yes sir."

Auger testifies to substantially the same effect, except his statement is, that Freeman asked for "five ounces of checkerberry."

The following morning Freeman related the circumstances to the county attorney as follows, according to the latter's testimony.

"He (Freeman) told me that they had decided that they wanted something to drink, and he had suggested to Cullinan that he thought something could be purchased at Tetrault's drug store and that they went up there. They went in, or he went in and found a young man behind the counter whom he thought was seventeen or eighteen years of age, as I remember, and asked the fellow if he had any checkerberry and the fellow answered him by saying he was not sure of it but that they had something there that they sold to clean teeth with; pointed to the bottle and reached for it and handed it to Freeman and asked him to smell of it to see if that was what he wanted. Freeman smelled of the bottle, passed it back to him and said that it was what he wanted. Four ounces were purchased."

Freeman then left the drug store and accompanied by Cullinan purchased a bottle of ginger ale; they poured out part of the ginger ale and replaced it with about half of the contents of the bottle purchased at the drug store, and each drank about half of the mix-

ture. They then went to a restaurant where Cullinan ate supper; while the latter was eating Freeman partly filled the ginger ale bottle with water and with Cullinan's knowledge poured into it the remainder of the contents of the other bottle; a part of this mixture Cullinan drank.

It is admitted that the liquid purchased by Freeman at the defendant's store was methyl salicylate, which according to the Standard Dictionary, is "artificial oil of Gaultheria (Wintergreen) synthetically prepared by distilling methyl (wood) alcohol with salicylic and sulphuric acids. It resembles the true oil in taste and color," and in odor, as appears by the case. From the effects of drinking the mixture both young men were made sick and Cullinan died the next morning.

The bottle in the drug store from which the liquid sold by Auger to Freeman was taken, was identified the next morning and found to be marked "Methyl Salicylate."

The plaintiff claims that the liability of defendant is thus established, upon the authority of *Thomas* v. *Winchester*, 6 N. Y., 397; 57 Am. Dec., 455; *Norton* v. *Sewall*, 106 Mass., 143; 8 Am. Rep., 298; *Wellington* v. *Oil Co.*, 104 Mass., 64. The instant case is clearly within the principle recognized in those cases, provided the deceased was not himself in fault, or negligence on the part of Freeman cannot be imputed to him.

The declaration contains one count, based upon alleged negligence of defendant. The defendant has specially pleaded and has the burden of showing (R. S., Chap. 87, Sec. 48) contributory negligence of the deceased. The statute did not "undertake to change the substantive law of negligence in any respect. The tribunal hearing the case must still be satisfied on all the evidence that the plaintiff was in the exercise of due care and did not by his own acts of omission or commission help to produce his injury, and that the defendant was negligent. All these elements must appear by the greater amount of credible evidence." *Duggan* v. *Bay St. Ry.*, 230 Mass., 370, 377.

The evidence clearly establishes that the conduct of Freeman was more than negligent; it was foolhardy. It appears that both these young men went to defendant's store for the purpose of purchasing an intoxicating liquor; that regardless of whether Freeman called for "essence of checkerberry," as he testified, or "checkerberry,"

as Auger testified, they intended to obtain essence of checkerberry, which contains 5% oil of checkerberry, and 95% alcohol. Freeman's testimony establishes that they intended to purchase it for use as a beverage, "for the alcohol in it." The incompetency of the clerk was evident to Freeman; the latter told the county attorney: "He (Auger) didn't appear to me to know much concerning the checkerberry or anything regarding the things in the store." To purchase anything in a drug store from a boy who did not know what he was selling, had no realization of the dangerous qualities of the article, and appealed to the purchaser to know if it was what he wanted, and to accept the article offered solely upon the evidence of the sense of smell disregarding the label on the bottle, is the height of negligence. If Freeman in purchasing the poison relied upon the knowledge of the boy, as he now says, he was negligent, because the boy's ignorance was apparent to him. If he relied upon his own judgment, he was negligent, because the bottle was plainly marked, "Methyl Salicylate," and he should not have relied solely upon the odor of the contents. His negligence is too evident to require further discussion.

The deceased and Freeman were engaged in a joint enterprise, and Freeman's presence in the store was in furtherance of that joint enterprise, which continued until the fatal drinking was ended. The conduct of Freeman in the store is imputable to the deceased. *Beaucage* v. *Mercer*, 206 Mass., 492, 498. 1 Shearman & Redfield on Neg. (Street's 6th Ed.), Sec. 65a and cases cited in note.

Judgment for defendant.

STATE *vs.* GEORGE H. GUSTIN et al.

Cumberland. Opinion December 14, 1923.

In a trial in a Superior Court for a felony, a motion for a new trial on newly-discovered evidence must first be presented to the Justice who tried the case, and not in the first instance to the Law Court, and from a denial by such presiding Justice of the motion, an appeal may be taken to the Law Court.

When the evidence in support of a criminal prosecution is so weak or so defective that a verdict of guilty based upon it cannot be sustained, it is the duty of the presiding Justice to direct a verdict in favor of the respondent; but when the evidence is neither weak nor defective, but is ample to justify the jury in finding a verdict of guilty, there is no error in denying a motion for a directed verdict.

On exceptions and motion by respondents. The respondents were indicted in the Superior Court for the County of Cumberland, at the September Term, 1922, for lascivious cohabitation. During the trial at the close of the testimony counsel for the respondents filed a motion for a directed verdict for the respondents, which was denied by the presiding Justice, and respondents entered exceptions. The jury returned a verdict of guilty as to each respondent, and counsel for the respondents filed a motion for a new trial upon the ground of newly-discovered evidence, which motion was not presented to and argued before the presiding Justice who tried the case, but presented to the Law Court and there argued. Exceptions overruled. Motion dismissed. 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.

Harry E. Nixon, for the respondents.

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

PHILBROOK, J. Upon a criminal charge, amounting to a felony, these respondents were tried before a jury in the Superior Court for Cumberland County and found guilty. At the close of all the

testimony they filed a motion for a directed verdict in their favor, which motion was denied by the Justice presiding, and to his ruling exceptions were allowed. The motion is based upon two grounds; first, that the evidence is not sufficient to warrant a conviction; second, that the allegations in the indictment are insufficient to permit proof to be offered of the commission of any offense known to law. The second ground is not referred to in the argument before this court and may be properly regarded as abandoned, leaving only the first ground to be considered.

When the evidence in support of a criminal prosecution is so weak, or so defective, that a verdict of guilty based upon it cannot be sustained, it is the duty of the presiding Justice to direct a verdict in favor of the respondent; but when the evidence is neither weak nor defective, but is ample to justify the jury in finding a verdict of guilty, there is no error in denying the motion for a directed verdict, and an exception to the denial must be overruled. *State* v. *Benson*, 115 Maine, 549. A careful examination of the evidence in the case at bar sustains the jury verdict and the ruling complained against. The exceptions must be overruled.

The respondents also present a motion for a new trial based upon the ground of newly-discovered evidence. The record discloses no submission of this motion to any ruling by the presiding Justice, nor adverse decision by him from which an appeal was taken. As to the procedure adopted by the respondents in presenting their motion directly to the Law Court they cite as authority only Spaulding's Practice, Ed. 1881, Page 428, where the author says: "If the motion is founded on any alleged cause not shown by the evidence reported, such as newly discovered evidence, the testimony respecting the allegations of the motion shall be heard and reported by the judge, and the case is then marked law." But the title page of Mr. Spaulding's work shows that he is dealing only with practice and proceedings at law in civil actions, hence rules of practice, or statutory provisions, relating only to criminal cases may sometimes, and often do, find control by judicial mandate or legislative utterance different from those which obtain only in civil cases.

R. S., Chap. 82, Sec. 100 provides that motions for a new trial in criminal cases, tried in either of the Superior Courts, shall be heard and finally determined by the Justice thereof. No discrimination is there made between motions where new trials are requested because

the verdict is against the law and the evidence, and those where such trials are sought upon grounds of newly-discovered evidence. For us to so discriminate would be an attempt at judicial legislation. This principle and procedure has been recognized and adopted in earlier cases. *State* v. *Stain et al*, 82 Maine, 472; *State* v. *Intoxicating Liquors*, 80 Maine, 57.

In a long line of decisions in this State, it has been held that in criminal cases, following the rules of practice at common law, a motion to set aside a verdict as against evidence, or the weight of evidence, is to be decided, in the first instance, by the Justice presiding at nisi prius; that this court sitting in banc has no jurisdiction of such a motion; that there is no provisional statute for it. *State* v. *Perry*, 115 Maine, 203. Where is there to be found any statutory provision giving this court jurisdiction in proceedings like the one at bar? This court is of statutory origin and its jurisdiction is limited by statutory provisions and powers conferred upon it. The common law rule is a wise one, not a technicality, since the presiding Justice sees the witnesses, hears them testify, notes their appearance, and would necessarily be well qualified to say whether a new trial should be granted. Moreover, no protective feature in favor of the respondent is thereby lost, for in *State* v. *Perry*, supra, attention is called to another statute, R. S., Chap. 136, Sec. 28, where, if a motion for a new trial in any criminal case amounting to a felony is denied by the Justice before whom the same is heard, the respondent may appeal from said decision to the next law term. The construction of this statute providing for appeal, and Chap. 82, Sec. 100 supra, is discussed in *State* v. *Brown*, 118 Maine, 164, a case tried in the same Superior Court as that in which the case at bar was tried, and need not here be repeated. Reasoning by analogy from those criminal cases where a new trial is sought because the verdict is against law and evidence, to those where a new trial is sought on ground of newly-discovered evidence, by the assistance of statutory provision and judicial rule, we are unable to discover wherein this court has jurisdiction over the motion at bar. Had the motion been heard and denied by the Justice who tried the case, and an appeal taken, an entirely different legal situation would exist.

Exceptions overruled.
Motion dismissed.
Judgment for the State.

STATE OF MAINE *vs.* JOHN K. CROOKER.

York. Opinion December 19, 1923.

When three respondents are indicted and tried jointly and have separate counsel, and one respondent takes the stand in his own behalf and in his testimony incriminates another of the three, the counsel for that other is entitled to cross-examine him.

On appeal by respondent. The respondent, Crooker was indicted and tried jointly with one Pettis and one Chapman for extortion of money under R. S., Chap. 120, Sec. 21. The respondents were tried together. During the progress of the trial, after the State's case had been presented, counsel for the respondent, Crooker, requested the privilege of cross-examining the respondent, Pettis, one of the co-respondents, which request was denied by the presiding Justice and exceptions by counsel for Crooker entered. Counsel for Crooker also filed a motion for a mistrial which was denied and an appeal taken. Appeal sustained. New trial granted.

The case is stated in the opinion.

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

Joseph E. F. Connolly, for respondent.

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

CORNISH, C. J. The respondent Crooker, was jointly indicted with two others, Charles Pettis and Milton C. Chapman, under R. S., Chap. 120, Sec. 21, on the charge of threatening to accuse one Newton of the offense of operating an automobile upon a public highway in Saco at an unlawful rate of speed with intent to extort money from him. Crooker was a member of the State Highway Police at the time of the alleged crime, the other men were private citizens. Each respondent pleaded not guilty and was represented at the trial by separate counsel. A motion was made for a separate trial of each defendant. This was denied by the court in the exercise of its judicial discretion.

The course of the trial was as follows: The State introduced its evidence to prove that Newton with five other boys had come from their home in Manchester, N. H., on the day in question, October 21, 1922, to Portland to attend a football game, and while on their return and within the limits of York County they were stopped by the respondent, threatened with prosecution for exceeding the speed limits, and together they contributed forty dollars for release from arrest, which money Crooker, Pettis and Chapman took and divided among themselves, and the boys were allowed to proceed on their journey. The State's evidence came from Newton and another of the boys and Mr. Shorey, the State's chief enforcing officer of the Motor Vehicle Law. Each of the State's witnesses was cross-examined by the respective attorney for each respondent. The State rested and after an opening by each attorney for the respondents, the respondents in turn offered their defense, each taking the stand in his own behalf, first Crooker, then Pettis and then Chapman. Pettis also introduced one Cressey as a witness.

Each respondent was cross-examined by the County Attorney. Pettis in the course of his direct examination gave strong evidence inculpating his co-respondent Crooker. Crooker's counsel then moved that the court direct a mistrial in the case "because of the prejudice which may exist in the mind of the jury after the testimony of this witness, which we cannot eradicate because he is not called as a State's witness, we cannot cross examine, we cannot meet." The motion was denied and an exception noted and allowed.

Counsel for Pettis then introduced Cressey as a witness. At the conclusion of his testimony, cross-examination by the State being waived, counsel for Crooker addressed the court as follows: "I understand this witness, as the former, I would not have the right of cross-examination?"

"THE COURT: I am reserving and preserving the right of rebuttal when the times comes." Counsel then renewed his motion for mistrial on the same grounds as before, and was granted an exception, the court adding, "Your right of rebuttal is being preserved if you desire it." Counsel: "I can't quite get the bearings on that. I am just debating now about calling these very witnesses in our own behalf. I don't know just how I will work out of it." THE COURT: "Take it under consideration. I am simply giving you advice that I do not mean to preclude you in any fair element of

the trial. As far as your rebuttal is concerned, you will still be regarded as having a right to rebuttal and in that behalf will be freely, fully and fairly heard in rebuttal."

Crooker was later recalled and testified briefly, on rather unimportant points. Each counsel for respondents argued in behalf of his client and the County Attorney for the State. The presiding Justice then charged the jury, and instructed them that the situation was the same "as though the cases had been tried separately, each independently of the other, and the State must maintain its case against each respondent here, regardless of the case of the other."

The jury acquitted Chapman and found both Crooker and Pettis guilty.

Counsel for Crooker did not preserve his rights under a bill of exceptions, but filed a motion for a new trial with the presiding Justice, incorporating the usual reasons, that the verdict was against law and evidence, and in addition the grievance that he was denied the right of cross-examination of Pettis and Cressey. The motion was denied, the respondent appealed, and as the offense was a felony the appeal is properly before this court. R. S., Chap. 136, Sec. 28.

The question of law involved is of novel impression, and may be put sharply in this form: In case of the indictment and trial of A, B and C jointly, and B takes the stand in his own behalf, is interrogated by his own counsel and gives testimony clearly incriminating A, has A's counsel the right to cross-examine B, or is cross-examination limited to the attorney for the State?

We think, both upon principle and authority, that A's counsel has such legal right under the circumstances stated, and that the right of cross-examination is not confined to the State's attorney.

It is a fundamental rule of the English common law, embodied in both the State and Federal Constitutions as a part of the declaration of rights, that in all criminal prosecutions the accused shall have and enjoy the right to be confronted by the witnesses against him. Constitution Maine, Article I., Section 6; Amendment VI. to Constitution U. S. To be confronted by the witnesses against him does not mean merely that they are to be made visible to the accused so that he shall have the opportunity to see and to hear them, but it imports the constitutional privilege to cross-examine them. The right of cross-examination is a substantive right and a most valuable and important one. By it the accused can test the interest,

prejudice, motive, knowledge and truthfulness of the witness, and nothing can be substituted for it. As was said by this court in an earlier case: "The object of this constitutional provision is to guard the accused in all matters, the proof of which depends upon the veracity and memory of witnesses, against the danger of falsehood or mistake, by bringing the witnesses when they give their testimony as to such matters face to face with him." *State* v. *Frederic*, 69 Maine, 400. The constitutional right of confrontation is preliminary to and but another name for the right of cross-examination.

But is this right to be limited to those witnesses called by the prosecution? Are they the only witnesses against him? Undoubtedly in the vast majority of cases they are and the peculiar question now under discussion does not often arise. The object of the constitutional provisions is not protection against any particular individual or against the person called by any particular party, but against adverse testimony from whatever source it may come. Hence it is that an attorney is allowed to cross-examine his own witness, one summoned and offered by himself, if such witness proves adverse and hostile. *State* v. *Benner*, 64 Maine, 267. The reason for this is that such witness is in fact adverse in interest and sympathy to the interrogating party. Truth is the desired goal, and to elicit truth it may be as necessary to cross-examine one's own witness as that of the adversary.

Why should not the same principle apply with equal if not with greater force to the cross-examination of a co-defendant B who may be endeavoring to incriminate A, and thereby through self-interest to exculpate himself? Must A remain powerless and helpless under the adverse testimony of B, simply because B has not been summoned by the State but appears as a witness in his own behalf? Does the mere fact of who calls the witness provide the test or must it not, in the interests of justice, be the character of the evidence itself which gives the constitutional right? The spirit of the common law, of our constitution and of what might be termed the Anglo-Saxon atmosphere of fair play require that the accused shall not be deprived of this right. It is not a mere privilege to be granted or withheld at the discretion of the court, but a substantive right possessed by the accused, and while the court may, in the exercise of reasonable discretion, limit the scope and extent of cross-examination, it cannot absolutely deny it to one entitled to it.

Such denial might lead to a strange miscarriage of justice. In any case the prosecuting attorney would not naturally feel called upon to weaken or break down the evidence of an accused party who was testifying against his co-respondent. In so much the evidence is aiding the prosecution. And an extreme case can be imagined where B is willing either to testify as a witness for the State or to take the stand in his own behalf according to the suggestion of the prosecuting attorney. If in the former case he could be cross-examined by counsel for A alone, and in the latter only by the prosecuting attorney, it is not difficult to anticipate the suggestion of the prosecuting officer. A would be remediless. We do not mean to imply that any such situation developed in this case. It did not. But we employ this as an illustration of the limit to which the denial of cross-examination might lead.

We are therefore of opinion that under these peculiar circumstances in order to do justice and to fully protect the rights of A, he should be given the right of cross-examination of B, who has sought to inculpate him.

In the case at bar the right to rebut Pettis' testimony was granted to Crooker, but that did not supply the place of cross-examination. Rebuttal merely arrays testimony against testimony. Cross-examination seeks to go further and weaken or destroy the testimony on the other side. Nor did the instructions of the court in the charge to the effect that each respondent must be tried on the evidence against him irrespective of the evidence against the others, accord to Crooker his full rights, especially as the court in charging on the Pettis branch of the case quoted at some length Pettis' testimony implicating Crooker. In our opinion Crooker has not received the full protection guaranteed by the constitution, as a matter of principle independent of authority.

Decisions on this question are few. In *Commonwealth* v. *Mullen et als.*, 150 Mass., 394, the Law Court sustained a ruling made by the presiding Justice permitting the defendant Mullen who offered himself as a witness, to be cross-examined by counsel for the co-defendants as to matters material to their client in addition to the cross-examination by the district attorney. "This necessarily resulted from the position in which Mullen had placed himself in becoming a witness" is the language of the opinion.

In *Rex* v. *Hadwen et al*, L. R., 1 K. B., Div. 1902, Page 882, this precise question was decided by the High Court of Justice. The opinion was rendered by Lord Alverstone, C. J., and is so directly in point, and is based on such strong reasoning, that we quote the following:

"The question for decision is, whether, where two prisoners are jointly indicted and are separately defended, and one prisoner elects to be sworn and to give evidence on his own behalf, and in the course of his evidence he gives evidence inculpating the other prisoner, counsel for the latter can cross-examine him, or whether he can only be cross-examined by counsel for the prosecution. Before considering how far the question is governed by authority, it is important to point out, that, if the law does not prohibit it, it is obviously in the interests of justice that the cross-examination of one prisoner by counsel for the other prisoner, should be allowed, because, where the evidence is very strong against both prisoners, counsel for the prosecution might not think it his duty to cross-examine the prisoner so strictly as counsel for the other prisoner would. Further, inasmuch as a prisoner in giving evidence may raise some new point inculpating the other prisoner as to which counsel for the prosecution has had no notice and has no instructions, counsel for the other prisoner would probably be able to cross-examine more effectively than counsel for the prosecution could do. There may also be cases in which the Judge's direction to the jury that evidence given by one prisoner is not evidence against the other, would not in the absence of cross-examination be an effective protection to the other prisoner. Therefore it is in the interests of justice that every opportunity of testing by cross-examination a prisoner's evidence against another prisoner should be given." The learned Chief Justice cites two cases where the same right to cross-examine had been previously upheld, *Reg.* v. *Woods*, 6 Cox C. C., 224, and *Reg.* v. *Burditt*, 6 Cox C. C., 458. In the latter case, Jervis, C. J., said that "the prisoner should certainly have been allowed to cross-examine and reply because the witness called by Burditt gave evidence to criminate him and that evidence became tacked, as it were, to the case for the prosecution." The court in *Rex* v. *Hadwen* then went on to discuss the effect of the English Criminal Evidence Act of 1898, and held that the common law rule in this respect was neither abrogated nor modified by that act and the right of cross-examination still obtained.

We are, therefore, of opinion, both upon principle and authority, that in the case at bar the respondent Crooker should have been given the right of cross-examining Pettis upon the testimony incriminating Crooker, which was virtually "tacked on to the case for the prosecution." It was damaging to Crooker if believed, and the denial of cross-examination cannot be regarded as harmless error. On the other hand, the testimony of Cressey introduced as a witness by and for Pettis was unimportant and no rights of Crooker were really sacrificed in denying his cross-examination.

One other point needs mention. Crooker's exceptions although taken were not fully preserved. Can his legal rights be considered by this court on the motion filed in his behalf and his appeal from the overruling thereof? We think they can, under the authority of *Pierce* v. *Rodliff*, 95 Maine, 346, where the court say: "This question would have been more appropriately presented in the plaintiff's bill of exceptions; but while the practice of raising questions of law upon motion is not to be encouraged, in cases where manifest error in law has occurred and injustice would otherwise inevitably result, the law of the case may be examined upon a motion, and if required, the verdict be set aside as against law." See also *Simonds* v. *Maine T. & T. Co.*, 104 Maine, 440. Especially is this true where as here the motion itself specifically sets out the alleged errors in law and the prejudice and injury caused thereby. The cited cases were civil actions, but we think the same rule should apply to criminal prosecutions, although as was said in *Pierce* v. *Rodliff*, the practice is not to be encouraged.

The verdict was clearly wrong as against the law.

Appeal sustained.
New trial granted.

STATE OF MAINE *vs.* ISRAEL DAVIS.

Kennebec. Opinion December 19, 1923.

In a trial on indictment for receiving stolen goods under R. S., Chap. 122, Sec. 12, four other men having been engaged in the larceny, the testimony of one of the other four persons who were engaged in the larceny as to what another one of the four had told him the respondent had stated, showing his knowledge of the proposed larceny, is merely hearsay and not admissible.

The indictment was not for conspiracy and the rules of evidence as to declarations of co-respondents does not apply.

The State should have produced the witness himself, to whom the respondent it was contended had made the statements, and he was readily available.

The admission of this evidence was not harmless error as it constituted a substantial part of the testimony against the respondent.

On exceptions by respondent. The respondent was tried upon an indictment charging him with having received stolen goods knowing them to have been stolen. The State called one Frank Murray, one of the four persons who were engaged in the larceny of the goods, who testified as to what one George Warren, another one of the four persons who were engaged in the larceny, had told him that the respondent had stated to him, Warren, showing respondent's knowledge of the proposed larceny. Counsel for the respondent objected to the admission of his testimony on the ground it was hearsay testimony and in violation of the best evidence rule. The testimony was admitted and counsel for respondent took exceptions. Counsel also requested the privilege to cross-examine Murray, which was denied by the presiding Justice and exceptions entered. Exceptions sustained.

The case is fully stated in the opinion.

Walter M. Sanborn, County Attorney, for the State.

Gordon F. Gallert, Pattangall, Locke & Perkins and F. Harold Dubord, for respondent.

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

CORNISH, C. J. The respondent was indicted under R. S., Chap. 122, Sec. 12, tried and found guilty of receiving stolen goods. Four men were engaged in the larceny itself according to the testimony which is made a part of the bill of exceptions. These were Knox and Smith in one automobile, Warren and Murray in another, and the plunder consisted of hens and a calf taken from the Plisga place in Sidney. The contention of the State was that the respondent Davis received and paid for the goods knowing them to have been stolen, that he was, to use the technical language of the craft, the "fence" in the transaction.

During the course of the trial the State offered the following testimony from Murray, one of the self-confessed thieves, which was admitted by the presiding Justice subject to objection and exception.

"Q. After you left Israel Davis' place in Waterville on the first night and you were bound for the John Plisga place in Sidney, what, if anything, did George Warren tell you about conversation that he had had with Israel Davis about Israel Davis sending him down there?

"A. He told me that Israel Davis told him where to go.

"Q. He told you that Israel Davis told him where to go for what purpose?

"A. Well, he didn't say for what purpose; he said he told him where the hens were."

The respondent objected to this evidence on the ground that it was mere hearsay, the respondent not being present at the alleged conversation. The State offered it on the ground that a conspiracy existed among the four thieves and the respondent and therefore any admissions or declarations by one of the conspirators were admissible against the others.

The exception must be sustained.

The State relies upon the recent decision in *State* v. *Vetrano et als*, 121 Maine, 368. The offense charged in that case was conspiracy to wound, maim and injure one De Sarno, and the indictment was brought under R. S., Chap. 128, Sec. 24. Conspiracy was the gist of the crime and the rule as laid down by the court in that class of actions was "that the acts and words of all parties alleged to be participants in the conspiracy, as well as all other testimony, are

admissible in the discretion of the court for the purpose of proving the fact of conspiracy, but are not to be taken into consideration against any one of the parties concerned until, from the evidence thus admitted, the fact of a conspiracy is proved; after which the acts and words of each co-conspirator, whenever done or whenever said, in furtherance of the common purpose are admissible against all the alleged conspirators upon the ground that the act of one is the act of all." Applying this rule the court in that case held certain letters admissible which were dictated by one of the conspirators, the fact of conspiracy being fully established.

That case however, is not relevant in the case at bar. Here the indictment is not brought against the five for conspiracy to do an unlawful act, but against one for doing an unlawful act. A conspiracy is neither alleged in the indictment nor substantiated by the evidence. The charge is simply that of receiving stolen goods and to prove it the State was allowed to introduce the testimony of Murray that Warren told him that Davis told him (Warren) where to go for the hens. This is a striking illustration of hearsay evidence and was clearly inadmissible.

If the State desired to prove the compromising statement of Davis it could and should have done so by introducing Warren himself, the party to whom the statement is claimed to have been made. He was within the jurisdiction of the court, in safe keeping in the nearby County jail, and therefore readily available. His incarceration afforded no excuse for his nonproduction. 2 Wigmore Ev., Section 1407.

In view of the weakness of the other evidence in this case by which guilty knowledge on the part of Davis was sought to be shown, we cannot regard the admission of this testimony of Murray as harmless error. It went to the very pith of the accusation and without it the case would have been rather doubtful.

The entry must therefore be,

Exceptions sustained.

W. W. FLYNT et al. *vs.* THE J. WATERMAN COMPANY.

Piscataquis. Opinion December 19, 1923.

Ordinarily the claim of duress per minas must be sustained by threats which create a reasonable fear of loss of life or of great bodily harm or of imprisonment of the person to whom the threats are made, but there are exceptions to this rule based upon the nearness and tenderness of family relations and the obviously restraining force of family ties, and the exception may include the case of father and son.

In this case the facts when carefully analyzed do not show that the plaintiffs have sustained the burden of proving that the confession of the son as to embezzlement was obtained by duress and threats of criminal prosecution.

Nor have they sustained the burden in proving that they themselves paid the money by reason of threats of the criminal prosecution of the party who was the son of one plaintiff and the nephew of the other.

In addition to other evidence in favor of the defendant, the fact that while the alleged acts took place on June 28 and 29, 1911, no complaint was made nor suit brought until June 26, 1917, just three days before the action would be barred by the statute of limitations is of compelling significance.

On report. An action for money had and received claimed to have been paid by plaintiffs under duress. A, a son of one of the plaintiffs B, and a nephew of the other plaintiff C, confessed to embezzlement from the defendant, and the plaintiffs paid to defendant one thousand dollars to reimburse him on July 3, 1911, the confession having been made a few days prior thereto, on June 28, 1911. On June 26, 1917, this action was brought alleging that the money was paid under duress and threats of criminal prosecution of the party who confessed to the embezzlement. By agreement of the parties at the conclusion of the testimony the cause was reported to the Law Court. Judgment for the defendant.

The case is stated in length in the opinion.

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

George E. Thompson, for defendant.

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

CORNISH, C. J. Action for money had and received brought on June 26, 1917, to recover the sum of $1,000 (and interest) alleged to have been paid to the defendant on June 29, 1911, under duress. The case is before the Law Court on report.

The material facts upon which there is no disagreement are briefly as follows: J. Curtis Flynt had been in the employment of the defendant, a retail clothing concern in Bangor, as clerk in the shoe department for about one year prior to May, 1911, when he left and went to Augusta as clerk for another retail shoe dealer.

After Flynt's departure the defendant suspecting that money had been taken by some of the clerks in the shoe department employed one Ripley, a detective, to investigate. Ripley enlisted the services of the Bangor police who placed one Oleson under arrest, and Mr. Knaide, then Inspector of Police, telephoned Curtis Flynt to go to Bangor, which he did on the evening train of June 28, 1911.

On arrival a conference was held at a hotel, between Curtis Flynt and the officers and detective and Mr. A. J. Waterman of the defendant company, which resulted in Curtis' writing and delivering to Mr. Waterman the following confession:

"June 28, 1911.

I acknowledge of my own free will that I have stolen money from J. Waterman Co. at various times from June, 1910, to the time I left about May 25, same varying from $12 to $20 per week, and I am willing to make settlement to J. Waterman Co. for any amount proven against me, but I think the above statement amply covers the amount.

(Signed) J. C. FLYNT.

Witnesses:
J. L. RIPLEY,
A. J. WATERMAN,
CALVIN KNAIDE,
T. E. O'DONOHUE."

Curtis was then taken to the police station at City Hall and allowed to telephone to Dover to request the plaintiffs, his father and his uncle, to come to Bangor the next morning. He was then locked up for the night. The next morning the plaintiffs arrived in Bangor about 9:00 or 9:30 and had conferences with the interested parties and also with an attorney who prepared some writing in the nature of a note or agreement whereby the plaintiffs agreed to pay the defendant the sum of $1,000. This was paid on July 3d, and the following receipt given:

"Bangor, Maine, July 3, 1911.

For one dollar and other valuable considerations received by J. Waterman & Co. paid by W. W. Flynt and others we hereby release J. C. Flynt from all claims or demands which we may have against him for any cause whatsoever.

J. WATERMAN CO.
By A. J. WATERMAN."

This is a mere outline of occurrences concerning which there is no serious controversy, but the various acts and words leading up to the consummation of the agreement between the parties and the payment of the money raise sharply contested questions of fact.

The principle of law invoked by the plaintiffs as the foundation of their right of recovery is that they were induced by threats of the prosecution and imprisonment of Curtis Flynt, the son of one plaintiff and the nephew of the other, to make this payment, that therefore it was made under duress, and the amount so paid can be recovered with interest.

Ordinarily the claim of duress per minas must be sustained by proof of threats which create a reasonable fear of loss of life or of great bodily harm or of imprisonment of the person to whom the threats are made. It is a personal matter and one person cannot ordinarily avoid an obligation or recover money paid by reason of duress to another. For instance, this claim is not open to sureties where duress has been practiced on the principal. *Robinson* v. *Gould*, 11 Cush., 55; *Oak* v. *Dustin*, 79 Maine, 23. But there are exceptions to this rule based upon the nearness and tenderness of

family relations and the obviously constraining force of close family ties. Thus the exception has obtained in case of intended husband and wife, *Rau* v. *Von Zedlitz*, 132 Mass., 164; of husband and wife, *McMahon* v. *Smith*, 47 Conn., 221; *Harmon* v. *Harmon*, 61 Maine, 227 at 231; of parent and child, *Harris* v. *Carmody*, 131 Mass., 51; *Bryant* v. *Peck and Whipple Co.*, 154 Mass., 460; *Stevens* v. *Thissell*, 240 Mass., 541; of aunt and nephew, *Sharon* v. *Gaher*, 46 Conn., 189; of brother and sister, *Kronmeyer* v. *Buck*, 258 Ill., 586, and see 9 R. C. L., Page 726-7 and examples given.

Conceding for the purposes of this case the application of this exception here, if the evidence warrants, we must determine as a matter of fact first whether the confession of Curtis Flynt was obtained by duress and threats of criminal prosecution, and second whether the money was paid by the plaintiffs also by reason of threats of prosecution and imprisonment of Curtis.

On these points the evidence in contradictory and the burden of proof is on the plaintiffs.

The testimony of Curtis as to what took place on the evening of June 28th, 1911, is extravagant to the verge of recklessness. He attempts to make out that the detective and the officers in the presence of Waterman wrung from him this confession against his protestation of innocence by all illegitimate methods possible; that they called him a liar, that they threatened that unless he made some kind of a statement acknowledging the taking of money and promise to repay, they would hold court the next day and railroad him to Thomaston, that the court and Judge were all there and they would railroad him to Thomaston before the next night; that in consequence of all these threats his will was overcome and he first wrote out a statement acknowledging the purloining of $500. That Waterman said that was not enough and instructed his agents to try and get more. That they came back to him and, to quote his words, "the detective sat down in front of me and says: 'Now you want to do this thing right and make it enough this time, we know how much it was,' and he took out a pair of handcuffs and he sat there in front of me jingling those handcuffs." In consequence of these threats Curtis testified that he made and signed this confession already quoted. In itself this statement bears the impress of unreliability. It stands uncorroborated.

In all its terrorizing features it is flatly contradicted by both Mr. Waterman and Mr. Knaide. They both say that when faced with the accusation Curtis at first denied it and appeared surly and unwilling to talk, but finally he admitted the theft and himself wrote the confession; that not two confessions of different amounts were written, but only this one; that no talk about railroading him to Thomaston was used, nor were any handcuffs dangled before him. In short these witnesses declare that it was as it purports to be on its face, a voluntary confession. These witnesses were Mr. Waterman of the defendant company, a prominent business man of Bangor, and Mr. Knaide then Inspector of Police, now Chief of Police, and connected with the department for forty years. Their testimony commends itself to the reader. The detective is blind and unable to appear in court. In the second place the confession written by Curtis and signed by him states that it is made of his own free will and that he is willing to make settlement for any amount proven. Not a word is said about immunity from prosecution or arrest. Restitution was apparently the matter chiefly under consideration.

Another point strongly militating against the truth of his statements we will consider later. It is sufficient to say that on the whole the plaintiffs have not sustained the burden of proof on the question of the confession being made under duress.

But the son did not bring this action. The plaintiffs are the father and uncle who paid the money, the former $600 and the latter $400. For what did they pay it? Was it to prevent the prosecution and imprisonment of Curtis and under threats on the part of the defendant and its agents that unless they did pay this sum he would be sent to State Prison, and were their wills overcome by these intimidations so that the payment was involuntary on their part, or was it a voluntary payment of what was due from the young man to the Waterman Company by way of restitution of money purloined, the discharging of a civil liability independent of any criminal action whatever?

The plaintiffs claim the first to be the true situation, and again the burden is on them to prove it, and again in our opinion the evidence fails to substantiate the contention.

The plaintiffs were men of mature years, with the experience which maturity brings. They themselves saw the situation. The young man had signed the confession. True he says he claimed to

them that he was innocent and had executed it because in fear of imprisonment, and they testify that they were actuated by the same motive in making the written promise on June 29th to pay the $1,000 and later, on July 3d, in paying that sum.

On the other hand it appears from Mr. Waterman's testimony that when he met the plaintiffs that morning they expressed deep regret that the young man had gone wrong and "wanted to return any money that he had stolen." That he then consulted an attorney as to his rights and duties and in consequence of that consultation he made the agreement of settlement with the plaintiffs with the distinct understanding that he would not agree not to prosecute. It was a matter of restitution, not of compounding a felony.

Then the plaintiffs consulted an attorney and employed him to draw up the agreement of settlement, which he did. That is not in evidence. It was made on June 29, and probably destroyed on July 3, when its terms were complied with by the payment of the money. Their attorney closed the transaction for them by paying the money which they sent him and by obtaining from the defendant the receipt acknowledging full payment of all demands and sending it to them.

Mr. Waterman further denies all threats or attempts at intimidation toward these plaintiffs as claimed by them, and in this he is fully corroborated by Mr. Knaide. There was neither blackmailing nor extortion.

But the strongest piece of evidence in favor of the defendant's contention is the fact that while the alleged duress took place on June 28 and June 29, 1911, this suit was not instituted until June 26, 1917, just three days before it would be barred by the statute of limitations. If the occurrence took place as the plaintiffs now declare, the enormity of it and the terrorizing conduct of the defendant and its agents must have created such a profound impression upon their minds that they would have been likely to seek immediate redress for the wrong done them, at least as soon as they got out from under the wicked influence. Not many days would have passed before they would have sought to obtain their legal rights. Yet they went back to Dover on June 29, and five days elapsed between the signing of the alleged involuntary agreement and the payment of the $1,000 called for thereby. No word of protest was then uttered. Payment was made and receipt given. And five years, eleven months and

twenty-six days passed by, a total of 2,187 days, before they awoke to a realization of how badly they had been treated, how their wills had been overpowered, and their rights trampled upon. In the meantime they had remained absolutely silent. Not a single demand or request had been made upon the defendant to restore its illgotten gains. The service of the writ was the first and only notice, or even suspicion, of the claim. Moreover that service was made on June 27, only two days before the statute of limitations became effective, and then it was so late that Curtis Flynt was practically immune from any prosecution, not by reason of any agreement on the part of the defendant as the inducement of the plaintiffs payment, but by reason of the same statute of limitations. That statute in effect then barred any criminal prosecution of the young man, but not the plaintiff's action which was begun at a most opportune time. The compelling force of this long, long delay, added to the other evidence for the defense, more than meets the evidence for the plaintiffs. The serious charges are not sustained and the entry must be,

Judgment for defendant.

EDWARD J. CONQUEST, Trustee in Bankruptcy

vs.

MELLEN N. ATKINS et als.

Penobscot. Opinion December 19, 1923.

A verdict glaringly wrong and set aside.

The evidence in this case is overwhelming that the Bulk Sales Act, so called, R. S., Chap. 114, Sec. 6, rendered void the attempted sales by the bankrupt to the defendants.

The jury in rendering a verdict for the defendants must either have failed to comprehend the significance of the testimony or have been swayed by sympathy.

On motion for a new trial by plaintiff. An action of trover brought by the trustee in bankruptcy of Benjamin Applebaum against the defendants to recover the value of a certain stock of merchandise consisting of wall paper and paint purchased by the defendants from the said Applebaum in violation of the provisions of the Bulk Sales Act, so called, R. S., Chap. 114, Sec. 6. The case was tried by a jury and a verdict for defendants rendered. The plaintiff filed a general motion for a new trial. Motion sustained.

The case is fully stated in the opinion.

Simon J. Levi and James D. Maxwell, for plaintiff.

George E. Thompson and Abraham M. Rudman, for defendants.

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

CORNISH, C. J. This is an action of trover brought by the trustee in bankruptcy of Benjamin Applebaum to recover from the defendants the value of a large quantity of wall paper and paint purchased by them in two sales, in violation of the Bulk Sales Law, R. S., Chap. 114, Sec. 6.

Both parties at the time in question were doing business in Bangor. The bankrupt occupied two adjoining stores with a connecting door.

In one he carried on a small retail grocery business and in the other a small retail wall paper and paint business. The defendants were also retail dealers in paints and wall papers. In October, 1919, according to the testimony of Mr. Atkins, one of the defendants, Applebaum went to him and solicited the defendant firm to buy his paints and papers. Nothing then came of it. Later in the fall, Applebaum importuned Atkins again to come and buy his paint and papers, but Atkins again refused to purchase as he testifies. The third time Applebaum went to him for the same purpose and that time Atkins yielded and in company with Mr. Nickerson, one of his partners, he visited Applebaum's store, made him an offer for his stock of paper which he accepted, and gave him their check therefor $119.45, dated December 16, 1919. Later they also purchased his stock of paints for $138 and gave him their check therefor on January 12, 1920. Applebaum was adjudicated a bankrupt April 12, 1920.

As to the quantity of wall paper and paint sold there is a slight discrepancy in the testimony, but the truth is apparent. Only three witnesses testified in the case, the bankrupt Applebaum, and Atkins and Nickerson, two of the defendants. Atkins sought to minimize the transaction as much as he could, and stated that they did not buy all the paper and paint in Applebaum's possession, but on cross-examination he admitted that they bought about three thousand rolls of paper, which was the "major portion" of the stock, and about ninety gallons of paint, but he could not tell how much paint was left as he did not look at it.

More explicit is the testimony of Applebaum who stated that he sold all the wall paper and paint that he had, disposing of his entire stock.

This evidence is corroborated by Mr. Nickerson, the other purchaser, whose testimony differs widely from that of his partner Mr. Atkins, and is very frank, truthful and convincing, as the following excerpts show.

"Q. Now Mr. Nickerson did you buy all the paint he had at that time?

"A. Why, practically all.

"Q. You bought the wall paper and the paint not as an ordinary purchaser, but as a dealer with the intention to resell it and make a profit?

"A. Yes, certainly.

"Q. And were these two sales by Applebaum to you, acting for your concern, made in his ordinary course of trade and in the regular and usual prosecution of Applebaum's business?

"A. Well, I don't know. I have never known him to sell in such quantities.

"Q. And you have never bought yourself from him in such quantities?

"A. No.

"Q. After your concern had bought the paint and wall paper from Applebaum it represented the sale in bulk of nearly the whole of his stock didn't it?

"A. Yes."

No better illustration of a violation of the Bulk Sales Statute than this could be well conceived. Applebaum according to his own testimony closed out his entire grocery and paint and paper business in three wholesale deals and all between December 16, 1919, and January 12, 1920; first the wall paper, then the groceries, *Conquest* v. *Goldman,* 121 Maine, 335, and then the paints. He further states that after this last sale he "discontinued business" as necessity might seem to require, because he had nothing left to sell.

And yet, notwithstanding the statute which declares that "the sale in bulk of any part or the whole of a stock of merchandise otherwise than in the ordinary course of trade and in the regular and usual prosecution of the seller's business shall be void as against the creditors of the seller" (R. S., Chap. 114, Sec. 6) unless certain conditions are complied with, none of which was complied with here, the jury brought in a verdict for the defendants. They must either have failed to comprehend the significance of the testimony or else were swayed by sympathy for the defendants who by an adverse verdict would lose what they had originally paid. Very likely the latter, but that furnishes neither reason nor excuse for the verdict which is glaringly wrong. The sale of the paper was a sale in bulk of a part of Applebaum's stock of merchandise, and after the sale of groceries to another party, the sale of the paints was the sale in bulk of the then whole of his remaining stock, and both sales were neither in the ordinary course of trade nor the regular and usual prosecution of the seller's business. In fact they constituted the closing out of his business.

The defendant Atkins, tried to justify the sale as to wall papers because it was what he termed the end of the season and it was customary for retail dealers to sell broken lots at that time. Such a custom was not proven, and if proven could not affect the force of the statute. Moreover, the transaction in this case was as consistent with a custom to buy as with one to sell, because the buyers were retail dealers as well as the seller. This contention was without merit.

The violation of the statute, which of itself constitutes constructive fraud, and renders the sale void, *McGray* v. *Woodbury*, 110 Maine, 163; *Philoon* v. *Babbitt*, 119 Maine, 172; *Conquest* v. *Goldman*, 121 Maine, 335, is apparent and the verdict manifestly wrong.

Motion sustained.
Verdict set aside.

ERNEST L. JORDAN *vs.* ABRAHAM GOODSIDE.

Cumberland. Opinion December 21, 1923.

A holder of a note given as collateral security is a holder for value, under the Uniform Negotiable Instruments Act, thus abrogating the former doctrine in this State.

The doctrine formerly held in this State that the holder of a note given merely as collateral security for a preexisting debt, without parting with any right or extending any forbearance or giving any new consideration, is not to be regarded as a holder for value, has been abrogated by Section 25 of the Uniform Negotiable Instruments Act. The plaintiff in this case is a holder for value.

The plaintiff is also a holder in due course before maturity and without notice of any infirmity. The mere lack of an Internal Revenue stamp did not render the instrument incomplete or irregular on its face within the meaning of the Negotiable Instruments Act.

In the instant case the questions of fact were found by the presiding Justice, and his findings were conclusive.

On exceptions by defendant. An action of assumpsit on a promissory note given to plaintiff as collateral security. The case was tried without the intervention of a jury and the presiding Justice found

for the plaintiff. Defendant excepted to rulings denying requested rulings, and also excepted to certain rulings made in matters of law. Exceptions overruled.

The case is sufficiently stated in the opinion.

Bradley, Linnell & Jones, for plaintiff.

I. E. Vernon, J. E. F. Connolly and H. C. Libby, for defendant.

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

CORNISH, C. J. Action of assumpsit on a promissory note of the following tenor:

"Portland, Me., Dec. 28, 1920.

$5,000.

Four months after date I promise to pay to the order of Charles J. Clukey four thousand dollars at any bank in Portland, Maine, or State of Maine.

No..... Due..... A. GOODSIDE."

(On the back) "CHARLES J. CLUKEY
5/21/21 Rec'd on
within note $500. and
interest to date."

The case was tried before the Justice of the Superior Court of Cumberland County without the intervention of a jury and he rendered judgment for the plaintiff in the sum of $5,017.50 at the April Term, 1923.

The presiding Justice in his decision found the following facts among others: that one Charles J. Clukey was connected in some official capacity with the W. E. Soule Company, a corporation operating a garage and doing a general automobile business, and the plaintiff was an employe of the company. Being desirous of raising funds, Clukey procured the plaintiff to make a note dated February 20, 1920, payable to his (Clukey's) order for the sum of eight thousand dollars, which note Clukey caused to be discounted and it finally came into the hands of the Ticonic National Bank at Water-

ville. At the time of making this note Clukey promised the plaintiff to give him something for his protection in case anything happened to him (Clukey).

On December 28, 1920, by way of fulfilment of this promise, Clukey gave to the plaintiff the note in suit, of which the defendant Goodside was the maker and Clukey the payee. "This note was endorsed by Clukey, the payee, and was given by him to the plaintiff before maturity. It bears no U. S. internal revenue stamp, for what reason the testimony does not disclose. At the time this note was given to the plaintiff by Clukey the plaintiff had no notice of any defect in Clukey's title thereto nor does it appear that there was any such. Divers payments were made to the Ticonic National Bank by Clukey, or at least by parties other than the plaintiff, upon plaintiff's note above mentioned, until the amount due thereon appears to have been a little less than five thousand dollars, when suit was brought by the bank against the plaintiff, and judgment recovered thereon at the January Term, 1923, of the Kennebec Superior Court. This suit was commenced long after the delivery of the Goodside note to the plaintiff by Clukey."

The presiding Justice made certain rulings and denied certain requests for rulings offered by the defendant, to all of which exceptions were duly taken. These contentions, all of which are governed and controlled by the Negotiable Instruments Act, Public Laws 1917, Chapter 257, may be condensed as follows:

1. That the plaintiff was not a holder for value.

The presiding Justice found as a fact that at the time when Jordan executed the $8,000 note for Clukey's accommodation and benefit Clukey then and there promised to protect him, and this note in suit given by Goodside to Clukey ten months later and indorsed by Clukey to Jordan fulfilled that promise. That promise had a valid executed consideration. It was made at the time of the original transaction and the fact that it was not carried out until ten months later does not affect its legality or validity.

The defendant urges that the plaintiff took this note merely as collateral security for a preexisting debt, without parting with any right or extending any forbearance or giving any new consideration, and therefore is not to be regarded as a holder for a valuable consideration under the decisions in this State, citing *Bramhall* v. *Beckett*, 31 Maine, 205; *Nutter* v. *Stover*, 48 Maine, 163; *Smith* v.

Bibber, 82 Maine, 34. In this last named case the court declared that were the question a new one in this State they would be inclined to adopt the contrary rule, which was that of the Federal Court and of most other jurisdictions, but they adhered to the doctrine established here.

However, this doctrine has been abrogated by the Negotiable Instruments Act, Section 25, which provides: "Value is any consideration sufficient to support a simple contract. An antecedent or preexisting debt constitutes value; and is deemed such whether the instrument is payable on demand or at a future time." This changed rule was applied in *Merrill Trust Co.* v. *Brown*, 122 Maine, 101, a case decided after the passage of the Negotiable Instruments Act, and is now the law in this State. It follows that the plaintiff was a holder for value, even if he took the note as security for a preexisting debt.

2. That the plaintiff is not a holder in due course.

Section 52 defines that term as follows:

"A holder in due course is a holder who has taken the instrument under the following conditions:

(1) That it is complete and regular on 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 was 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."

Some of these requirements are questions of fact, others of law.

The first condition is that the note be complete and regular on its face. This refers to the conditions and appearance of the note itself, its terms, its execution and its indorsement. These make up the essentials. The affixing of a stamp is no part of the contract between the parties nor of the note. That is a requirement of the government for revenue purposes only, and the cancelled stamp shows that the tax has been paid.

Under the earlier Internal Revenue Acts, prior to that of October 22, 1914, and Act of October 3, 1917, it was provided that unstamped documents should not be used in evidence in any court. Under that provision the almost universal weight of authority held that this

restriction applied to Federal Courts only and not to State Courts, the Congress having no constitutional power to prescribe rules of evidence for State Courts. *Wade* v. *Foss*, 96 Maine, 230; *Wade* v. *Curtis*, 96 Maine, 309, (affirmed in *Mansfield* v. *Gushee*, 120 Maine, 333, 336), *Green* v. *Holway*, 101 Mass., 243; *Moore* v. *Quirk*, 105 Mass., 49; *Cassidy* v. *St. Germain*, 22 R. I., 53; *Garland* v. *Gaines*, 73 Conn., 662. Iowa held a contrary doctrine in its early decisions. *Muscatine* v. *Sterneman*, 30 Iowa, 526; *Mitchell* v. *Home Ins. Co.*, 32 Iowa, 421; *Ricord* v. *Jones*, 33 Iowa, 26.

The Internal Revenue Act of 1914, however, contains no provision as to the inadmissibility of unstamped documents in court, *Cole* v. *Ralph*, 252 U. S., 286, and it is this Act of 1914 and that of October 3, 1917, that were in force when the note in question was given.

If, therefore, it makes no difference whether a promissory note be stamped or unstamped so far as its validity and enforceability are concerned, the mere lack of such stamp cannot render the instrument incomplete or irregular on its face, within the meaning of the Negotiable Instruments Act. To so hold would have the effect of rendering an immateriality vital and fatal, and of preventing the enforcement of a note which before the passage of the Act was valid and enforceable. The Act can bear no such construction. The effect of a revenue stamp was not within its contemplation.

Counsel for defendant relies with great confidence upon *Lutton* v. *Baker*, 187 Iowa, 753 (1919) where the court held that a note which lacks the required revenue stamps is not "complete and regular" within the meaning of the Negotiable Instruments Act. This decision on being re-reported in 6 L. R. A., 1701, was criticized by the learned editor in a note as follows:

"The Court in the reported case seems to regard its decision as supported by earlier Iowa decisions to the effect that where the purchaser of a bill or note bearing a revenue stamp knew that such stamp was placed on the note after it was executed and delivered, the omission of the stamp could be pleaded against him, (*First Nat. Bank* v. *Dougherty*, 29 Iowa, 260) and by other cases in which a purchaser of a post-stamped note has been held to be a bona fide holder, and in which his character as such is expressly based upon the fact that he has no knowledge that the note was not stamped until after it was issued (citing cases), notwithstanding that the view in

force in Iowa at the time these cases were decided that the omission of the stamp, even if advertent, invalidated the instrument, was overruled by later cases."

However, following the Iowa decisions further we find that even that State is receding from its position in *Lutton* v. *Baker*, supra, and is coming into accord with the general trend of authority. In *Farmers Savings Bank* v. *Neel*, 193 Iowa, 685 (1922) after a careful review of the authorities in that and other states, the court distinctly states that it must recede in part from its position in *Lutton* v. *Baker*, and holds that the failure of a maker to cancel revenue stamps placed thereon is not a circumstance tending to impart notice of defects to a prospective purchaser of the note. See same case reported in 21 A. L. R., 1116, and note 1125.

Still later in *Richardson* v. *Cheshire*, 193 Iowa, 930 (1922) the court makes further recession in these words:

"It is sufficient to say at this point that we have recently receded from the position announced in that case as to the effect of such an omission upon the negotiability of a note and the cited case (*Lutton* v. *Baker*), is overruled in that regard. The effect of such holding is to follow the great weight of authority that such an omission is not conclusive upon the negotiability of the note." See also *Solomon National Bank* v. *Birch*, 111 Kan., 283 (1922), where the court declined to follow *Lutton* v. *Baker* and held that the omission of a stamp did not render the note incomplete or irregular under the Uniform Negotiable Instruments Act.

Therefore on both reason and authority we declare that in the case at bar the first condition of a due-course holder has been complied with.

The second condition as to being a holder before maturity without notice of any previous dishonor is a pure question of fact. The presiding Justice so held and his finding is final.

The third condition as to taking in good faith and for value is, as regards good faith, a question of fact which the presiding Justice has conclusively found; as to taking for value, that is a question of law which has hereinbefore been discussed and determined in the plaintiff's favor.

The fourth condition, as to want of notice of any infirmities or defect in title is also a question of fact and the finding of the presiding Justice has settled it.

Various other propositions were raised by the defense in argument, but it is unnecessary to discuss them in detail. It is sufficient to say that there was no error in the rulings of the presiding Justice, that the plaintiff is entitled to his judgment, and the entry must be,

Exceptions overruled.

ISAAC STACHOWITZ *vs.* BARRON ANDERSON COMPANY.

Androscoggin. Opinion December 20, 1923.

The parties to an agreement may modify the original contract by agreement, and by agreement they can abrogate the modification.

In this case the presiding Justice in effect found this to be the situation and his finding is justified by the evidence.

On exceptions. Action for covenant broken. The parties entered into a sealed contract under the terms of which the defendant agreed to employ the plaintiff as a pressman in his clothing factory at Lewiston for one year at $75 per week. Before the expiration of the year defendant moved his factory to Boston and did not comply with the terms of the contract in employing plaintiff. The case was heard by the presiding Justice who found for the plaintiff in the sum of $2,255. Counsel for defendant requested several rulings on matters of law which were refused and exceptions entered. Exceptions overruled.

The case is fully stated in the opinion.

Benjamin L. Berman, Jacob H. Berman and Edward J. Berman, for plaintiff.

William H. Newell, for defendant.

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

CORNISH, C. J. Action for covenant broken heard by the Justice of the Superior Court, Androscoggin County, without the intervention of a jury.

The parties entered into a sealed contract dated June 13, 1921, whereby the defendant covenanted to employ the plaintiff in its clothing factory at Lewiston as pressman, for the term of one year from date at a salary of $75 per week. It appears that the defendant had moved its machinery and establishment to Lewiston at or about that date, and the plaintiff in consequence of this contract had moved his family from Boston and had established his home in Auburn. The declaration alleges a breach by the defendant company by closing and removing their factory from Lewiston to Boston and thereby preventing the plaintiff from performing his work as pressman and then and there refusing to give the plaintiff further employment as pressman in their factory at Lewiston. The first count alleges September 5, 1921, the second, September 9, 1921, as the date of the breach. In other particulars the two counts are alike.

The defendant pleaded non est factum with a brief statement admitting the contract, the removal of its factory to Boston on September 5, 1921, alleging that the plaintiff had received his wages up to September 10, 1921, and that at the date of the writ, September 10, 1921, there had been no breach of the contract, and therefore the suit was prematurely brought; and further alleging that it intended to ship goods from its factory in Boston to the plaintiff in Lewiston to be pressed in the same manner as had been done in the Lewiston factory and at the same price.

By the admission in the brief statement, as well as by the evidence, it is shown that the defendant by removing its factory to Boston on September 5, had rendered it impossible to comply with the terms of the contract and therefore was guilty of a breach unless the plaintiff assented to the changed conditions.

It appears that Mr. Barron, of the defendant company, on Monday, September 5, submitted three propositions to the plaintiff in the nature of modifications of the contract:

1. Plaintiff to go to Boston and continue work there.

2. Defendant to pay plaintiff $600 to adjust all claims under the contract.

3. The defendant to provide some place and appliances in Lewiston where plaintiff could work and to send clothes to him to be pressed and sent back to Boston.

The first two propositions the plaintiff immediately declined. The third he took under consideration and later in the same day wrote Mr. Barron as follows:

"Auburn, Me., Sept. 5, 1921.

DEAR MR. BARRON:

I have decided to stay in Lewiston and do your work that you will send me over. For its toward Winter and I don't see what I can do otherwise.

Respectfully yours,

ISAAC STACHOWITZ."

As Mr. Barron went from Lewiston to Portland after this interview and thence to New York, he did not return to Boston, where plaintiff had addressed the letter, until the last of the week.

Upon this state of facts the presiding Justice at the first trial before him without the intervention of a jury, held that there had been a breach prior to September 10, on which date the writ was brought and gave judgment for the plaintiff. Defendant's exceptions to this ruling were sustained by the Law Court. *Stachowitz* v. *Barron Anderson Company*, 121 Maine, 534. This court held that the original contract of June 13, had been modified by this mutual agreement of September 5, and as the opinion states: "The contract which alone was in force on September 10th was made after and in view of the defendant's closing its factory and removal to Boston. It is obviously impossible that there could have been any breach caused by such closing and removal." This refers to any breach of the alleged modified contract whereby the plaintiff was to continue his work in Lewiston on clothing sent to him from Boston, because the closing and removal were contemplated in, and the reason for, the modified contract. These words do not refer to the original contract. The opinion continues: "There was no suggestion of repudiation of the only contract then in existence between the parties, to wit, the contract made by the defendant's offer and the plaintiff's written acceptance of September 5. . . . . At the date of the beginning of the action there was nothing due the plaintiff for services rendered; nothing on the contract of June 13, for that had been superseded by a modified contract, and the modified contract had not been violated or renounced by either." Under the incomplete evidence before the court at the first trial this position is impregnable

and the decision in harmony with law and fact. The full evidence covering the transactions between September 5, the date of the modified contract, and September 10, the date of the writ, was not before the court at that time.

A second trial has been had, also before the presiding Justice without the intervention of a jury. Again he has given judgment for the plaintiff, this time in the sum of $2,255, and again the case is before the Law Court on defendant's exceptions.

At this second trial the paramount issue was the abandonment or waiver of the modification on both sides and the continued existence of the original contract unmodified. The presiding Justice in effect found this to be the situation and his finding is justified by the evidence.

It is apparent that both parties at least on and after September 8, mutually disregarded the proposed modification and by their words and their acts were considering their legal rights on the basis of the original contract alone. This they had a legal right to do. They could by agreement modify the original contract and subsequently by agreement they could abrogate the modification. This they evidently did prior to the bringing of this action.

This left their rights to be determined under the terms of the original contract, and to the breach of that contract there is no defense.

The entry will therefore be,

Exceptions overruled.

STATE *v.* HARRY M. COLE AND LOIS E. MCAULEY.

Knox. Opinion December 21, 1923.

The entry, "Judgment for the State," in a criminal proceeding completes the record on the docket and leaves nothing whatever to the action and decision of the presiding Justice at nisi prius.

On report. The respondents were indicted for adultery and found guilty by a jury. The respondent, Lois E. McAuley, was fined three hundred dollars and paid. The respondent, Harry M. Cole, was sentenced to State Prison for eighteen to thirty-six months, who filed a general motion for a new trial which was denied by the presiding Justice and respondent appealed to the Law Court, where the appeal was denied. Respondent then filed a motion for a new trial on the ground of newly-discovered evidence and by agreement the case was reported to the Law Court. Report dismissed.

The case is fully stated in the opinion.

Z. M. Dwinal, County Attorney, for the State.

M. A. Johnson, for respondent.

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

SPEAR, J. The defendant Cole was the only one interested in this proceeding. The facts pertinent to the issue may be taken from the defendant's motion for a new trial, namely: "Now comes the defendant, Harry M. Cole, in the above entitled case, after verdict against him, sentence imposed, appeal to the Law Court and the judgment of the law court against him, but before mittimus has issued, and moves for a new trial . . . ., because of newly discovered evidence."

It is unnecessary to quote further as the decision of the case turns upon a question of law. The defendant was arraigned upon the indictment, tried and convicted at the January Term of Court, 1922. After conviction he filed and addressed a motion to the presiding

Justice for a new trial. The motion was overruled and an appeal taken to the Law Court. He was then sentenced to the State Prison and released from custody on recognizance. The appeal was entered and heard by the Law Court. On February 24, 1923, the certificate of decision of the Law Court came down with the mandate "Appeal Denied. Judgment for the State." This mandate was dated February 24, 1923. *State* v. *Cole*, 122 Maine, 559. The mittimus, however, was not issued until the next April Term of court; and before the mittimus was issued the defendant filed his motion at that term for a new trial on newly-discovered evidence. The defendant contends that, inasmuch as his motion was filed, at nisi, before the mittimus was issued, the court at nisi still has jurisdiction of the case to stay the execution of the sentence and send the motion to the Law Court either upon appeal from a denial of the motion or on report. The latter could not be done as it decided in the *Stain and Cromwell Case*, 82 Maine, 472. In that case the motion on newly-discovered evidence was sent up on report, the report discharged and the case remitted to nisi for the decree of the sitting Justice, and was brought up on appeal upon a denial of the motion, in accordance with the provisions of R. S., 1883, Chap. 134, Sec. 27, now R. S., 1916, Chap. 136, Sec. 28, the two sections being identical as to the method of procedure. But the failure of procedure is not at all the basis of our decision. The real issue involves the scope and effect of a certificate "Judgment for the State" in a mandate of the Law Court in a criminal case. By the provisions of R. S. 1916, Chap. 136, Sec. 27, sentence had been imposed before the appeal. The case had therefore been closed at nisi prius and marked "law." If the appeal had been sustained that would have opened the case at nisi, but the denial of the appeal left nothing on the docket at nisi except the record upon which the case was marked "law" and the entry "Judgment for the State." The latter entry completed the record and left nothing whatever to the action and decision of the presiding Justice at nisi. The case was then ended and there was nothing in the record either of fact or law upon which the presiding Justice could predicate any jurisdiction, not even the order of a mittimus. The force and effect of a criminal judgment as discussed in *Tuttle* v. *Lang*, 100 Maine, 124, is as follows: "Upon a criminal charge within its jurisdiction, if upon trial the respondent is found guilty, or if he plead guilty, it becomes the duty of the Judge at that session

to impose sentence. When that is done, the cause is determined, the Judge's judicial duty is at an end, and nothing remains but to carry the judgment into effect." . . . . "The issuance of a mittimus is a ministerial and not a judicial act, ... In courts of general jurisdiction it is issued by the Clerk, without action or direction by the Court." The same general effect is *State* v. *Sturgis*, 110 Maine, 96.

Reverting to the contention of the defendant that inasmuch as his motion was filed before the mittimus was issued his case should be differentiated from the case where the motion was filed after such issue, it is pertinent to add, that the judgment of the Law Court went into effect as soon as it was certified to the clerk of the Law Court and by him certified to the Clerk of Courts where the indictment was pending. In this case, assuming that the certificate was transmitted by due course of mail from Bangor to Rockland, it must have been received on the 25th or 26th of February. When received the certificate should have been at once recorded and mittimus thereupon issued. *Breton, Petitioner*, 93 Maine, 39. That the issue of the mittimus was delayed until the April Term of court did in no respect affect the force of the judgment of the Law Court. *Breton, Petitioner*, 93 Maine, 39, is a case in which the defendant was apprehended and committed in vacation, upon a mittimus furnished by the clerk of courts upon a sentence which ran concurrent with the sentence which had just expired.

The effect of the action of the clerk in issuing a mittiums on the second sentence is stated as follows:

"The Court omitted to state what sentence should be served first, and whether either should succeed the other. The mittimus is only a transcript of the minutes of the conviction and sentence duly certified by the clerk. The clerk has no power to control the effect of the sentences of the Court by changing the time of issuing the mittimus."

It accordingly follows that the fact that the clerk did not issue the mittimus when the judgment of the Law Court went into effect but delayed until the next term of court could in no way affect the force of the judgment of the Law Court.

We are not criticising the clerk, however, for, upon an examination of the statutes and the law we do not wonder that he may have been confused as to just what to do.

We are unable to find any legal ground upon which the court can exercise jurisdiction of the defendant's motion without trespassing upon the province of the pardoning power.

Judgment for the State.

JAMES H. PINKHAM *vs.* TUDOR G. JENNINGS.

Cumberland. Opinion December 21, 1923.

An instrument purporting to be a writ, containing the same statement that appears upon the face of a regular writ, but is not attested by the clerk of any court, neither has the seal of any court impressed upon it, is absolutely invalid and confers no jurisdiction upon the court in which it is entered. The want of jurisdiction when it appears upon the face of a record can be raised by motion to dismiss at any stage of the proceedings and cannot be waived.

Such an instrument presents no process to the court upon which it could predicate an amendment or any other action, except to dismiss it from the files of the court as a document improperly entered thereon.

On exceptions. A proceeding in the form of an action in assumpsit in which plaintiff seeks to recover commissions alleged to be due for the sale of a timber or wood lot. The instrument purporting to be a writ, dated September 13, 1922, presents no evidence whatever of having been issued by authority of the court, as it bears no seal of the court and has no attesting signature of the clerk of any court. The defendant waived service, appeared and pleaded the general issue. When the case was called for trial and before it was opened to the jury, the defendant filed a motion to quash the writ and dismiss the case which was granted by the court and the writ quashed, and plaintiff entered exceptions. Exceptions overruled.

The case is fully stated in the opinion.

Howard Davies, for plaintiff.

Joseph E. F. Connolly and Jacob H. Berman, for defendant.

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

SPEAR, J. The exceptions state the case as follows: "This was an action of assumpsit wherein the plaintiffs sued to recover under an account annexed to the writ and common omnibus account the sum of $500.00, for commission to him for the sale of a certain timber or wood lot. The writ was not attested by the Clerk of any Court, neither was there any seal of any court impressed upon the writ. The general issue was pleaded by the defendant to the merits of the case and filed on the first day of October Term, 1922. When the case was called for trial and before it had been opened to the jury on the part of the plaintiff, the defendant presented a motion to quash the writ and dismiss the case. The motion was granted by the court and the writ quashed."

We have seen accounts of the entry of writs in court without a seal and of writs without the signature of the clerk, but we do not recall an instance of a case in which a writ has been entered devoid of both of these statutory requirements. We have never run across a judicial bird so completely featherless. The plaintiff, however, claims that his exceptions should be sustained upon the ground that the defendant by pleading the general issue waived the irregularities apparent upon the face of the writ, but cites no case directly pertinent to the issue involved. But, regardless of authority, we are not prepared to hold that a writ with neither seal nor signature of the Clerk of Courts, purporting to come from a court in which both a seal and the signature of the clerk are required, can confer any jurisdiction upon the court from which it purports to issue.

While the seal upon a writ is a matter of substance and not amendable, *Bailey* v. *Smith*, 12 Maine, 196, *Tibbetts* v. *Shaw*, 19 Maine, 204, *Witherel* v. *Randall*, 30 Maine, 168, it emphatically follows that the signature of the Clerk of Courts, or his deputy, which is required to be fixed by his own hand, R. S., Chap. 82, Sec. 5, is indispensable to the validity of any writ issuing from the court of which he is clerk. And, that this requirement is indispensable, is fully confirmed in *Bass* v. *Dumas*, 114 Maine, at Page 53. This was a case in which an officer was required to make the return of an attachment of personal property within five days as prescribed by Statute. The following quotation states the case and the application of the law: "A return

not signed by the officer is not a return, although it may be signed by someone else in his name and by his direction. The very office of a return requires a signature. And it is the signature which authenticates it and gives it its official character. When the signature of a public officer is required he must make it himself. He cannot delegate the doing. The question is res adjudicata in this State." For a stronger reason it is evident that the signature of the Clerk of Courts in his own handwriting upon a writ is necessary to give it validity.

In answer to the plaintiff's contention that the instrument which he entered in court, purporting to be a writ, was amendable, it would seem only necessary to point out that such instrument was nothing more than a piece of blank paper containing upon its face the same statement that appears upon the face of a regular writ, is absolutely invalid and conferred no jurisdiction upon the court in which it was entered, and, consequently, presented no process to the court upon which it could predicate an amendment or any other action, except to dismiss it from the files of the court as a document improperly entered thereon.

Want of jurisdiction when it appears upon the face of a record can be raised by motion to dismiss at any stage of the proceedings and cannot be waived. *Bailey* v. *Smith, Tibbetts* v. *Shaw*, supra, *Powers* v. *Mitchell*, 75 Maine, 364. Accordingly the motion to dismiss was the proper procedure and properly granted.

Exceptions overruled.

RAY MOTOR COMPANY *vs.* WILLIAM P. STANYAN.

WILLIAM P. STANYAN *vs.* RAY MOTOR COMPANY.

Penobscot. Opinion December 22, 1923.

There is no implied warranty, as a general rule, where there is an express warranty, and if an implied warranty may exist it must not be inconsistent with the express warranty. A vendee rescinding a contract of sale for default of the vendor must act within a reasonable time; what is a reasonable time is a question of law when the facts are ascertained; under other conditions it is a mixed question of law and fact, for submission to a jury.

Where, as in the present case, a written contract of sale contains an express warranty referring for its terms to another document, the burden rests upon the party relying upon an implied warranty to show that such implied warranty is consistent with the express warranty; and when the document showing the terms of the express warranty is not in evidence, the implied warranty claimed cannot be given effect.

When by written contract one party, a dealer agrees to sell, and the other party to buy a motor car of a designated type and to accept delivery on or before a future specified date, the question whether the contract refers to a certain specified car then on hand and shown to the purchaser, or to a new car to be later delivered, depends upon the intention of the parties as disclosed by the written instrument in the light of the attendant circumstances.

In the instant case the court is of the opinion that it is the only fair construction of the written contract, and clearly the intention of the parties, that the purchaser was entitled to a new car, and that the contract was not satisfied by the delivery of the car on hand.

Where the seller delivered the car on hand in fulfillment, as he claimed, of his obligation under the contract, and the jury have found, and were warranted in finding, that the car delivered was incapable of giving reasonably efficient and satisfactory service, the purchaser had the right to rescind the contract, for breach by the vendor, unless he had unqualifiedly accepted the car delivered in place of the car for which he contracted.

It is a question of fact for the determination of the jury, whether the vendee did accept the car which was delivered, and the jury must have found that he did not; such finding is warranted by the evidence.

After such a finding the jury was warranted in further finding that the vendee acted with reasonable diligence in returning the car and rescinding the contract. The question as to whether the alleged rescission was brought to the knowledge of the vendor was also for the jury.

On motions for a new trial. Two actions of assumpsit tried together. The first action brought by Ray Motor Company against William P. Stanyan on account annexed to recover $645 balance due on the purchase price of a new Mitchell automobile, the purchase price being $1,945 and $900 the agreed value of a Dodge car taken in exchange, and $400 paid in cash, having been credited on the purchase price, the writ being dated August 8, 1921. On April 11, 1922, the second action was brought by William P. Stanyan against the Ray Motor Company to recover the agreed value of the Dodge car given in exchange, viz., $900 and interest, and the $400 paid in cash, the new Mitchell car having been returned to the Ray Motor Company by the purchaser in rescission of the contract on the ground that it was not a merchantable or marketable machine by reason of defective construction. The purchaser, William P. Stanyan, the defendant in the first action and the plaintiff in the second action relied upon an implied warranty and rescission of the contract. The general issue was pleaded in each case. In the first action the jury returned a verdict for defendant, and in the second action a verdict of $1,373.23 was rendered for plaintiff, and counsel for the Ray Motor Company filed a general motion for a new trial in each case. Motion in each case overruled.

The case is fully stated in the opinion.

Donald F. Snow, for the Ray Motor Company in each case.

Charles P. Conners, for William P. Stanyan in each case.

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

MORRILL, J. The first action is to recover the sale price of a motor car known as a Mitchell Roadster; the verdict was for defendant. The second action is to recover the amount of payments made by plaintiff on the price of the same car; the verdict was for plaintiff. The actions were tried together before the jury, and on general motions for new trials are before us upon a single record.

On December 24, 1920, Mr. Stanyan entered into a written contract with the Ray Motor Company to purchase "One Mitchell Car, Model F 3 Passenger Body Type, Roadster; . . . . and to accept delivery on or about May 1st, 1921"; during the latter part of May or the first of June, 1921, the Ray Motor Company delivered

to him a car of the type designated. The record discloses that the car so delivered was absolutely lacking in the qualities which any purchaser had the right to expect, and was worthless for reasonably efficient service. The purchaser kept the car until August 6, 1921, and then returned it to the service station of the vendor, and notified the man in charge that he was returning it upon advice of counsel.

Counsel for Mr. Stanyan does not claim an express warranty of quality; but he claims to defend the first action and to maintain the second upon the theory that there was an implied warranty that the parts of the car delivered were properly constructed and assembled so as to meet the requirement of a merchantable or marketable car; that this implied warranty was broken and that the purchaser had the right to rescind the contract of sale.

The contract of sale contained, however, an express warranty in these words: "Guarantee on the sale is that which the Factory gives in their catalogue."

It is a general rule that no warranty is implied where the parties have expressed in words, or by acts, the warranty by which they mean to be bound, or, as sometimes expressed, where an express warranty is made upon a sale of chattels, no other will be implied. Benjamin on Sales, 4th Amer. Ed., Section 666, Page 766. *Lombard Water Wheel Governor Co.* v. *Great Northern Paper Co.*, 101 Maine, 114, 120, and cases cited. It is not necessary for us here to decide whether an implied warranty may exist under some circumstances along with an express warranty; assuming such to be the law, as claimed by the vendee's counsel, the implied warranty cannot have effect if inconsistent with the express warranty. Here there was an express warranty of some kind; its terms do not appear; the catalogue referred to in the contract of sale is not in evidence; the purchaser, upon whom the burden rests, has not shown that the implied contract is consistent with the express; the latter may in terms negative and exclude the former. The verdicts cannot therefore, upon this record, be sustained upon the ground of the implied contract claimed.

Upon examination of the record, however, the issue upon which the jury must have based their verdicts, is apparent, and thereon the verdicts are fully justified.

The Ray Motor Company people claim that they sold Mr. Stanyan a specified car, of the type designated, which was at the date of the

contract on the floor of their salesroom and was the car delivered in the following May or June. On the other hand Mr. Stanyan in reply to the question, "Did you buy that particular car that was on the floor," answered, "I was told later that I did, but I did not understand it so at that time; I was to purchase what I presume we thought was a 1921 roadster." As in all other cases of written contracts, the question presented is, what was the intention of the parties as disclosed by the written instrument in the light of the attendant circumstances.

The record fully sustains the vendee's understanding of the contract; such is the only fair construction of the written agreement, and such was clearly the intention of the parties. If the Ray Motor Company was selling a car which they then had on hand, the clause in the contract, ... "This delivery date (May 1, 1921) accepted subject to delays in transportation or other causes beyond the control of the Ray Motor Co., Distributors," . . . . has no application; nor is any reason for postponement of the delivery date to May 1 apparent; the Dodge car taken in part payment was delivered to the Ray Motor Company early in January, and the sale could have been then closed. The final sentence of the contract shows conclusively that the contract was for the sale of a car not then on hand; it reads:—"The cash deposit shall be forfeited as liquidated damages if subsequent payment is not made within twenty days of notice that the car is ready for delivery."

The jury was amply justified in finding that the Ray Motor Company did not deliver to Stanyan the car which they agreed to deliver to him, but delivered in place thereof a car which they had had on sale since August, 1920, and which was incapable of giving reasonably efficient and satisfactory service. The evidence of the defective condition of the car when delivered, and of the repeated ineffectual attempts of the vendor to put it into proper condition for service, is plenary. The jury was fully justified in finding, upon this record, that the motor in the car delivered was made sometime prior to March, 1920 and from structural defects or otherwise was useless for further service; that the battery was worn out and could not be recharged; that the carburetor was defective; that the car would not respond to pressure upon the gas lever; and that after repeated trials the vendors were unable to remedy the defects.

The purchaser, Mr. Stanyan, was entitled to the new car for which he contracted, and upon such state of facts had a right to rescind the contract, for breach by the vendor, (*Hallwood Cash Register Co.* v. *Lufkin*, 179 Mass., 143), unless he had unqualifiedly accepted the car delivered in place of the car for which he contracted, and thus waived his right. Whether another car would have given better service is not the question at issue; the contract was not satisfied by the delivery of the car on hand. The action of the vendor in changing the radiator to conform in appearance to cars made for the season of 1921 tends to support this view. It was a question of fact for the determination of the jury, whether the vendee did so accept the car which was delivered, and the jury must have found that he did not; such finding is not manifestly wrong, and is warranted by the evidence.

Was the attempted rescission seasonable? Undoubtedly a vendee rescinding a contract of sale for default of the vendor must act within a reasonable time. What is a reasonable time is a question of law when the facts are ascertained. *Kingsley* v. *Wallis*, 14 Maine, 57. *Watson* v. *Fales*, 97 Maine, 366. *Getchell* v. *Kirkby*, 113 Maine, 91; under other conditions it is a mixed question of law and fact, for submission to a jury. *Hill* v. *Hobart*, 16 Maine, 164, 168. *Hollis* v. *Libby*, 101 Maine, 302, 309. *Libby* v. *Haley*, 91 Maine, 331. *Getchell* v. *Kirkby*, supra. The requisite diligence is governed by the circumstances of the particular case.

There is testimony tending to show that for the greater part of the time from the delivery of the car, about the first of June, until about the middle of July the car was in the service station of Ray Motor Company, for changes and adjustments, in ineffectual efforts by the company to make it serviceable. About the middle of July, Mr. Ray drove the car from Bangor to Hampden and return, with Mr. Stanyan, a distance of ten or twelve miles, to demonstrate that it was in proper condition. Mr. Stanyan testifies that upon their return, "I told him that I would take the car out that evening after supper and try it out and if it worked satisfactorily that I would come over to his office in the morning and pay him." The evidence further tends to show that when Mr. Ray left the car on that occasion there was trouble in starting it, and that after running a few rods it stopped; that a man from the Ray Motor Company's garage came upon telephone call and replaced the battery with one hired

from another garage; that with that battery Mr. Stanyan drove the car home. Two or three days later Mr. Stanyan went on his vacation and drove the car with the hired battery, to some extent, for about two weeks, the evidence tending to show that it ran no better with the new battery than before; shortly after his return to Bangor, upon the advice of counsel, he returned the car to the service station of the vendor, where the work upon it had been done.

Upon this branch of the case the issue was peculiarly for the jury; after a finding that Mr. Stanyan did not accept the car in question in place of the new car, to which he was entitled under the contract, the jury was warranted in further finding that Mr. Stanyan acted with reasonable diligence in returning the car and rescinding the contract; and that it was not an unreasonable delay to permit the Ray Motor Company to attempt to remedy the car's defects, or for Mr. Stanyan to test out the car; that he did not lose his right of rescission thereby. We cannot say as a matter of law that he was too late. *Pitcher* v. *Webber*, 103 Maine, 101, 105. *Boles* v. *Merrill*, 173 Mass., 491, 494.

Whether the alleged rescission was brought to the knowledge of the vendor was also for the jury; if the statement to the mechanic, when the car was left at the service station, was not a sufficiently positive act, they had before them Stanyan's letter of August 9, and it was for them to say whether it was received.

Upon this record we are not justified in declaring the verdicts of the jury erroneous. In each case,

Motion overruled.

J. A. GREENLEAF & SONS COMPANY et als.

vs.

FREE-ANDREWS SHOE COMPANY et als.

Androscoggin. Opinion December 31, 1923.

A bill in equity to enforce a lien claim against the property of the owner in invitum for work and materials furnished under a contract to which the owner was not a party and over which he had no control should not go beyond the natural import of the evidence offered to prove consent. The consent of the owner must be shown, and whether it appears in any given case will depend wholly upon the facts in that case.

If the well-settled principles of law are applied directly to the undisputed facts in this case, there is no adequate evidence that brings to the knowledge of the owner any explicit information as to the nature and extent of the alterations and repairs which were being made in his building.

On report. A consolidated bill in equity to enforce lien claims which plaintiffs allege they have on land and building owned by George C. Wing, one of the defendants, for labor and materials furnished in altering and repairing the building during the occupancy of the defendant, Free-Andrews Shoe Company, under a lease from said owner, the contracts for such labor and materials having been made with said Free-Andrews Shoe Company. The question involved was as to whether the owner had consented to such labor and materials. A hearing was had upon the bills, answers, general replications, report of a Special Master and the evidence taken before him and by him reported to court. At the conclusion of the testimony, by agreement of the parties, the case was reported to the Law Court for final determination. Judgment for liens upon the property denied. Judgments for plaintiffs against Free-Andrews Shoe Company.

The case is fully stated in the opinion.

Harry Manser, for plaintiffs.

White, Carter & Skelton and L. J. Brann, for defendants.

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

MORRILL, J., concurring in the result by opinion.

SPEAR, J. This consolidated cause (R. S., Chap. 96, Sec. 35), aims to establish mechanics' liens upon land and buildings formerly occupied by Free-Andrews Shoe Company under lease from George C. Wing, the owner thereof, who is made a defendant, and has answered.

At the hearing before a single Justice upon the coming in of the Master's report, trial by jury having been waived, the cause was reported to the Law Court for final determination.

There is little, if any, dispute as to the material facts. On December 15, 1919, George C. Wing, the owner, leased to Free-Andrews Shoe Company for a term of five years from that date, at a rental of fifty-five dollars a month,

"A certain three story wooden building, with basement, standing on the easterly side of Mechanics Row, in said Auburn, the first story of which has for many years been occupied by John M. Crawshaw as a machine shop; and the right to have a conveyance by deed of warranty at any time during the term of this lease, of said building and the land between said building and a line five feet distant from the stable known as the Hotel Cortland Stable, and extending back parallel thereto to the line now occupied by a temporary fence, upon the payment of eighty-five hundred dollars in money; but the lease of the building does not carry with it a lease of the land, except so much thereof as is necessary for the purposes of ingress and egress to the building first described. Said lessee is to pay all water rates and sprinkling taxes, if any during the term of this lease, and to make all repairs inside and out."

The lease contained no other covenant as to repairs than as above stated, nor any statement of the purposes for which Free-Andrews Shoe Company intended to use the building; but undoubtedly the lessor knew when the lease was executed that the lessee was hiring the building for use as a shoe factory, and intended to manufacture shoes therein.

The building had previously been used, at least in part, as machinist's shop for many years. Upon the execution of the lease the

lessee took possession and employed J. A. Greenleaf & Sons Company to make alterations and repairs necessary to adapt the building for the manufacture of shoes; the work was done and materials furnished between January 7, 1920, and March 17, 1920. The business career of Free-Andrews Shoe Company was short; the lease was terminated for breach of the conditions thereof, and lessor took possession April 13, 1920; the lessee was adjudicated a bankrupt April 24, 1920. While the lease was in force, the lessee was in possession of the building, and the lessor exercised no control over it. While the alterations and repairs were in progress, Mr. William A. Greenleaf called the attention of the owner's son to the work; the conversation as given in the son's testimony, which is not controverted, is as follows:

"I met Mr. Greenleaf in front of the building in which our office is. He said to me he was engaged in . . . . I am not quoting exactly, but the substance of it . . . . that he was engaged in renovating your Free-Andrews Shoe Company building, and he made an inquiry of me as to what interest or direction we had in it. I told him we had none. He changed I think a window if I remember correctly. I said to him that the repairs were on the Free-Andrews Shoe Company. Mr. Greenleaf says to me, 'I understand the repairs are on the lessee.' He said he didn't want to make what he called a structural change without my father's knowing about it, and I spoke to my father and reported either to Mr. Greenleaf or Mr. Free—I think to Mr. Free, and he sent word to Mr. Greenleaf that, as long as there was no weakening of the building there was no objection, and I never went near the building, never was in it until after the bankruptcy."

The attitude of Mr. Wing, the owner, is best expressed in his own language, as follows:

"You will notice that this lease provides that the lessee was to do all repairs, inside and out, and it didn't concern us what the repairs were if they did not impair the efficiency of the building. I never went near it.

"Q. But what I want to get at is whether you knew that they were making changes and repairs and alterations in the building for other purposes?

"A. I only had a suggestion of it once, and I will tell you about that. My son came in one day, and said, 'Mr. Greenleaf,' 'Put,' he called him, said he was making some changes out there; I won't

say whether they were putting in a door where there had been a window, or putting in a window where there had been a door; something of that sort, and Put says he didn't know but you ought to know about it.' I says, 'I don't care anything about it if they don't weaken the building.' I says, 'Greenleaf knows better than that.' I never went near it.

"Q. That is, you mean that Greenleaf knew better than to do anything to weaken it?

"A. Yes; that I thought Greenleaf knew too much to weaken the building; that is all I cared about it; might do what they were a mind to.

"Q. That is, while Greenleaf & Sons were at work there you did know that something was being done?

"A. Yes, I did have that suggestion. I was busy and paid no attention to it."

The paint furnished by Charles M. Hay Paint Company was purchased by Mr. Free and used upon the building, in greater part upon the interior, by J. A. Greenleaf & Sons Company. Mr. Wing had no knowledge of this paint bill; the representative of the Paint Company made no inquiries as to the ownership of the building and was content to deal with the Free-Andrews Shoe Company alone.

The foregoing are the material facts presented in a light as favorable to the lien claimants as the case will permit.

This is a bill to enforce a lien claim against the property of the owner in invitum, for work and materials furnished under a contract to which the owner was not a party and over which he had no control. The only question, therefore, is whether the consent of the owner should be inferred from the foregoing facts including his declaration touching his knowledge of what was being done. R. S., Chap. 96, Sec. 29, provides that whoever performs labor or furnishes labor or materials in erecting, altering, moving or repairing a house, building, or appurtenances . . . . by virtue of a contract with, or by consent of, the owner, has a lien thereon." Consent is defined in *Hanson* v. *News Publishing Company*, 97 Maine, 95, as follows: "Consent, within the meaning of the statute, is held to mean something more than acquiescence. It implies an agreement to that which could not exist without such consent."

In cases of this kind we are of the opinion that a fair inference against the owner should not go beyond the natural import of the

evidence offered to prove his consent. With regard to what may constitute consent a clear distinction is made in *Shaw* v. *Young*, 87 Maine, 271, and confirmed in *York* v. *Mathis*, 103 Maine, 67, between ordinary repairs which are necessary, and alterations and improvements, which are made for the particular purpose of the tenant. *Shaw v. Young*, having found in that particular case that consent should be inferred from the facts, then sums up on this point as follows:

"We are satisfied from the facts in this case that the statute consent of the owners specially appears.

"This decision, however, should not be extended beyond the facts in this particular case. Consent may be inferred for ordinary preservative repairs, when it would not be inferred for alterations, remodelings, additions, or even more extensive repairs. The consent must be shown, and whether it appears in any given case will depend wholly upon the facts in that case."

The work and materials in the present case come within the latter classification. They went into work and alterations of which the owner had no detailed knowledge and had no interest, except their effect upon the strength of the building. In *Hanson* v. *News Publishing Company*, 97 Maine, 103, it is held: "The fact that Mr. Brown knew the lessees were putting in the partitions which were of no service to him or to the store, and to which he had no right to object consistently with the rights of the lessees, does not authorize the inference that he consented in the sense of the statute."

If we apply the foregoing well-settled principles of law found in *Shaw* v. *Young*, supplemented by the rule found in *Hanson* v. *News Publishing Company*, directly to the undisputed facts in the present case, there is no adequate evidence sufficient to affect the question of consent, tending to prove that the owner of the building had any knowledge as to the nature of the alterations and repairs, except what was contained in the lease, the information conveyed to him by his son, and his own declaration. And there is nothing to be found in these classes of evidence that brings to the knowledge of the owner any explicit information as to the nature and extent of the alterations and repairs which were being made in his building.

On the other hand, under the rule of exclusio, which may not be inapt under the circumstances of this case, it would seem that the testimony of the owner might be fairly construed as a legitimate

inference that he had no knowledge of the nature and extent of the repairs beyond the ordinary repairs. Therefore, unless we hold that, under the language of the statute, general knowledge not of what, but merely that, "alterations and repairs" are being made, it would seem that under the rule of distinction between extraordinary and ordinary repairs, as stated in *Shaw* v. *Young*, the owner's knowledge upon the evidence here presented cannot fairly be construed as proving consent.

Judgment for liens upon the property must be denied; the owner may recover a single bill of costs against J. A. Greenleaf & Sons Company and Charles M. Hay Paint Company. The plaintiffs may have judgments against Free-Andrews Shoe Company as follows: Auburn Electrical Company $586.94, W. A. Ray, Jr. $109.58, J. A. Greenleaf & Sons Company $1,913.57, and Charles M. Hay Paint Company $270.75, each with interest from date of filing their respective bills and costs.

Decree in accordance with opinion.

MORRILL, J. I fully concur in the result of the foregoing opinion, but not in the line of reasoning by which that result is reached.

One undisputed fact seems to me to be decisive of the case. By the terms of the lease, the lessor agreed to convey to the lessee, by warranty deed, at any time during the term, the building leased and a specifically described lot of land on which it stands, for the sum of eighty-five hundred dollars. The labor and materials in question were furnished while this contract was in force and unmodified. While the contract to convey the property so remained in force and unmodified, the owner did not agree that the prospective purchaser could charge him or the property with responsibility for the purchaser's contracts. The contract did not contemplate that the owner would derive any ultimate benefit from the work to be done. Knowledge that the property was to be used as a shoe factory and that repairs and alterations would be necessary to fit it for such use, and were being made, is not enough to establish a lien on the owner's estate. *Roxbury Painting and Dec. Co.* v. *Nute*, 233 Mass., 112. *Hayes* v. *Fessenden*, 106 Mass., 228; and cases from states having lien statutes similar to the statute of Maine collected in 4 A. L. R., 685. This case is clearly distinguishable from *Baker* v. *Waldron*,

92 Maine, 17, in which the seller made it a condition of the sale that the purchaser should erect the mill.

The owner neither contracted with the lien claimants, nor expressly consented that they should furnish the labor and materials, nor expressly authorized the vendee to charge the building with any expense; on the contrary the lease provided; "Said lessee is . . . to make all repairs inside and out."

Nor can it be said that the owner's consent should be inferred, or that by implication he authorized the work upon the building. There was nothing in his conduct to justify the expectation and belief that he had consented to the making of the repairs and alterations on the credit, or at the charge of the building, as in *York* v. *Mathis*, 103 Maine, 73, 77; the lien claimants were not misled; they made their contracts upon the credit of the lessee, without considering the building. "No one ever looked for anything like this," testified Mr. Greenleaf.

It is contrary to the ordinary course of business affairs and dealings that the owner, who had agreed to convey the property by warranty deed for a specified price, would consent, either expressly or tacitly, to the making of alterations and repairs by the prospective purchaser for which liens would attach to the owner's interest, unless the cost had been included in the price, which is not the case here.

Consent should not be implied contrary to the obvious truth unless upon equitable principles the owner should be estopped from asserting the truth; that is, the actual fact. *York* v. *Mathis*, supra, at Pages 76 and 77. *De Klyn* v. *Gould*, 165 N. Y., 282; 80 Am. St. Rep., 719. *Hartley* v. *Holt*, 58 Conn., 445, 450. *Clark* v. *North*, 131 Wis., 599, 605; 11 L. R. A., (N. S.), 746; 111 N. W., 681. There is no ground for invoking the principle of estoppel here.

Consent by the owner cannot be found on the facts of this case. See *Conant* v. *Brackett*, 112 Mass., 18, a very similar case.

EVA E. BOWDEN'S CASE.

Cumberland. Opinion January 1, 1924.

A claimant under the Workmen's Compensation Act as a deputy sheriff and Superior Court officer is not an "employee" of the State, nor "under the direction and control" of the executive department of the State, within the meaning of the Act. Such claimant is an official excepted under paragraph "e" of the Act, and not an "employee." A finding by the Chairman of the Industrial Accident Commission that such a claimant, as a matter of law, is an "employee" within the meaning of the Act is erroneous, hence reversible.

A deputy sheriff while acting as court officer during a session of the court, is not and cannot be held to be exercising an executive function while acting as such court officer, under the direction and control of the executive department, nor is he an employee of any department within the meaning of paragraph "g" of the amendment of the Act.

It is a rule generally prevailing, and adhered to in this State, that the executive and judicial departments are absolutely independent of each other within the sphere of their respective powers. This rule does not preclude just what happened in the instant case. A deputy sheriff, an executive as well as an administrative officer, was for the time being acting as an officer of the judicial department, as an officer of a court, within the sphere of the power of that court. This overlapping and interlacing of the duties of officers of the two departments is not unusual. On the contrary, it is a very necessary result of our governmental system.

On appeal. This is a proceeding under the Workmen's Compensation Act by petition by Eva E. Bowden, claimant, as dependent widow of Arthur C. Bowden, a deputy sheriff of the County of Cumberland, who was injured in an automobile accident on December 6, 1921, at Martin's Point Bridge, in the city of Portland, while on his way from his home in Freeport to Portland to attend to his duties as a Superior Court officer of the Superior Court of the County of Cumberland, and four days later died from the injuries thus sustained. A hearing was had before the Chairman of the Industrial Accident Commission, counsel for the claimant contending that the injury sustained by the husband of claimant resulting in his death arose out of and in the course of his employment, and counsel for

the respondents alleging that the said Arthur C. Bowden at the time of the injury was not an employee of the County of Cumberland, and was not employed by the State of Maine or under the direction and control of any department of the State, as defined by the Workmen's Compensation Act, and compensation was awarded to claimant as against the State of Maine, and an appeal entered by the respondents. Appeal sustained. Decree reversed.

The case is stated at length in the opinion.

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

William H. Fisher, Deputy Attorney General, for the State, and *Strout & Strout*, for the United States Fidelity & Guaranty Co.

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

HANSON, J. This is an appeal from a decree based on the findings and rulings of the Chairman of the Industrial Accident Commission. By the decree compensation is awarded as against the State of Maine to the claimant, widow of former Deputy Sheriff Arthur C. Bowden, for the maximum amount provided by statute.

Arthur C. Bowden was a deputy sheriff of Cumberland County, and was acting, by appointment of the sheriff, as court officer of the Superior Court for Cumberland County during its session.

The Chairman of the Commission found the following facts:

"Mr. Bowden was accidentally injured while on his way from his home in Freeport to attend to his duties as a superior court officer of the Cumberland County Superior Court, on the morning of December 6, 1921, and he died as a result of those injuries, on the tenth day of December, 1921. Besides his duties as a superior court officer, Mr. Bowden was also acting in the performance of his regular duties as a civil deputy, in that, because of certain legal matters which had been turned over to him as a deputy sheriff for action, it was necessary for him to see Sheriff King F. Graham in Portland that morning. Mr. Bowden lived in Freeport and it was his custom to go to Portland each morning to attend to his duties as court officer and to return to his home each evening, when those duties were completed for the day.

"On the morning of December 6, 1921, while proceeding to Portland for the purpose outlined above, the accident occurred which resulted in the death of Mr. Bowden."

The following statutes given here in the order of their passage, were and are involved in the findings of the Commission, and in the determination of the instant case:

"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) person whose employment is but casual, or is not in the usual course of the trade, business, profession or occupation of his employer; (e) officials of the state, counties, cities, towns or water districts and other quasi-municipal corporations of a similar character; policemen and firemen shall be deemed employees within the meaning of this act. If, however, any policeman or fireman claims compensation under this act, there shall be deducted from such compensation any sum which such policeman, fireman or other person may be entitled to receive for any pension or other benefit fund to which the state or municipal body may contribute. Any reference to an employee who has been injured shall, when the employee is dead, also include his legal representatives, dependents and other persons to whom compensation may be payable. R. S., 1916, Chap. 50, Sec. 1, Page II.

An "Act to Provide Compensation for injuries Received by State Employees" was enacted later, to wit:—

Chapter 230, Laws of 1917, which provides as follows: "All persons employed by the state or under the direction and control of any department of the state shall be entitled to the benefits of Chapter fifty of the revised statutes. The governor and council shall order such compensation as shall be assessed, paid from the state contingent fund."

An amendment to the foregoing Chap. 50 of R. S., 1916, relating to Workmen's Compensation incorporating therein Chapter 230, Laws of 1917, was passed as in Public Laws, 1919, Chapter 238, after paragraph "e" as follows: "(f) except that any town or city may, in lieu of the compensation and insurance provided by this act, continue any member of the fire department or police force in said town, who may have been injured in the course of his duties, on the payroll at full pay, if such full pay exceeds the maximum compensation provided for employees under this act. Any reference to an employee who has been injured shall, when the employee is dead,

also include his legal representatives, dependents and other persons to whom compensation may be payable; (g) all persons employed by the state or under the direction and control of any department of the state shall be entitled to the benefits of chapter fifty of the revised statutes. The governor and council shall order such compensation as shall be assessed, paid from the state contingent fund."

The Chairman of the Industrial Accident Commission quotes also Sec. 9 of Chap. 85 of the R. S. of the State of Maine, which provides that "Sheriffs shall obey all such orders relating to the enforcement of the laws as they from time to time receive from the governor;" and Article 5th, Part 1, Section 1 of the Constitution "that the supreme executive power of this state shall be vested in a governor; and also Section 12 declares that "he shall take care that the laws be faithfully executed." The chairman quotes very fully the opinion of the Justices, 3 Maine, 484, answering questions proposed by the Senate as to the right of any person to hold and exercise, at the same time, "the several offices of deputy sheriff and justice of the peace." The Justices there held that,—"There can be no question that sheriffs, deputy sheriffs and coroners are executive officers; and for the reasons we have assigned, we think they must also be considered, though not named under a distinct head, as belonging to the executive department, the limits of which are nowhere in the constitution expressly defined."

The question before the Commission so far as it related to the State, was proposed and answered by the chairman as follows: "Was Arthur C. Bowden in the employ of the State of Maine or under the direction and control of any department of the State of Maine on December 6, 1921?" His answer was:—"Based upon the evidence submitted and upon the rulings of the Supreme Judicial Court already quoted it is found that Mr. Bowden was not in the employ of the State of Maine, at the time of the accident which caused his death but that, as a deputy sheriff and superior court officer, he was 'under the direction and control' of the Executive department of the State of Maine, and therefore an 'employee' within the meaning of the Act."

The chairman gives very clearly his view of the effect of the law, and particularly his construction of paragraph "g," as follows: "As originally enacted in 1915, Section I, subdivision II of the Maine Workmen's Compensation Act did not include paragraph (g).

This paragraph was added by an amendment in 1919. Prior to that time, some doubt existed as to whether or not certain persons in the service of the State were entitled to the benefits of the Workmen's Compensation Act. By the amendment it was intended to include within the benefits of the Workmen's Compensation Act, without exception, all persons employed by the State or 'under the direction or control of any department of the State.' Were it not for the provisions of paragraph (g) as adopted by the amendment to the Maine Compensation Act, extending to 'all persons in the employ of the state or *under the direction and control of any department of the State,' deputy* sheriffs would not be entitled to compensation under the Maine Workmen's Compensation Act, for, like policemen and firemen, they act in an official capacity rather than under a contract of hire."

We are not persuaded that Mr. Bowden, a deputy sheriff and Superior Court officer, was at the time of the accident "under the direction and control of" the executive department of the State of Maine, and therefore an "employee" within the meaning of the Act. Mr. Bowden was admittedly an official, a public officer, and before the amendment was admittedly excepted under paragraph "e" of the Act. If the Legislature had intended in any manner to change the meaning and intent of paragraph "e" of the Act, or to authorize a more liberal construction of the same than had already been accorded it, we must assume such intention would have been expressed in terms. From the language of the amendment those persons not included in the original Act, and comprehended in the amendment, were intended to be protected thereby. It was an extension of, and not a change in, the existing statute inclusion. It was not meant for one department of state, but for all. Primarily, it was intended for employees, as distinguished from officials, employees directly employed by officials authorized to act for the state, or persons employed or in the service of any department without such official or authorized sanction.

A deputy sheriff while acting as court officer during a session of the court, is not and cannot be held to be exercising an executive function while acting as such court officer, under the direction and control of the executive department, nor is he an employee of any department within the meaning of paragraph "g" of the amendment.

That sheriffs and their deputies are subject to the direction and control of the executive has been recognized since 1820, but in all the years since, the rule stated in the opinion of the Justices cited has been followed, that such direction and control has been exercised, "when legal coercion was necessary," and not when such officer was acting under his oath in an official capacity in another department of state, to wit, in the administration of the law. Nor has such direction or control been attempted in a similar case in the history of the state. The opinion of the Justices, supra, recognized this when defining the status of sheriffs and deputies. Quoting Article 5, Part 1, Section 1, "that the supreme executive power of the State shall be vested in a governor," and that Section 12 declares that "he shall take care that the laws be faithfully executed," the court say, "The faithful administration of them devolves on another department." A further recognition of the rule that the executive may exercise direction and control of sheriffs and their deputies, is found in R. S., Chap. 85, Sec. 9, supra,—"Sheriffs shall obey all such orders relating to the enforcement of the laws as they from time to time receive from the Governor."

"The word 'control' seems in itself to imply that the party to be controlled has power to exercise his functions, or discharge his duties in several different ways." 9 Cyc., 811, Note. The same authority defining "direction" gives the following definition: "An order prescribed, either verbally or written; instructions in what manner to proceed." 14 Cyc., 291. "Direct," as a verb, is defined "to guide, to show, to regulate; to point out with authority, or direct as a superior; to instruct, to order; to point out a course of proceeding with authority; to command." Idem, quoting *Berkshire Woolen Co.* v. *Day*, 12 Cush., 128, 130, where it is said: 'Direction' means general instructions as to the manner of doing it." "The word 'direction' in the clause 'under the direction of the Judges' is to be taken in the sense of authority to direct as circumstances may require and not as requiring direction in order to confer authority upon the the clerk to act." In *Re Durant*, 60 Vt., 176, 12 Atl., 650. The statutes provide that, "Sheriffs receive their salaries from the treasuries of the counties which they serve." R. S., Chap. 117, Sec. 41. It is further provided that,—"The sheriff of each of said counties shall attend the superior court thereof . . . . or he shall specially designate a deputy, approved by the justice of such superior

court, so to attend." R. S., Chap. 82, Sec. 90. It appears that Mr. Bowden was so designated, and approved by the presiding Justice, and at once became one of the number of officials comprising the Superior Court of Cumberland County. "A court consists of persons officially assembled under authority of law, at the appropriate time and place, for the administering of justice." 7 R. C. L., 973, and cases cited. "The power to maintain order, to secure the attendance of witnesses to the end that the rights of the parties may be ascertained, and to enforce process to the end that effect may be given to judgments, must inhere in every court or the purpose of its creation fails. Without such power no other could be exercised." Id. Page 1033, Note 12.

It is a rule generally prevailing, and adhered to in this state, that the executive and judicial departments are absolutely independent of each other within the sphere of their respective powers. *Dennett, Petitioner*, 32 Maine, 508. This rule does not preclude just what happened in the instant case. A deputy sheriff, an executive as well as an administrative officer, was for the time being acting as an officer of the judicial department, as an officer of a court, within the sphere of the power of that court. This overlapping and interlacing of the duties of officers of the two departments is not unusual. On the contrary, it is a very necessary result of our governmental system. 7 R. C. L., 1047; 35 Cyc., 1489. "To some extent, and for certain purposes, the powers appropriate in their nature to one department are exercised by each of the others; sometimes by express direction of the supreme law; but otherwise only when it is done incidentally or as a means of exercising its own proper power." Lewis Sutherland Statutory Construction, Vol. 1, Page 5, and cases cited.

"There is a manifest difference between an office, and an employment under the government. We apprehend that the term 'office' implies a delegation of a portion of the sovereign power to, and possession of it by the person filling the office;—and the exercise of such power within legal limits, constitutes the correct discharge of the duties of such office. The power thus delegated and possessed, may be a portion belonging sometimes to one of the three great departments, and sometimes to another; still it is a legal power, which may be rightfully exercised, and in its effects it will bind the rights of others, and be subject to revision and correction only according to the standing laws of the State. An employment merely

has none of these distinguishing features." Opinion of the Justices 3 Maine, 481. In addition to the statute definition of "employee," it is well settled that an officer is distinguished from the employee in the greater importance, dignity and independence of his position, in being required to take an official oath, and perhaps to give an official bond, in the more enduring tenure, and in the fact that the duties of the position are prescribed by law. 22 R. C. L., 381. "Of the element of sovereignty which is exclusively and intrinsically judicial, the people gave the courts all they had to give; and while the domain of the judiciary is not so extensive as that of the other departments, no other power can enter that domain without a violation of the constitution, for within it the power of the judiciary is dominant and exclusive. When any power is conferred upon a court of justice, to be exercised by it as a court, in the manner and with the formalities used in its ordinary proceedings, the action of such court is to be regarded as judicial irrespective of the original nature of the power." 7 R. C. L., 1050, Notes 19 and 20. "The judicial power of this State shall be vested in a Supreme Judicial Court, and such other courts as the legislature shall from time to time establish." Constitution of Maine, Article VI., Section 1. And, "No person or persons belonging to one of the departments" into which "the powers of this government shall be divided shall exercise any of the powers properly belonging to either of the others." Id., Article III., quoted in *State* v. *Leclair*, 86 Maine, 530. In *Sibley* v. *State*, Supreme Court of Errors, Conn., 96 Atl., 161, where the duly elected and qualified sheriff of Windham County, in undertaking to board a trolley car to go from his home to Putnam in connection with the duties of his office was thrown to the ground and received injuries which resulted in his death a short time afterwards, the Commissioner awarded compensation to the widow, and the state appealed to the Superior Court which reserved the case upon the facts found by the Commissioner for the advice of the court of errors. The definition of the word "employee" under the Connecticut Act is substantially the same as in the Maine Compensation Act. In setting aside the award, the court say: "We do not agree with the claimant in the suggestion that compensation by the State to public officers in case of their injury while employed about their duties is within the intent and spirit of the Compensation Act. Its title, Workmen's Compensation Act, its history showing at whose

instigation such acts were brought forward and passed, the considerations which were urged in support of them, as well as the fact that in nearly all of the states which have compensation acts such officers and their dependents are excluded from compensation under them, are a sufficient answer to the suggestion."

Chapter 230, Public Laws of 1917, was not an amendment or revision of the original act. There is no conflict between the two enactments. They are in entire harmony with the purposes of the legislative will and intention. While not controlling, the title to the Act approved April 7, 1917, to wit, Chapter 230, Public Laws, 1917, is helpful, and may be resorted to as an aid in determining the meaning of the Act. The title reads, "An Act to provide compensation for injuries received by State Employees." Idem. This Act was again before the Legislature two years later when, by Chapter 238, Public Laws of 1919, an "Act to amend Chapter 50 of the Revised Statutes relating to Workmen's Compensation," was passed, in which Chapter 230 of the Laws of 1917 was incorporated, again without reference to any change in the earlier paragraphs of the original Act.

The history of the legislation therefore, brings that act clearly within the rule, that an act which simply adds something to the law, is not in conflict with, and does not necessarily change, the provisions of an earlier act. "Two statutes relating to the same subject will be so construed as to allow both to stand when they do not contain inconsistent provisions, and the provisions of both can be carried out." 25 R. C. L., 875, and cases cited. To say that officials excepted by paragraph "e" were intended by the Legislature to be included in paragraph "g" of the amendment, without in any manner referring to the provisions of paragraph "e," would be creating by construction an exception to an exception. This we do not feel authorized to do. We think the legislative intent was plain, and the words used in paragraph "g" of the amendment were not intended to change in whole or in part the purpose and intent of paragraph "e" of the original act so far as it relates to officials of the State. The construction sought would operate as a repeal of part at least of paragraph "e," a result surely not intended by the framers of the amendment.

The finding that Mr. Bowden was not in the employ of the State of Maine at the time of the accident which caused his death was a

finding of fact, and being supported by evidence, in the absence of fraud, cannot be disturbed by us. *Mailman's Case*, 118 Maine, 179. But the finding "that as deputy sheriff and superior court officer," Mr. Bowden, "was under the direction and control" of the executive department of the State of Maine, and therefore an "employee" within the meaning of the Act, is a finding of law and therefore open to review. Such finding is error in law. Mr. Bowden at the time of the accident was an official, and not an employee because an official. He was an official excepted under paragraph "e" of the Act.

The entry will be

Appeal sustained.
Decree reversed.

HARTFORD FIRE INSURANCE COMPANY *vs.* FRANK E. STEVENS.

Cumberland. Opinion January 1, 1924.

It is well settled that a party may not impeach the general credibility of his own witness; and it is equally well settled that a party is not precluded from showing by other competent evidence the truth in contradiction of the testimony of his own witness. A directed verdict should be set aside if there is evidence in the case which would sustain a contrary verdict should such be rendered by a jury. Where defendant, in a replevin action, pleads title in himself, he waives his right to question the matter of description of the property as set out in the writ.

In this case the defendant relies on plaintiff's inability to prove the numbers, the color of the car, or kind of tire, as stated in the writ. This ground is not well taken. If such defense should be sustained, it would open the way for a wider practice of an evil now too prevalent. A stolen car, if the thief has the time and the skill, is always changed in the very details mentioned.

What constitutes a sufficient description of the property in an action of replevin must in a great measure depend upon the particular facts of each case, but, generally speaking, it must be described with a reasonable degree of certainty, sufficiently definite to enable the property to be positively identified.

The underlying principle as shown by the cases is, that if trial may be had on the merits of the case, and the defects in the pleading may be amended or cured by subsequent pleas or proceedings, the action should not be dismissed.

On exceptions by plaintiff. An action of replevin to recover the possession of a Buick coupe. One James W. Holt of Medford, Massachusetts, owned a Buick coupe, 1922 model, and on the night of April 6, 1922, he left the car in front of a hall in Somerville, Massachusetts, and entered the building and while he was therein the car was stolen. The plaintiff paid to him $2,000 insurance it had on the car and took from him a bill of sale of the car, describing it as one 1922 Buick coupe, No. 783506; Motor No. 790915. Two days later, viz., April 8, 1922, one William J. Parker of Portland, Maine, gave a bill of sale of one Buick coupe, Motor No. 790815, to The Atlantic Automobile Sales Company, located at said Portland. On April 23, 1922, The Atlantic Automobile Sales Company sold to defendant the car it bought of said Parker. On September 8, 1922, the plaintiff brought this action and replevied the car sold to defendant by The Atlantic Automobile Sales Company, claiming that it was the same car formerly owned by the said James W. Holt and from him stolen. The case was tried before a jury, and after the conclusion of the testimony and arguments of counsel to the jury, the presiding Justice directed a verdict for the defendant, and plaintiff excepted. Plaintiff also excepted to the exclusion of evidence to establish a fact which was in contradiction to the testimony of a witness called by the plaintiff. Exceptions sustained. Verdict set aside.

The case is stated at length in the opinion.

James H. McCann, for plaintiff.

William A. Connellan and Ralph M. Ingalls, for defendant.

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

HANSON, J. This was an action of replevin and is before the court on plaintiff's exceptions. The exceptions state the facts and questions raised as follows:—

"The plaintiff claimed that the automobile was owned on April 6, 1922, by James W. Holt, of Medford, Middlesex County, State of Massachusetts, and was stolen from Holt on that day. The plaintiff was Holt's insurer against such a loss. It later paid Holt his loss, and also took from him a bill of sale of Holt's Buick automobile. On April 8, 1922, one William J. Parker gave a bill of sale of a Buick coupe to a corporation known as The Atlantic Automobile

Sales Company in the office of an attorney in Portland, Maine. On April 23d, The Atlantic Automobile Sales Company gave a bill of sale, through its Treasurer, David Tarshis, of the Buick coupe it received from said Parker, to Dr. Frank E. Stevens, of Bridgton, Maine, the defendant. The plaintiff replevied said Buick coupe, claiming that the automobile transferred by said Parker to The Atlantic Automobile Sales Co. on April 8th, 1922, was the same automobile stolen from James W. Holt on April 6th, 1922.

"The plaintiff called as a witness David Tarshis, who demonstrated and sold to the defendant the replevied car. Plaintiff endeavored to show by this witness, Tarshis, that three months previously, he, Tarshis, had declared that he, certain personal property before then within said State feloniously stolen, taken and carried away, feloniously did buy, receive and aid in concealing one Buick coupe, 1922 model, the original serial number of which was 783506, the present serial number being 783508, the original motor number was 790515, the present motor number being 790815, of the value of one thousand dollars, of the property of one James W. Holt. The answer of the witness was in the negative.

"Plaintiff then claimed the right to prove that Tarshis had pleaded guilty to receiving the Holt automobile, the Buick car replevied in this action, counsel stating the reason as follows: 'Because it is already established as a fact, and inasmuch as the witness denies it, then it can be shown under the rule that you can clearly by other competent evidence, by other evidence or other witnesses, establish the fact which the witness at the present time denies as being true. I may rely upon the conviction as the existence of a fact.' After discussion between the Court and counsel on both sides on the matter, the question was asked, after the above reason for its being asked had been stated: Question (by plaintiff's counsel) 'May it please the Court, that the matter may be made clear, I now offer to prove by Mr. Tapley, the clerk of this Court, the record of an indictment found against this witness (David Tarshis), charging him with receiving stolen goods, and in which the automobile in question is specifically described; said record containing his plea of guilty thereto in open court at the September Term of this year.' (September, 1922, is referred to).

"Defendant objected to the admission of such evidence and same was excluded by ruling of the Court."

"EXCEPTION 2. After the evidence in the case was closed, and following arguments to the jury by counsel for the defendant, and counsel for the plaintiff, the defendant addressed a motion to the Honorable Court to direct a verdict in favor of the defendant. The Honorable Court granted said motion, and instructed the jury to return a verdict for the defendant, which was done. Plaintiff duly excepted."

The officer was commanded to replevy "one automobile, Buick coupe, year 1922, Model 22-48, which plaintiff says was owned on April 6, 1922, by James W. Holt, of Medford, in Middlesex County, State of Massachusetts, and stolen on the same day at Somerville, in said Middlesex County. The plaintiff succeeded said Holt in title by reason of being his insurer against theft, perfecting its title thereto by payment of theft insurance." The declaration then recites the original numbers on the car, and the numbers as changed, the color of the body of the car, the kind of lock, and tires. The defendant relies on plaintiff's inability to prove the numbers, the color of the car or kind of tire, as stated in the writ.

We are of opinion that the ground is not well taken. If such defense should be sustained, it would open the way for a wider practice of an evil now too prevalent. A stolen car, if the thief has the time and the skill, is always changed in the very details mentioned. The items referred to might all be removed and leave no distinguishing number, or tire, or lock, and the color even may be changed. If such removal and changes were sufficient under the law to prevent an owner from identifying his property in a suit for its recovery, he would be without a remedy. The law does not so intend. It follows logs sawed into boards and returns them to the owners. *Wingate* v. *Smith*, 20 Maine, 287. If all the numbers had been removed, if the color had been changed, the lock and tires removed, it was still an automobile; the class, the identity, had not been changed, and its ownership, history and identity were open to proof. With regard to the quality or species of the goods, the plaintiff is perhaps bound to prove the fact as laid, but with regard to the number or value of the goods, he may prove less than he charges in his declaration, but he cannot prove more. Chitty on Pleading, Volume 1, Section 378. The words describing the numbers, lock and tires could have been omitted, and the description remain well

within the rule laid down in *Musgrave* v. *Farren,* 92 Maine, 202, for the automobile would then be described with reasonable certainty.

Defendant's counsel in their brief contend further "that the pleader in the matter of description went far beyond what is required by law. Nevertheless, he then and there assumed the burden of proving each and every fact so alleged, and his failure so to do would be fatal to his case," and cite *Commonwealth* v. *Lloyd Wellington,* 7 Allen, 299, in support of their position. The case cited was an indictment for wrongfully desecrating and disfiguring a public burying ground. The burial ground was described in the indictment by "metes and bounds with minuteness and particularity." Evidence was introduced upon the trial tending to show that there had been many interments in some parts of the lot of land thus described. The defendant contended that this evidence was insufficient to show that the whole of the lot had ever been used or occupied or appropriated as a burying ground; that there was a fatal variance between the fact proved and the allegation in the indictment, and for that reason a verdict ought not to be rendered against him. The court held substantially as claimed under the rule that "whenever a person or thing necessary to be mentioned in an indictment is described with unnecessary particularity, all the circumstances of the description must be proved; *for they are essential to its identity.*" In support of its conclusion the court cites *United States* v. *Howard,* 3 Sumner, 14, where the court say, "that the rule seems to be fully established, both in civil and criminal cases, with respect to what statements in the declaration or indictment are necessary to be proved, that if the whole of the statement can be stricken out without destroying the accusation and charge in the one case, and the plaintiff's cause of action in the other, it is not necessary to prove the particular allegation; but if the whole cannot be stricken out without getting rid of a part essential to the cause of action, then, though the averment be more particular than it need have been, the whole must be proved, or the action or indictment cannot be maintained." That finding was made sixty years since, based upon a then long standing rule of practice and procedure, but even then courts had begun to relax the stringency of the rule in civil cases at least, and were seeking a way to reach the issue in a case, stripped in some measure of technicalities that hindered and delayed the course of justice. The rule indeed was not itself so inflexible as counsel contends, for it excepted

cases where, if surplusage and unnecessary allegations could be eliminated without destroying the plaintiff's right of action in a civil case, the action could be maintained.

The defendant in his brief statement pleaded property in himself in these words,—"that the one certain automobile taken by the plaintiff under and by virtue of the writ in this case, was the property of the defendant, said Frank E. Stevens, and not the property of the plaintiff." That by so pleading he waived his right now to question the matter of description is well settled.

As to description of the property. "The declaration in this action, which is local, requires certainty in the description of the place where the distress was taken; and the description, number and value of the goods also must be stated with certainty although the same strictness does not prevail as formerly." Chitty on Pleading, 16th Ed., Volume 1, Section 185. A declaration defective in these particulars is cured "by an avowry justifying the taking of the said goods and chattels in the said close," &c., &c., note to the above, citing among other cases *Gardner* v. *Lane*, 9 Allen, 492, 500; and *Pomeroy* v. *Trimper*, 8 Allen, 398. "What will constitute a sufficient description of the property in a complaint in replevin must in a great measure depend upon the particular facts of each case, but, generally speaking, it must be described with a reasonable degree of certainty, sufficiently definite to enable the property to be positively identified." Ency. Pleading & Practice, Page 534. In *Stevens* v. *Osman*, 1 Mich., 92, it was held that "defects in Writ of Replevin must be taken advantage of by special demurrer, as the description would be held sufficient after verdict; it would also be deemed sufficient if the defendant had avowed or pleaded property in himself, as there would then be no controversy between the parties as to what the goods were." "The strictness of the old rule is now somewhat modified, and it is held that certainty to a general intent is sufficient, particularly after verdict." Morris on Replevin, 131; note to *Stevens* v. *Osman*, 1 Mich., 92, supra; 23 R. C. L., 930. If the defendant pleads property in himself, any defect in the description is waived, as there would then be no controversy between the parties as to what the goods were." 23 R. C. L., 930, Section 98. If a subject comprehends multiplicity of matter, and a great variety of facts, general pleading is allowed, in order to avoid prolixity. And even though a plea is meager in its statement of facts, if no exception is made, it may be sufficient to

require the court to submit to the jury the issue sought to be raised by it. The usual test as to the declaration is that it should state the cause of action with such a reasonable degree of certainty as will give fair notice to the defendant of the character of the claim or demand made against him so as to enable him to prepare for his defense. 21 R. C. L., 9, Note 6. Allegations, although not strictly necessary to the complaint, but tending more fully to state the claim, will not be expunged. In general, a motion is the proper method to get rid of immaterial, redundant, or superfluous matter; but if a plaintiff avers more than is necessary, and fails to sustain immaterial and redundant averments, but does prove all the material facts on which a right to relief is based, and no motion to correct the pleading has been made, it will be treated as sufficient, and the surplus allegations disregarded. And this is the rule especially after verdict. Id. Paragraph 18 and Note. In an action of replevin, the writ must specify the particular property to be replevied, and describe it with a reasonable degree of certainty, in order that the property may be identified and delivered to the plaintiff. *Musgrave* v. *Farren,* 92 Maine, 202, supra. In *Litchman et al.* v. *Potter,* 116 Mass., 371, the officer was directed to replevy the contents of a grocery store, and upon the question of description of the property to be replevied the court say:—"The goods ordinarily contained in such a store are too numerous and varied to be enumerated in detail. The store is pointed out, and the goods are further described as now taken and held by a deputy sheriff as the property of another. This is a sufficient description to inform the officer and to furnish the means of clearly identifying the property; and that it was so identified appears by the agreement of the parties as to the value." "The underlying principle as shown by the cases is: That if trial may be had on the merits of the case, and the defects in the pleading may be amended or cured by subsequent pleas or proceedings, the action should not be dismissed." *Littlefield* v. *Railroad Co.,* 104 Maine, 132; Cyc., Volume 14, Pages 440-1.

FIRST EXCEPTION:

An automobile had been stolen. Every person connected with the case knew that it was the automobile replevied. Tarshis had pleaded guilty to having received the stolen automobile. On the stand, on

being questioned by plaintiff's counsel, who had called him, he denied having so pleaded. The plaintiff sought to show that he had stated differently at the former trial, and offered to prove the same by the introduction of the record. The court excluded the testimony, and the plaintiff excepted. While it is well settled that a party calling a witness may not impeach his general credibility, it is equally well settled that a party calling a witness who misstates a particular fact, is not precluded from showing by other competent evidence the truth of the fact, in contradiction to the testimony of his own witness. *Morrell* v. *Kimball*, 1 Maine, 324; *Hall* v. *Houghton*, 37 Maine, 411; *Brown* v. *Osgood*, 25 Maine, 511; *State* v. *Knight*, 43 Maine, 135, citing *Bradley* v. *Ricardo*, 8 Bing., 220. The cases are practically in accord in holding that a party who is surprised by unfavorable testimony given by his own witness may interrogate such witness as to previous inconsistent statements made by him. 28 R. C. L., 642, 644. And even in a criminal prosecution the government for the purpose of contradicting a witness called by it, at the trial of an indictment, may prove that he testified differently before the grand jury. *Com.* v. *Chance*, 174 Mass., 245. The rule restated in *State* v. *Sanborn*, 120 Maine, 170, is applicable in the instant case, "that he who calls a witness may not by general evidence impeach his competency or credibility, if his testimony be disappointing. But this rule never contemplated that the truth should be shut out and justice prevented. It does not prevent the showing by other witnesses, or by the direct or redirect examination, that the facts are otherwise than the witness testified to. There is no principle of law or of justice which prevents one from availing himself of the truth of his case, although the credit of his own witness may thereby be impeached." This exception is sustained.

2. Exception to directing a verdict for defendant. The plaintiff introduced Mr. Holt, the former owner, who testified to several distinguishing marks on the automobile and who positively identified the same as the automobile stolen while owned by him. This testimony was not shaken, but rather strengthened, by a severe cross-examination, and no testimony was introduced in contradiction to the important facts testified to by him. The defendant did not testify, and introduced but one witness, Mr. Stubbs, who testified to but one fact of the many testified to by the plaintiff and his witnesses.

It is very evident, therefore, that there was testimony which should have been passed upon by the jury aside from that attempted to be shown by the witness Tarshis, and that a contrary verdict based on the same would stand. *Young* v. *Chandler*, 102 Maine, 253; *Johnson* v. *New York, New Haven & Hartford R. R.*, 111 Maine, 265.

In view of the authorities, and in further view of the manifest injustice entailed to hold otherwise, the second exception is sustained.

The entry will be,

Exceptions sustained.
Verdict set aside

G. J. BOYLE *vs.* PATRICK WARD et al.

Cumberland. Opinion January 8, 1924.

When a party has promised to pay two sums, and is sued for nonpayment of one of such sums it is not reversible error to exclude evidence that he has paid the other.

In the instant case it was shown that at some previous time, date not proved, the plaintiff had wired the defendant,—"Horses I shipped were good work horses." It cannot be assumed as a matter of law that in the offer and acceptance the parties intended to refer to the telegram of unknown date as a warranty. This was a question of fact for the jury. The finding upon this fact is not manifestly erroneous.

An offer to prove that the defendants had paid the freight was properly excluded.

On exceptions and motion. An action of assumpsit to recover eight hundred dollars which plaintiff alleged defendant promised to pay for a car-load of horses owned by plaintiff but in the possession of the Grand Trunk Railway Company at Yarmouth Junction. The defendant pleaded a breach of warranty. The case was tried before a jury and a verdict for $822.27 was rendered for plaintiff. The defendant offered a check given in payment of the freight on the

car from Wyoming to Yarmouth Junction, which was excluded by the presiding Justice and defendant excepted, and also filed a general motion for a new trial. Motion and exceptions overruled.

The case is sufficiently stated in the opinion.

Verrill, Hale, Booth & Ives, for plaintiff.

Howard Davies, for defendant.

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

DEASY, J. The defendants, horse dealers at Yarmouth, Maine, by telegram dated September 20, 1921, ordered the plaintiff, a horse dealer at Gillette, Wyoming, to buy for them a car-load of horses. The kind of horses desired was specified in the order. In due time the plaintiff shipped a car-load of horses to the defendants and drew a draft upon them for the price, $1,625.

The defendants refused to pay for, or receive, the horses, for the alleged reason that they were not of the kind and quality ordered. They left the animals in possession of the railroad company. Whether the horses did or did not conform to the order is not in question now, for a new and substituted contract was made which is the subject of this suit.

The defendants having made some examination of the horses in the hands of the railroad company, on October 8th, telegraphed the plaintiff as follows:

"Condition of horses at present time one lame behind two lame in front several with cuts and bruises ten tails chewed off four very wild mostly all shipped bad several too small for this country I will give eight hundred dollars pay freight and expenses for them would prefer to sell them for your account and give my time free of charge you collect the damage from the railroad answer."

After some further telegraphic correspondence, not changing the situation, the plaintiff on October 11, 1921, accepted the offer contained in the above quoted telegram.

The defendants not having paid the $800, promised, and having refused to make payment, this suit was brought to recover said sum. A verdict was rendered for the plaintiff and the defendants bring the case forward on motion and exceptions.

The defendants' ground for refusing to pay the agreed price of $800 is as follows: At some time (the date does not appear) the plaintiff sent a telegram to the defendants in which he used the sentence, "Horses I shipped were good work horses." The defendants say that this language constitutes a warranty that the horses were good work horses; that in making the offer of October 8 they relied, and were entitled to rely, upon this guaranty; that the horses were not good work horses, and therefore that they, the defendants, are justified in refusing payment. In the offer and acceptance of October 8th and 11th, the parties may have intended to refer to the telegram of unknown date and to adopt the language contained in it as a warranty. But it cannot be assumed as a matter of law that this is true. This issue was apparently submitted to a jury together with other issues of fact, and the verdict was in favor of the plaintiff. No manifest error appears. The $800 offered and accepted was about $34 each, plus freight, for the horses. The jury may well have believed that in a sale and purchase at that price no warranty was intended, but that both parties contemplated the sale of the horses as they were, with all their imperfections on their heads.

The motion must be overruled.

The defendants offered to prove by receipts that they had paid the freight. To the exclusion of this testimony they excepted. Their promise was to pay $800, plus freight. When a defendant has promised to pay two sums, and is sued for nonpayment of one, it is immaterial that he has paid the other.

Motion and exceptions overruled.

INHABITANTS OF BROWNVILLE

vs.

U. S. PEGWOOD AND SHANK COMPANY.

Piscataquis. Opinion January 15, 1924.

A town has no power to abate a tax. A vote by the town to exempt from taxation certain property is null and void. Assessors may grant reasonable abatements but their acts are entirely independent of the town, not being subject to the direction and control of the municipality in the discharge of their duties. Minor irregularities in mere procedure will not prevent a recovery of a tax by a town.

Under an article in the warrant for an annual town meeting reading, "To choose three assessors," in accordance with R. S., Chap. 4, Sec. 12; the selectmen who issue the warrant cannot thus circumscribe the action of the voters.

When the party taxed is liable to taxation in the plaintiff town and the assessors have proper authority and jurisdiction which they do not exceed, minor irregularities in mere procedure, which do not increase the taxpayer's share of the public burden, nor occasion him any other loss, will not prevent a recovery of the tax in an action by the town therefor.

It is a constant and well-established practice to admit parol testimony to identify persons or property named in a deed or record.

In defense to an action at law by a town to recover taxes, objections relating to alleged irregularities in the qualification of the collector of taxes and in the commitment of taxes to him are immaterial. The town in such action proceeds independently of the collector; the latter is not undertaking to execute his warrant.

It must be considered settled that parol evidence is admissible to identify the party taxed notwithstanding error in name. Errors, mistakes and omissions by the assessors do not render the assessment void.

On exceptions. An action of debt to recover taxes assessed against the defendant in the town of Brownville for 1920. The case was heard by the presiding Justice without a jury who found for the plaintiff.

The defendant entered numerous exceptions based upon irregularities in the proceedings, and on a vote of the town to exempt from taxation the property taxed. Exceptions overruled.

The case is sufficiently stated in the opinion.
C. W. & H. M. Hayes, for plaintiff.
Hudson & Hudson, for defendant.

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

MORRILL, J. This is an action to recover the amount of taxes assessed in the town of Brownville against the defendant for the year 1920; it was heard by the presiding Justice without the intervention of a jury. The case is presented upon defendant's bill of exceptions, twenty in number, which are of the most technical character, and all without merit.

The first exception relates to Article 5 of the warrant for the town meeting of March 22, 1920, which reads: "To choose three assessors." It is urged that, because the warrant did not follow the language of the statute which provides for the choice of "three or more assessors," the voters were deprived of their full legal rights. Not so; the selectmen who issued the warrant could not thus circumscribe the action of the voters; the latter were free to elect as many assessors as they saw fit, and by electing three they indicated the number of their choice. The assessors were legally elected.

We might well overrule all other exceptions, except the last, applying the rule many times stated by this court that when the party taxed is liable to taxation in the plaintiff town and the assessors have proper authority and jurisdiction which they do not exceed, minor irregularities in mere procedure, which do not increase the taxpayer's share of the public burden, nor occasion him any other loss, should not prevent a recovery. *Rockland* v. *Ulmer,* 84 Maine, 503, 508. *Foss* v. *Whitehouse,* 94 Maine, 491, 495. *Inhbts. of Charleston* v. *Lawry,* 89 Maine, 582.

The exceptions, however, may be considered in groups, the same objection being made several times.

Exceptions two, six, ten, fourteen, fifteen and eighteen are based upon the fact that on the town records a lack of uniformity exists in recording the names of certain officials, the record sometimes giving the initials instead of the full given name; objection is raised that plaintiff was allowed to prove orally that the persons so designated were one and the same. But it is a constant and well-established practice to admit parol testimony to identify persons or property

named in a deed or record. *Jay* v. *East Livermore*, 56 Maine, 107, 120. *Andrews* v. *Dyer*, 81 Maine, 104. The defendant can take nothing by these exceptions.

Exceptions three, four and twelve present objections to the sufficiency of the constable's return on the warrant for the town meeting of March 22, 1920. We are unable to perceive the slightest merit in these objections. The return shows that the inhabitants of the plaintiff town were legally and seasonably notified by a duly appointed and qualified constable of the town to assemble at the time and place and for the purposes mentioned in the warrant. In answer to the contention that the return is indefinite, (Exception 12) it need only be said that both dates given as the date of service, are more than seven days before the day of meeting.

Exceptions five, seven, eight, nine and eleven relate to the sufficiency of the official oaths administered to two assessors, the town treasurer and the tax collector elected at the annual election of 1920, and the selectmen elected in 1921. The defendant can take nothing by these exceptions; the record shows that each officer named was duly sworn in open town meeting faithfully to perform the duties of the office to which he had been chosen by the voters of Brownville.

Exceptions fifteen and eighteen also relate to alleged irregularities in the qualification of the collector of taxes and in the commitment of the taxes to him. These objections, even if well founded, are immaterial here and can afford no defense. The collector is not undertaking to execute his warrant; the town is proceeding independently of him. *Rockland* v. *Ulmer*, supra. *Inhbts. of Verona* v. *Bridges*, 98 Maine, 491. *Inhbts. of Greenville* v. *Blair*, 104 Maine, 444.

Exceptions thirteen, sixteen and seventeen raise the question that the record shows that in the valuation book, and in the list of taxes committed to the collector, and in the assessment, the taxes were assessed against the "United States Pegwood & Shank Company" and not against the "U. S. Pegwood & Shank Company"; and defendant contends that the record discloses a fatal variance.

It is undoubtedly true that testimony of the assessors cannot be admitted to contradict their records (*Saco Water Power Co.* v. *Buxton*, 98 Maine, 295, 298), and an assessment cannot be modified or limited aliunde (*Sweetsir* v. *Chandler*, 98 Maine, 145, 152); yet it must be considered settled that parol evidence is admissible to identify the party taxed notwithstanding error in name. *Farnsworth*

Co. v. *Rand,* 65 Maine, 23. *Bath* v. *Reed,* 78 Maine, 283. *Thorndike* v. *Camden,* 82 Maine, 47. Errors, mistakes and omissions by the assessors do not render the assessment void. R. S., Chap. 11, Sec. 31.

Exception nineteen is not pressed. In support of exception twenty and in defense of this action the defendant relies upon a vote passed at an adjourned session of a meeting of the voters of the plaintiff town duly called and held on September 7, 1915, and duly adjourned to September 13, 1915, which follows:

"Voted to abate all taxes that may be assessed on all buildings together with all machinery that may be placed therein for manufacturing purposes and also on all buildings for storing manufactured products that may be erected on land owned by the U. S. Pegwood & Shank Co. on the West Shore of Pleasant River for a period of ten (10) years."

If construed according to the ordinary meaning of the language used, this vote does not grant an exemption from taxation, but an abatement of taxes assessed by an independent body created by law, and charged with the duty of assessing taxes, and authorized to grant reasonable abatements. Assessors are not subject to the direction and control of the municipality; their duties and authority are imposed by law. A town has no power to abate a tax. *Thorndike* v. *Camden,* 82 Maine, 39, 46. *Rockland* v. *Farnsworth,* 93 Maine, 183.

Treating the action of the town as a vote of exemption, as probably intended, it was likewise beyond the power of the town; the law must be considered in this State as settled to that effect. *Brewer Brick Co.* v. *Brewer,* 62 Maine, 62. *Thorndike* v. *Camden,* supra. The element of contract which was present in *Portland* v. *Portland Water Co.,* 67 Maine, 135, relied upon by defendant, and in *Maine Water Co.* v. *Waterville,* 93 Maine, 595, is not present here. The principle established in *Brewer Brick Co.* v. *Brewer* is not affected by those later cases.

Exceptions overruled.

In re MUNICIPAL OFFICERS OF NEWPORT
vs.
MAINE CENTRAL RAILROAD COMPANY.

Penobscot. Opinion January 18, 1924.

A ruling by the Public Utilities Commission to constitute exceptional error must be shown to have been prejudicial to the interest of the excepting party. Where it is claimed that a later of two statutes in pari materia repeals the former by implication, the later statute must be so broad in its scope and so clear and explicit in its terms as to show it was intended to cover the whole subject matter and to displace the prior statute, or the two must be so clearly repugnant that they cannot stand together.

In the instant case while the Commission may not make the protection of the foolhardy alone the basis of its action, yet inasmuch as it does not expressly appear that the alleged ruling was made the basis of its decision, unless by inference it was necessarily involved therein, it would not appear from the bill of exceptions that the railroad company was prejudiced by this statement.

There was sufficient evidence in the case on which its finding that additional protection was required at the crossing in question may rest, without invoking the broad doctrine excepted to by the railroad company as to the duty of the Public Utilities Commission in such cases.

The Legislation of 1917 found in Chapters 50 and 145 is not repugnant to the provisions of Sec. 73 of Chap. 56, R. S. Nor were they clearly enacted to cover the entire subject of protection of grade crossings, and so displace Sec. 73 of Chap. 56.

On exceptions by defendant. A proceeding by petition of the Municipal Officers of the town of Newport to the Public Utilities Commission under the provisions of Sec. 73 of Chap. 56 of the R. S., for the purpose of requiring the Maine Central Railroad Company to maintain better protection to the traveling public at its grade crossing near East Newport, known as Caverly Crossing. A hearing was had before the Commission and it ordered the railroad company to install, maintain and operate continuously an automatic signal of the audible and visible type at said grade crossing.

Counsel for the railroad company entered several exceptions to the rulings of the Commission and the case was certified by the clerk of the Commission to the Chief Justice under Sec. 55, Chap. 55 of the R. S. Exceptions overruled.

The case is fully stated in the opinion.

William H. Mitchell, for the town of Newport.

Charles H. Blatchford and George E. Fogg, for Maine Central Railroad Company.

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

WILSON, J. On April 2d, 1921, the Municipal Officers of the town of Newport, in accordance with the provisions of Sec. 73, Chap. 56, R. S., requested in writing the Maine Central Railroad Co., to erect and maintain gates across a certain highway in said town at a point locally known as Caverly Crossing, where the tracks of the Railroad Company cross the highway at grade, which request the Railroad Company refused. Whereupon the Municipal Officers appealed to the Public Utilities Commission.

The Commission after due notice and hearing found that public safety required an automatic signal to be maintained at this crossing and ordered the Railroad Company to install one of the visible and audible type.

To certain rulings and the finding of the Commission the Railroad Company filed exceptions, which were duly allowed and certified to the Chief Justice of this court under the provisions of Sec. 55 of Chap. 55, R. S.

The validity of the first, second, third and sixth exceptions, without setting them forth in terms, depends upon the authority of the Municipal Officers to proceed under Sec. 73 of Chap. 56, R. S., in case of a "fair view crossing" as defined in Sec. 2 of Chap. 145, Public Laws 1917, and may be disposed of as one exception.

The fourth and fifth exceptions relate to an alleged ruling by the Commission that it was its duty to provide protection at grade crossings, "even to the extent of protecting, so far as may be, the careless and foolish man from the effects of his own folly"; the contention of the Railroad Company being in substance that the finding of the Commission upon the evidence in this case, that the public

safety required the installation and maintenance of automatic signals at this crossing must have been based upon an improper conception of its duty in such cases, and was, therefore, unwarranted in law and hence confiscatory.

While the Commission in its findings did use the above quoted language, the bill of exceptions does not, we think, disclose that its final conclusion was based upon any such broad conception of its duty.

It may well be that if the laws enacted to prevent accidents at grade crossings were enforced, and travelers on the highways at all times used due care, there would be no need of gates or flagmen, or even automatic signals at what are termed "fair view crossings."

The Public Utilities Commission, however, in determining what public safety requires in the way of protection at grade crossings, while it may not make the protection of the foolhardy alone the basis of its action, may properly take into consideration the frailties of human nature, as well as the volume of travel, and the existing physical conditions surrounding the crossing, and may consider also the consequences which may flow from the negligent conduct of the imprudent, a certain degree of which, experience teaches, is quite as likely to enter into every "crossing accident" as the physical or inanimate conditions surrounding the crossing. Again, public safety at railroad crossings involves more than that of the drivers of motor cars. It includes as well, not only passengers therein and other travelers upon the highway, including those of tender years and immature judgment, but also those traveling by rail as well.

The alleged ruling of the Commission as to the scope of its duty was not expressly made the basis of its findings. Unless, then, by inference it was necessarily involved therein, it would not appear from the bill of exceptions that the Railroad Company was in any way prejudiced by the alleged ruling.

We think there was sufficient evidence in the case on which its finding, that additional protection was required at this crossing, may rest without invoking the broad doctrine, excepted to by the Railroad Company, as to its duty in such cases. The exceptions on this branch of the case must, therefore, be overruled. *Kilpatrick* v. *Hall*, 67 Maine, 543; *Look* v. *Norton*, 94 Maine, 547.

In support of its other exceptions, counsel for the Railroad Company strenuously urge that the Municipal Officers of towns may no

longer initiate proceedings under Sec. 73, Chap. 56, R. S., at least in the case of "fair view crossings," as defined in Sec. 2 of Chap. 145, Public Laws, 1917, within which definition, it is admitted, that the crossing here in question comes.

For a long time prior to 1917, the only method of compelling railroad companies to furnish protection at grade crossings was under Sec. 73 of Chap. 56, R. S. In 1917, in view of the increased use of the improved highways of the State by motor cars, and the alarming increase in so called "crossing accidents" in which automobiles were involved, the Legislature enacted Chapter 50, and the emergency legislation found in Chapter 145 of the Public Laws of that year.

Chapter 50 required the erection of warning signs along the highways at suitable distances on each side of grade crossings, except under certain conditions enumerated in the Statute, and regulated the speed of motor cars, after passing such warning signs, on approaching a crossing.

Chapter 145, entitled, "An Act to require Automatic Signals and the Removal of Obstructions at Certain Grade Crossings not Protected by Gates or Flagmen," after authorizing the Public Utilities Commission to require after due notice and hearing automatic signals to be installed at any crossing, then defined (Section 2) what are termed "fair view crossings," viz.: Crossings where travelers on the highway on either side of the crossing for the distance of one hundred and fifty feet can have a fair and continuous view of the railroad track each way for a distance of three hundred feet. By the provisions of Section 9 of this Act, the Public Utilities Commission were directed to proceed at once and within sixty days to make in effect a survey of all the grade crossings within the State, not protected by gates or flagmen, and designate such crossings as in their opinion required automatic signals or some other form of protection; and give to the railroad companies an opportunity to show cause at a public hearing why such protection should not be given.

To relieve the railroad companies of too great a burden resulting from such a summary proceeding, it was further provided that the installation of such protection might be extended over a period of four years, or even a longer period, and should not apply to a crossing conforming to, or caused by the railroad company to conform to, the

requirements of a "fair view crossing" as defined in Section 2 of the Act, at least so long as a "fair view" was maintained.

Though relating to the same subject matter, the Acts of 1917 do not in express terms repeal or modify the provisions of Sec. 73, Chap. 56, R. S. It is not quite clear on what grounds the Railroad Company in the case at bar bases its contention that the municipal officers of towns no longer have any authority to initiate proceedings for protection at any crossing within the limits of their respective towns.

As we understand the contention of counsel, it is not claimed that the Acts of 1917 are repugnant to or in conflict with Sec. 73 of Chap. 56, or by implication repeal it; but that by the later Acts the Legislature intended to cover the whole subject matter of protection at grade crossings and, therefore, they supersede Section 73 and control, at least, so far as "fair view crossings" are concerned. We think this contention cannot be sustained.

There can be no difference in effect between a statute which by implication supersedes or controls and one which repeals. When statutes relating to the same subject matter are under construction and it is claimed that the one later in point of enactment repeals the former by implication, either because it was intended to supersede it, or because it is so repugnant to it that they cannot stand together, "the later statute must be so broad in its scope and so clear and explicit in its terms as to show that it was intended to cover the whole subject matter and to displace the prior statute, or the two must be so clearly repugnant and inconsistent that they cannot stand together." Courts will, if possible, give effect to both statutes and will not presume that the Legislature intended a repeal. *Eden* v. *Southwest Harbor*, 108 Maine, 489; Black's Interpretation of Laws, Sec. 53; Endlich on Interpretation, Sec. 210.

As counsel admit, there is no conflict between the prior law and the Acts of 1917. We think it equally clear that the later Acts were not enacted with the view of covering the entire field of safeguarding grade crossings and so supersede all prior legislation on this subject. They were enacted to meet an emergency and secure as speedily as possible protection in some form at all crossings not then adequately protected. Obviously neither prompt nor uniform action could be expected under the provisions of Sec. 73 of Chap. 56 under which the existing conditions had arisen.

The title of Chapter 145, indicating that it was not intended to apply to crossings already adequately protected by gates or flagmen; the fact that no provision appears to have been made for further proceedings in case of changed conditions, and the protection secured under the provisions of Section 9 proved inadequate; and that it was enacted as emergency legislation; all go to show it was not intended to create a complete and exclusive system of providing protection at grade crossings.

Section 9 did not even provide for a public hearing at which those locally interested might be heard as to the need and the kind of protection required at any particular grade crossing. The Commission was to arrive at its conclusions without even an *ex parte* hearing, and was then directed to notify the railroad companies of its conclusions and order a public hearing at which the railroad companies might then show cause why the protection determined upon should not be given. Such at least are its terms as bearing upon the legislative intent.

There is apparent reason why "fair view crossings" should not have been made subject to such summary proceedings as are provided for in Section 9 of this Act; but if the Legislature had intended that such crossings should no longer be subject to the provisions of Sec. 73 of Chap. 56, whenever changed conditions made further protection necessary, we think it would have so provided and not left it to inference.

It is no answer to say that the Commission may upon proceedings under Section 73, at once abrogate the legislative fiat contained in Chapter 145 as to crossings at which a "fair view" can be had. The purpose of the exception of such crossings from the provisions of Section 9, which exception is based on an arbitrary assumption that a "fair view" will under ordinary conditions be sufficient protection, was, we think, rather to lighten the burden imposed upon the railroad companies by this Act, where it could presumably be done with a reasonable degree of security to the traveling public, and is not to be considered the final word as to the sufficiency of such protection under all circumstances. We cannot assume that the Commission would act in case of an appeal under Section 73, except upon sufficient grounds.

It is readily conceivable that conditions from time to time might arise, even in the case of "fair view crossings,"—by reason of

increase in traffic and the location of obstructions just beyond the "fair view" limit fixed by the statute, the angle at which the highway and the railroad intersect, the grade of the approaches to the crossing, or other unusual conditions, where as in the case at bar, the Public Utilities Commission, after hearing all parties interested, and perhaps viewing the locus, might properly find that the public safety required additional safeguards over that afforded by a "fair view" or even by automatic signals.

We, therefore, see no impropriety or inconsistency with the purpose and terms of the Acts of 1917 in leaving with the local authorities in whom it has been vested for more than sixty years, the power of initiating proceedings for better protection at all grade crossings within their respective towns.

The exceptions are overruled.
The Clerk of this Court will so certify to the Clerk of the Public Utilities Commission.

PUBLIC UTILITIES COMMISSION

vs.

CITY OF LEWISTON WATER COMMISSIONERS.

Androscoggin. Opinion January 19, 1924.

The findings of the Public Utilities Commission on questions of fact if based upon any substantial evidence are final, and its findings on questions of law only are subject to review.

In the instant case the single issue is whether the required extension is financially expedient, taking into consideration the estimated cost on the one hand and the estimated revenue on the other. This is purely an economic and not a legal question.

A case might be conceived where the disproportion of revenue to cost might be so fixedly great, with no prospect of betterment in the future, as to make an order of extension confiscatory in its nature and therefore open to relief from the court. But this is not such a case.

The questions involved in this case are peculiarly within the study, experience and good judgment of this Commission which was established by the Legislature to pass upon these and kindred questions. The judgment of the court in such matters is not to be substituted for that of the Commission.

On exceptions. This is a complaint against the city of Lewiston instituted before the Public Utilities Commission by certain residents of that city for the purpose of requiring that city to extend its water service to Leavitt Avenue and Lemont Avenue, two comparatively new and parallel streets about two hundred feet apart leading off from East Avenue in said city.

The Water Commissioners of the city refused to extend the service upon request of some of the residents on said streets, basing such refusal upon the claim that the additional revenue that would result from such proposed extension of service would not warrant the necessary expenditure. A hearing was held on November 1, 1922, and the Commission ordered the city of Lewiston to extend its water mains along said streets and render service to all persons living thereon. On petition of the city the case was reopened and a second hearing held on June 12, 1923 and the previous order and decree were confirmed. Counsel for the city entered exceptions. Exceptions overruled.

The case is stated in the opinion.

Constance E. L. Gastonguay, pro se, *and Olivier Cloutier,* pro se.

Frank A. Morey, Louis J. Brann and William J. Tackaberry, City Solicitor, for the city of Lewiston.

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

CORNISH, C. J. This case comes before the Law Court on exceptions to two orders and decrees of the Public Utilities Commission dated respectively December 9, 1922, and June 15, 1923. These decrees pertain to the same matter and require the city of Lewiston to extend its water mains along Leavitt Avenue and Lemont Avenue in said city and to render service to all persons living upon said avenues desiring such service.

This court is not an Appellate Court from the Public Utilities Commission, to retry questions of fact already tried and decided by that tribunal. The only power of review relates to questions of law.

"Questions of law may be raised by alleging exceptions to the rulings of the Commission on an agreed statement of facts, or on facts found by the Commission." R. S., Chap. 55; Public Laws, 1917, Chap. 28. "Facts found by the Commission are not open to question in this Court unless the Commission should find facts to exist without any substantial evidence to support them, when such finding would be open to exceptions as being unwarranted in law." *Hamilton* v. *Caribou Water, Light and Power Company*, 121 Maine, 422, a case which determines the power of this court on review in this class of cases and establishes the practice in such proceedings.

The single issue in the case at bar is whether the required extension is financially expedient, taking into consideration the estimated cost on the one hand and the estimated revenue on the other. This is purely an economic, not a legal question. Cases might be conceived perhaps where the disproportion of revenue to cost might be so fixedly great, with no prospect of betterment in the future, as to make an order of extension confiscatory in its nature and therefore open to relief from the court. But this is not such a case. The proposed extension reaches land partially developed and sparsely occupied by dwellings, eleven in all, so that at the present time the income upon investment would be small. But what the future may bring in the way of new houses, whether the water system extension should precede further building or further building should precede the extension in that particular locality on the edge of a populous and growing city owning its own water system, are questions peculiarly within the study, experience and good judgment of this Commission, which was established by the Legislature to pass upon these and kindred questions. The judgment of the court in such matters is not to be substituted for that of the Commission. "It was not intended that the Courts should interfere with the Commissions or review their determinations further than is necessary to keep them within the law and protect the constitutional rights of the corporations over which they were given control." People ex rel. *New York & Queens Gas Co.* v. *McCall*, 219 N. Y., 84, A. C. 1916 E., 1042.

The action of the Commission in the present case was neither arbitrary nor capricious. The first hearing was held on November 1, 1922, was duly attended by the Commission's staff of experts, and the order for extension was made on December 9, 1922. On petition

of the city the case was reopened and a second hearing had on June 12, 1923. At the second hearing nothing was adduced in the judgment of the Commission to reverse or modify the previous order and therefore on June 15, 1923, the previous order and decree were confirmed by supplemental order except as to certain minor details. We see no legal reason why this order and decree so far as extension are concerned should be disturbed.

The date fixed for beginning the work was not later than July 1, 1923. That must of course now be modified by the Commission after due notice to the parties. It is proper to say, however, that the delay has not been caused by this court. Exceptions were not filed with the Commission until July 12, 1923, copies of proceedings not filed in court until September 13, 1923, and brief for the city until December 11, 1923. The clerk of the Law Court will certify this decision to the clerk of the Public Utilities Commission.

Exceptions overruled with costs.

STATE OF MAINE *vs.* ERNEST BURGESS, App't.

Kennebec. Opinion January 18, 1924.

When an offense consists of a series of acts or a habit of life, the complaint or indictment may charge the offense in general terms, and the particular acts which establish the guilt of the party need not be stated.

Being wanton and lascivious in speech and behavior is made a distinct offense under R. S., Chap. 143, Sec. 6, and the words by which the offense is created and defined are fully descriptive of it.

On exceptions. The respondent was arrested on a warrant issued on a complaint charging him as being "a person wanton and lascivious in speech and behavior." Counsel for the respondent filed a general demurrer which was overruled and the respondent found guilty. The respondent entered exceptions. Counsel for the State filed a motion that the exceptions be adjudged frivolous and intended for delay which was granted and the case was transmitted to the Chief Justice under Sec. 55, Chap. 82, R. S. Exceptions overruled.

The case is fully stated in the opinion.

Walter M. Sanborn, County Attorney, for the State.

Frank Plumstead, for the respondent.

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

CORNISH, C. J. The complaint and warrant in this case allege (omitting formal parts) that, "Ernest Burgess of said Oakland in said County, on the second day of August, 1923, at said Oakland was a person wanton and lascivious in speech and behavior, against the peace of the State and contrary to the statute in such case made and provided."

The respondent in the Superior Court filed a general demurrer which was overruled by the presiding Justice and on exceptions to this ruling the case is before the Law Court.

The statute alleged to be violated and under which this complaint is brought, R. S., Chap. 143, Sec. 6, provides for the imprisonment for a term not exceeding ninety days of various classes of offenders, including rogues, vagabonds, beggars, jugglers, common pipers, fiddlers, runaways, drunkards, night walkers, railers, brawlers and pilferers; "persons wanton or lascivious in speech or behavior" and various others. This is an old statute, somewhat quaint in its phraseology, and has come down in substantially the same form through all the revisions since the establishment of our State. In R. S., 1821, Chap. 111, Sec. 5, this specific clause reads: "wanton and lascivious persons in speech, conduct or behavior." In fact this statute was copied from the old Massachusetts Statute of March 26, 1788.

It is the contention of the respondent that the crime is inadequately set forth in this complaint in that the words and acts which constituted the alleged wantonness and lasciviousness on his part should have been specifically set forth. Such is not the rule of pleading in this class of offenses, where it is the common practice and not the particular words or acts which constitute the crime alleged. It may and doubtless does become necessary to prove the doing of particular acts and the utterance of certain words of a wanton and lascivious nature in order to make out the statutory offense, but these are merely evidence of the general charge and need not be alleged in the complaint. *Commonwealth* v. *Pray*, 13 Pick., 359. Or as well expressed in a head note in *State* v. *Collins*, 48 Maine, 217, "When an offense consists of a series of acts or a habit of life, the indictment may charge the offense in general terms, and the particular acts which establish the guilt of the party need not be stated."

Precedents illustrating this rule are at hand. Thus in case of "a common seller of intoxicating liquors," *Commonwealth* v. *Pray*, 13 Pick., 359, for which a form in general language is prescribed in this State, R. S., Chap. 127, Sec. 54; "A common railer and brawler," under the very statute now under consideration, *Stratton* v. *Commonwealth*, 10 Met., 217, both of which cases are cited and quoted in *Moulton* v. *Scully*, 111 Maine, 428 at 444; "A common drunkard," *Commonwealth* v. *Boon*, 2 Gray, 74; and in *Commonwealth* v. *Parker*, 4 Allen, 313, a case directly in point where the charge was that the respondent was "a lewd, wanton and lascivious person in speech and behavior," that language was held sufficient in the complaint,

and the court say: "It is difficult and perhaps impossible to describe the matter charged against the defendant in more definite or intelligible form than it is in the complaint." (See also Bishop Directions and Forms, Section 157).

The same may be said of the charge in the complaint under consideration. Being wanton and lascivious in speech and behavior is made a distinct offense under our statute, and the words by which the offense is created and defined are fully descriptive of it. They are therefore technically sufficient, and a party can well be charged in the words of the statute. They meet all the requirements of criminal pleading, in that they appraise the respondent of the precise nature of the charge against him; they enable the court to determine whether the facts constitute an offense and to render proper judgment thereon; and the judgment so rendered is a bar to further prosecution for the same offense. *Commonwealth* v. *Pray*, supra. Nothing more is required.

Exceptions overruled.
Judgment for the State.

ANNIE M. LOWE et als. *vs.* CHARLES M. BROWN.

Franklin. Opinion January 21, 1924.

In a real action, under a plea of nul disseizin, the plaintiff prevails upon proof prima facie of a title, not necessarily good against the world, but good against the tenant, unless as between himself and the plaintiff the tenant shows a better title. Rents and profits must be claimed in the writ.

In this case the source from which the defendant insists that, as between himself and the plaintiffs, he shows a better title to the property is a recorded deed from one John B. Staples to the defendant and his father, dated fourteen years prior to the date of the deed which is the starting point of the plaintiff. The deed, being warranty in form, raises a presumption of seizin and ownership. There is intimation, but not evidence, that defendant conveyed his interest to his father, because the latter in subsequently deeding the same interest to the defendant, so recites. Defendant's title and seizin and right to be in possession as owner of the whole are not otherwise in the record. But if it were assumed

that upon searching in the appropriate registries of deeds of probate, there would be found the missing links, which, fitting to other links of the chain, would bring to this defendant and leave in him the title to the yet remaining land that he sets up, still there would be nothing indicative that that land concerns this controversy.

On report. A real action demanding certain real estate in Carthage. Defendant pleaded the general issue and disclaimed to all the land described in the writ except a strip eight rods wide and as to that pleaded nul disseizin. The case was begun before a jury and at the conclusion of the evidence, by agreement of the parties, it was withdrawn from the jury and reported to the Law Court for final determination upon questions of both fact and law. Judgment for the plaintiffs.

The case is fully stated in the opinion.

Frank A. Morey, for plaintiff.

Frank W. Butler, for defendant.

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

DUNN, J. Real action; the land demanded being a single lot in Carthage. Defendant disclaimed as to all, except a strip eight rods in width in the northeastern part with regard to which he pleaded nul disseizin, and issue was joined.

Plaintiff and defendant assenting, the case was withdrawn from the jury, when the evidence was in, and reported upon the stipulation that this court, drawing the same inferences as a jury might, should render such a judgment as by law the parties are entitled to have entered.

In the year 1899 one David T. Jones quit-claimed to Hewitt M. Lowe by deed embracing in its description land corresponding to that the title to which is the point in contest, the identity of the property therefore being supposed. *Rand* v. *Skillin*, 63 Maine, 103; *May* v. *Labbe*, 112 Maine, 209. The deed was duly recorded and under it Lowe actually and exclusively occupied. His occupancy, however, seems never to have been really of the disputed strip. But his seizin being by entry under a claim of title in fee, it must be deemed to have extended to the whole parcel surrounded by the calls of the

deed, for, in such a situation, entry on a part is entry on the whole. Stearns Real Actions, 38; *Banton* v. *Herrick*, 101 Maine, 134, *Hornblower* v. *Banton*, 103 Maine, 375; *Proprietors Kennebec Purchase* v. *Springer*, 4 Mass., 416; *Bellis* v. *Bellis*, 122 Mass., 414.

Mr. Lowe died intestate. The descent of his estate, of which this land was, was cast by the statute of descents and distributions on these plaintiffs, one being his widow and the others his only two children.

The deed to Mr. Lowe, his possession with the accompanying claim of ownership in virtue of it (*Tebbetts* v. *Estes*, 52 Maine, 566; *Butler* v. *Taylor*, 86 Maine, 16; *Tibbetts* v. *Holway*, 119 Maine, 90; *Anderton* v. *Watkins*, 122 Maine, 346), and the showing of the succeeding in title sustain the contention of the plaintiffs, prima facie. They may not have a true title, what Judge Peters styled "A title good against the world" (*Chandler* v. *Wilson*, 77 Maine, 76), but they have a title good against the tenant, unless he shall show that he had a right to disturb it.

The source from which this defendant insists that he derives, and as between himself and these plaintiffs shows, a better title is a recorded deed from John B. Staples to the defendant and his father, dating into earlier history by some fourteen years than does the deed which is the starting-point of the other side. The deed, being warranty in form, raises a presumption of seizin and ownership. *Rand* v. *Skillin*, supra; *May* v. *Labbe*, supra. There is intimation, but not evidence, that defendant conveyed his interest to his father, because the latter, in subsequently deeding the same interest to the defendant, so recites. Defendant's title and seizin and right to be in possession as owner of the whole are not otherwise in the record. But if it were assumed, having reference to the attitude of opposing counsel, in the furtherance of right, that upon searching in the appropriate registries of deeds and probate, there would be found the missing links, which, fitting to other links of the chain, would bring to this defendant and leave in him the title to the yet remaining land that he sets up, still there would be nothing indicative that that land concerns this controversy. The north, the east, and the south calls in the Staples deed are not of particularly essential moment. The other is, "West by land of Orville Judkins," and the factual question as to the location of that divisional line is one on which the importance of the defendant's underlying assertion depends.

Tebbetts v. *Estes*, supra. But no light whatever is shed by the evidence upon where the land of the defendant runs to meet that of Mr. Judkins. If it be said that it was not doubted but the land described in the defendant's deed overlapped that in the plaintiffs' deed the statement would be only negative and entirely inadequate.

Rents and profits are not considered in this decision. They were not claimed in the writ. *Larrabee* v. *Lumbert*, 36 Maine, 440. And to regard the writ as amended in such behalf, the case being on report, would not better the position, it being uncertain in the record whether the defendant cut certain trees into logs and whether he took the logs away.

The finding must be that, as against the tenant, the title to the land was in the plaintiffs, and that the defendant did disseize them.

Judgment for plaintiffs.

CLARENCE B. RUMERY, Administrator

CHARLES H. LEIGHTON'S ESTATE, Excepter.

York. Opinion January 21, 1924.

If an executor dies before an account of his administration has been settled, it becomes the duty of the representative of his own estate to account. All parties in interest are entitled to be heard concerning the allowance and settlement of an account.

In this case the executor of a dead executrix, by way of accounting in behalf of the latter, stated that she received nothing and paid nothing. This excepter, as a party in interest, was privileged to inquire and be heard concerning the account. Since he was denied that right, the exception which he reserved because of the denial, is entitled to be upheld.

On exceptions. Charles H. Leighton of Biddeford died testate in June, 1897, and his widow, Christiana D. Leighton, was appointed executrix and accepted the trust. Twenty-three years later the

widow died testate without having filed any account as executrix of the will of her husband. Clarence B. Rumery was appointed administrator with the will annexed of the estate of Charles H. Leighton, the husband. This administrator cited the executor of the will of the widow to court to show what she had done in the settlement of her husband's estate. The executor of the estate of the widow filed an account setting out that nothing was received by the widow as executrix and nothing paid out by her, which account was allowed in the Probate Court. On appeal the Supreme Court of Probate ruled it incompetent for the appellant to introduce evidence tending to contradict the account as it was filed and allowed below. Exceptions sustained.

The case is stated very fully in the opinion.

Clarence B. Rumery, for the administrator of the estate of Charles H. Leighton.

Emery & Whitehouse, and Orestes T. Doe, for the executor of the estate of Christiana D. Leighton.

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

DUNN, J. The issues of this case are neither numerous nor complex. The single point concerned is, whether one in interest should have been heard to say that an account, as submitted by the executor of a deceased executrix, was not full and accurate. And the answer, once the relevant facts are stated, is not far to seek.

Mr. Charles H. Leighton, a Biddeford man, died in June, 1897. Two months later his widow was appointed executrix of his will. She accepted the trust. But, although she lived about the space of twenty-three years after, she never filed an account in the probate court having jurisdiction of her decedent's estate.

Mrs. Leighton died testate, and an executor of her will entered upon his duties. At the instance of the executrix of a legatee under the husband's will, administration with the will annexed of goods not administered was granted in that case, and that administrator petitioned that Mrs. Leighton's executor be cited to court to settle an account of how she had executed Mr. Leighton's will. Citation issued. In accounting the executor stated that the dead executrix

received nothing and paid nothing. The account was allowed, unchanged in form, and an appeal was made.

What took place in the court of appeal is recited in the bill of exceptions in these words:

"The appellant called witnesses and offered to prove by their testimony that said Christiana D. Leighton as executrix of the estate of said Charles H. Leighton did receive and take into her possession a large amount of personal property that belonged to him and was his property at the time he died, appellant contending that she should be charged in her account with receipt of that property.

"The justice presiding thereupon ruled that as a matter of law it was not competent for the appellant to show such facts as he offered to prove by introducing evidence extrinsic of the account itself as allowed by the probate court; that the evidence offered was irrelevant and inadmissible; and that the witnesses called by the appellant would not be permitted to testify to any facts tending to show receipt by said executrix of any personal property that belonged to said Charles H. Leighton at the time of his death."

The fallacious argument that misled a hurried judge, very likely because of the degree of plausibility with which presentation invested it, was: Mrs. Leighton, in her capacity of executrix, as the probate record shows, never proceeded beyond qualifying. Admitting, for argument's sake, that she received property from her husband's estate, it must necessarily be deduced that she had it in an individual and not in a fiduciary way; hence, responsibility being that of her official bond, the account must be accepted as filed.

Whether that bond may or not meet liability is a topic not now in order for discussion. But the virtual ruling, that the remedy against the bond was exclusive, sheared sensible meaning from the language of legislative enactments and judicial decisions. A highly important and early duty of an executor is to keep and settle true and just accounts. The statute requires that he shall render accounts conformably to the condition of his bond; that notice shall be given before allowing any account; and it provides that the accountant may be inquired of under oath. R. S., Chap. 68, Sec. 57. Where an executor dies, not having finally settled an account of his administration, it devolves upon the representative of his own estate to account in his stead. *Nowell* v. *Nowell*, 2 Maine, 75; *Cook* v. *Titcomb*, 115 Maine, 38; *Libby* v. *Jerrard*, 117 Maine, 303.

The word "account" has no rigid technical meaning. A definition bearing the impress of approval's stamp is, "A list or catalogue of items, whether of debts or credits." *Theobald* v. *Stinson*, 38 Maine, 149, 152. An accounting, in the sense that the term is applied to an executor, contemplates the fixing of the charges against him and the allowances to him, on paper, under his signature, supported by oath, after notice, upon hearing in court; and thus settling, between all parties in interest, what the executor is to be responsible for. And not the least of these is hearing.

The appellant was a party in interest. Upon him there rested, among other duties, that of collecting from the representative of his predecessor in trust all the undistributed assets of the estate confided to his charge. R. S., Chap. 68, Sec. 25. Being a party in interest he was privileged to be heard. Since he was denied that right, the exception which he reserved because of the denial, is entitled to be upheld.

Let the mandate be,

Exceptions sustained.

FRED B. WASHBURN'S CASE.

Androscoggin. Opinion January 21, 1924.

Injuries sustained in the course of employment, by reason of horseplay, practical joking, fooling or skylarking, done independently of or disconnected from the performance of any duty of the employment, do not arise out of the employment, within the meaning of the Workmen's Compensation Act.

In this case the disputed point is whether the injury arose out of the employment. That is, if, after the event, it can be seen that the playing of such a rough and harmful prank originated in a risk connected with the claimant's service, and if the physical harm which befell him may be followed to that service, without any intervention, as the efficient cause.

The statute cannot be legitimately construed in the light of providing that every accident that may happen to the employee, even while he is on the premises of his employer, shall be of its essence. Each case is to be decided upon the particular facts. And there must not be too clamorous insistence in pressing any claim beyond safe limits.

Measured by the standard that there must be a causal connection between the conditions under which the employee worked and the injury which he received, that the causative danger must be incidental to the character of the business and not independent of the relation of employer and employee, it is plain that no other conclusion could possibly be attained, and that no other reason could be reasonably entertained, than that this claimant's hurt did not originate in causal or incidental connection with his employment. The injury was not a peril of that employment, nor in a just sense related to it, nor had it association with the work as it was required to be performed. It was wholly without the scope of the employment. It was the outcome of the act of a fellow employee, who, in an attempt to be what he himself considered "funny," was inexcusably rude and violent, and who in nowise then represented their same employer.

On appeal. This is an appeal from the finding of the Industrial Accident Commission under the Workmen's Compensation Act, awarding to claimant compensation for injuries sustained while in the employment of Parker Spool & Bobbin Company at Lewiston on March 2, 1923. The claimant in passing from one part of the room where he was at work to another part of the room to get a basket which he needed in his work, stopped to look at some lumber

and as he was about to leave the lumber to continue to get the basket, he was seized from behind by the throat by a coemployee and fell to the floor which resulted in a broken leg. The question involved was as to whether the injury arose out of the employment. After a hearing compensation was awarded and respondents appealed. Appeal sustained, decree below reversed and compensation denied.

The case is fully stated in the opinion.

The claimant was without counsel.

Eben F. Littlefield, for respondents.

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

DUNN, J. Workmen's Compensation Act, R. S., Chap. 50; Laws of 1919, Chap. 238, Sec. 1.

Mr. Washburn was employed as an operative in a spool and bobbin mill. Square blocks of wood were supplied to his machine; the fit ones he bored and sent along to be completed; the imperfect he put into a basket to be taken away. Needing another basket, because the one at hand was filled, he started for the opposite end of the room to get it, as was requisite. On his way he stopped to look at certain lumber to see if it would be easy to bore. While looking, another employee suddenly and unexpectedly made his presence known to him by saying, "Quite a lot of beech down there in that pile." "Yes," replied the present claimant, "quite a lot." Upon that, and as this claimant was about going on again, the coemployee grasped him from behind by the throat, and felled him to the floor, breaking his leg in consequence. For the injury so caused, in unmalicious and unusual conduct, compensation was awarded, the finding and ruling being that its incurrence was accidental, and out of and in the course of employment, within statutory meaning.

The disputed point is whether the injury arose out of the employment. That is, if, after the event, it can be seen that the playing of such a rough and harmful prank originated in a risk connected with the claimant's service, and that the physical harm which befell him may be followed to that service, without any intervention, as the efficient cause.

A comprehensive abstract definition of the expression "arising out of" the employment, which would be inclusive of all cases within

the purview of the act, and with nicety exclude those not within the spirit of its intent, might not readily be framed. Quite as succinct and at the same time as complete a defining as any is, there must be a causal connection between the conditions under which the employee worked and the injury which he received. *Westman's Case,* 118 Maine, 133. True enough, the indispensable inquiry is not one of fault or negligence, and equally true the central idea, around which the provisions of the statute cluster, is that of a relationship between the employment and the injury for which compensation is sought, in which it is obvious to the rational mind that the chain of causation is unbroken and perfectly fitting.

Speaking for the Massachusetts Court, in a luminous and convincing way, Chief Justice Rugg says: "If the injury can be seen to have followed as a natural incident of the work and to have been contemplated by a reasonable person familiar with the whole situation as a result of the exposure occasioned by the nature of the employment, then it 'arises out of' the employment. But it excludes an injury which cannot fairly be traced to the employment as a contributing proximate cause and which comes from a hazard to which the workmen would have been equally exposed apart from the employment. The causative danger must be peculiar to the work and not common to the neighborhood. It must be incidental to the character of the business and not independent of the relation of master and servant." *McNicol's Case,* 215 Mass., 497.

The statute cannot be legitimately construed in the light of providing that every accident that may happen to the employee, even while he is on the premises of his employer, shall be of its essence. Each case is to be decided upon the particular facts. And there must not be too clamorous insistence in pressing any claim beyond safe limits.

Measured by our own standard, and by that quoted and only too gladly accepted from our mother commonwealth, it is plain that no other conclusion could possibly be attained, and that no other reason could be reasonably entertained, than that this claimant's hurt did not originate in causal or incidental connection with his employment. The injury was not a peril of that employment, nor in a just sense related to it, nor did the nature of the employment attract or invite it, nor had it association with the work as it was required to be performed. It was wholly without the scope of

the employment. It was the outcome of the act of a coemployee, who, in an attempt to be what he himself considered "funny," was inexcusably rude and violent, and who in nowise then represented their same employer.

Supporting illustrations are not hard to find. In *Lee's Case*, 240 Mass., 273, when an employee was making, at the noon hour, to ring out on the time clock on the premises where he was employed, he was knocked down by a fellow-workman whom still another employee had pushed, to his consequential injury. Compensation was denied; the court saying that the weight of authority, in this country and in England, was in harmony with its conclusion, a statement abundantly sustained by the cases cited in the opinion. So a claimant, the sight of whose eye was destroyed by a missile playfully directed by a fellow-employee from a trick camera, was denied compensation in California. *Fishering* v. *Pillsbury*, 158 Pac., 215. The same court held that an injury was in the course of, but did not arise out of, employment, where an employee, peculiarly susceptible to being tickled, while bearing a basket down a flight of stairs, was punched in the back by a companion-worker and thereby made to fall, injuring one of his knees. *Coronado Beach Co.* v. *Pillsbury*, 158 Pac., 212. In Michigan, the injury did not come from a causative danger of his employment where one servant was seized by another, who held a compressed air hose to his rectum, while a third turned on the air, all seemingly by way of practical joke, to his injury. *Tarpper* v. *Weston-Mott Company*, 166 N. W., 857; L. R. A., 1918E, 507. Nor did injury so arise in Illinois in a case where one employee was killed by other employees forcing compressed air into his body. *Payne* v. *Industrial Com.*, 129 N. E., 122; 13 A. L. R., 518. In *Armitage* v. *Lancashire, etc., Company*, (1902) 2 K. B. 178, some boys were at work for a railway. One of them pushed another into a pit, on the works, for a "lark." Angered thereby, the boy in the pit picked up a piece of iron and threw it at the one who had shoved him there, but, missing the human target aimed at, the iron hit still another boy, doing injury in respect of which he claimed compensation from their employer. The conclusion was that the act had no relation whatever to the employment. *Hulley* v. *Moosbrugger*, 88 N. J. L., 161; 92 Atl., 1007, holds that an employer is not liable to make compensation for injury to an employee, which was the result of horseplay or shylarking, regardless, as in Massachusetts, (*Lee's Case*, supra,) of

the injured employee's attitude toward the play. Scuffling, begun as a pastime and ending in unintentional harm to one of the two fellow-employees engaging therein, did not lay the basis for compensation in Nebraska. *Pierce* v. *Boyer-Van Kuran, etc. Company,* 156 N. W., 509, L. R. A., 1916D, 970. Again: One Edna Saenger, a milliner, had some difference with her boss with regard to her work. She fainted. Two associate employees of hers rushed for water and ammonia. One brought ammonia and the other water. The glasses containing the liquids became mixed. Another employee, mistaking the glass, threw ammonia into Edna Saenger's face, injuring her. The calamity was not compensable. *Saenger* v. *Locke,* 220 N. Y., 556, L. R. A., 1918F, 225. One employee went from a freight car to a hydrant and got a can of drinking water. He refused to meet another employee's request for a drink, telling him to get his own water. When he climbed upon the car, to resume his work, that other assaulted and fatally hurt him. Compensation was not granted his widow. *Chicago* v. *Industrial Com.,* (Ill.), 127 N. E., 49.

Of course cases are various, which is but saying that if accidents happen differently they are not the same. For example: The head waiter of a hotel, while at luncheon in the hotel, was killed by a waiter of excitable temperament, whom he had discharged for breach of discipline. The waiter, who was an habitual drinker and habitually carried a pistol, shot to gain revenge. The injury suffered by the head waiter, while in the exercise of his employer's business, solely for the reason that as an employee he properly discharged the authority conferred upon him by his contract of employment, and the resultant death were within the concept embodied by the terms of her statute, decided Massachusetts. *Cranney's Case,* 232 Mass., 149. Once more: A master in an industrial school, while engaged in the performance of his duties, was attacked and killed by two pupils. There had been assaults before in the school and several of the boys were surly and unruly. It was held, in a majority decision, that there was evidence to support the finding that the accident arose out of the employment. *Trim Joint District School* v. *Kelley,* (1914) A. C., 667. Not infrequently, it may be added, becoming vigilance on the part of an employer, to whom the hazard is or ought to be known, averts disaster to his subordinate. Still another recorded decision: A foreman over gangs of laborers engaged in loading and discharging ships at a wharf on the Thames, while so

engaged, was wilfully assaulted by one of the men and sustained a severe injury, which was classified as compensable. Scrutton, L. J. puts it thusly: "I take it . . . . that acts of violence deliberately intended to injure, though not accidents from the point of view of the person who inflicts the injury, may be accidents from the point of view of the person who suffers the injury, and that it is a question of fact in each case whether the risk of assault is merely one which is common to any subject of His Majesty equally with the person who has suffered it, or whether there is some risk of assault to the particular person arising from his employment." *Reid* v. *British, etc., Company, Limited,* (1921) 2 K. B., 319. Injury caused a teamster, while eating dinner in his employer's stable, from the bite of a cat belonging there, arose out of the employment. *Rowland* v. *Wright,* (1909) 1 K. B., 963. But injuries directly ascribable to the flying of an insect through an open window into the place of employment did not. *Craske* v. *Wigan,* (1909) 2 K. B., 635.

It seems unnecessary to instance further; nay, it is needless. The term "arising out of," as applied to industrial injuries, though it appears at first sight to be almost as simple as a phrase in a small child's reading book, has yet, as has well been said of it and its conjunctive expression "in the course of," "filled volumes with discussion." *Stertz* v. *Industrial Accident Com.,* (Wash.), 158 Pac., 256; Ann. Cases 1918B, 354.

The term has purpose. That purpose is to create a uniform rule of causation on the plane of which the law shall be administered for the equal good of all within its provisions, and the administration of the statute thereby saved from being plunged into the abyss of misrule. The gist of the whole matter simmers down thereto.

There is an excellent annotation of this subject in American Law Reports, volume 13 at page 540, in which the editor observes that it is generally held that injuries sustained in the course of employment, by reason of horseplay, practical joking, fooling or skylarking, done independently of or disconnected from the performance of any duty of the employment, do not in legislative meaning, arise out of the employment. See, in like vein, a statement in Re Loper (Ind.), 116 N. E., 324. And see the supplemental annotation in 20 A. L. R., 882. There are decisions otherwise, as the annotator clearly marks, by the Oklahoma and other courts of eminence, a fact mentioned here that it may appear that they have not been overlooked.

The record is bare of evidence to support the finding by the Chairman of the Industrial Accident Commission that this claimant's injury arose out of his employment. Therefore the appeal is sustained, the decree below reversed, and compensation denied.

So ordered.

DELANO MILL COMPANY *vs.* A. F. WARREN et als.

Somerset. Opinion February 8, 1924.

A bill in equity to enforce a lien claim, sustained by the sitting Justice. It cannot be said from the evidence that the finding of the sitting Justice was clearly wrong.

The plaintiff's contract to furnish all doors for the building was not completed until the door in question was furnished; the door in question appears to have been furnished in good faith to complete its contract and not merely to keep alive its lien claim; value of the material does not govern, nor that it was not furnished before was due to the oversight of the plaintiff.

The credit of the note on account is not conclusive as to its acceptance in payment. The presumption of payment may be overcome by showing that it would result in loss of some security for the debt or by other circumstances.

On appeal. A bill in equity to enforce a lien claim for materials furnished in the erection of a high school building in Madison. The bill was heard by a sitting Justice and sustained, whose findings were not from the evidence found to be clearly wrong. Appeal dismissed. Decree of sitting Justice affirmed.

The case is fully stated in the opinion.

Clifford E. McGlauflin, for plaintiff.

Harry Manser and Charles O. Small, for defendants.

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

WILSON, J. The plaintiff Company in January and March, 1922, entered into a contract or contracts to furnish the defendants, A. F.

Warren and Martin W. Warren, as copartners, what is termed the inside finish, which included among other items all the doors required for the construction of a high school building in and for the town of Madison. The total contract price agreed upon amounted to $10,740.00, on which it is now claimed there is due, together with certain small sums for "extras," the sum of $5,270.75.

The plaintiff Company on February 20th, 1923, filed in the office of the town clerk of Madison a notice in accordance with the statute claiming a lien on the building and land for the above sum; and on March 10th, 1923, filed its bill in equity setting forth that the last materials were furnished under said contracts December 28th, 1922.

The sitting Justice after hearing found that the materials were furnished as alleged and with the consent of the town of Madison, and that the last materials were furnished on December 28th, 1922; and there was due the plaintiff the sum of $5,270.75. A decree was entered in accordance with this finding from which the defendants appealed.

The only questions raised by the defendants on their appeal are as to the date on which the last materials were furnished and whether a note of $2,000.00 given by the defendants on November 28, 1922, was accepted by the plaintiff in part payment of its claim, and should be deducted from the amount allowed as a lien claim.

The only item furnished by the plaintiff which entered into the construction of the building within sixty days of the date of filing the notice of the lien in the town clerk's office is one door delivered December 28th, 1922. The evidence discloses that the doors for this building were shipped from the West, by order of the plaintiff, direct to the defendants at Madison and through some oversight one door was omitted. Upon being notified by the defendants on December 11th that one door more was required to complete its contract the plaintiff made up a door at its plant in Portland and shipped it to defendants at Madison, where it was received December 28th, 1922.

It appears that on October 28th the plaintiff sent the defendants a statement of its account assuming at the time that all materials had been then furnished under its contract, in which statement it charged the full amount of the contract price.

The insistence of the defendants appears to be, that, having charged the defendants with the full contract price on October 28th,

and the door in question having been overlooked or omitted through some neglect of the plaintiff, the plaintiff could not properly make a charge for it on December 28th; and relies upon *Farnham* v. *Richardson*, 91 Maine, 559, in support of its claim.

But *Farnham* v. *Richardson* does not, we think, support the defendants' contention. In that case the question was whether the door furnished was one which the plaintiff was obliged to furnish in place of another, because of some fault of his own, or whether the failure of the door first delivered to fit the frame for which it was intended was due to the fault of the defendant. The court found the latter to be the fact, and properly held that need of the new door was due to the defendants' fault and not the plaintiff's; and hence it was not a case of replacement, but of new material for which the plaintiff was entitled to make a charge.

In the case at bar, the door in question was furnished under a contract, which was not completed till it was delivered. The fallacy in the defendants' reasoning comes from assuming that the contract was actually completed October 28th, and that the plaintiff was entitled to make a demand on the defendants on that day for the balance due on the contract price without furnishing all the material called for in its contract, and that whatever was furnished thereafter was in the nature of a gratuity for which no charge could be made.

Obviously this is not so. Not having completed its contract on October 28th, it had no right to demand payment of the balance due thereunder, whether the failure to complete was due to the non-delivery of one door, or fifty. Until all material which it agreed to furnish was delivered the final payment on the contract price did not become due. It matters not that through mistake it had entered on its books the delivery of all material on October 28th. If it was later found that some material still remained to be furnished, it was its delivery, which finally completed the contract and matured the obligation of payment on the part of the purchaser or builder.

It is not the value of the material last furnished, which determines whether it will serve to keep alive the lien, so long as it was furnished in good faith, was not a mere accommodation or some trifling service for which no charge was intended to be made, as in the case of *Cole* v. *Clark*, 85 Maine, 336, and *Hartley* v. *Richardson*, 91 Maine, 424. It is not contended that the delivery of the door was held back by the plaintiff to keep alive its lien. It was due to an oversight which

might occur under any contract, where so many articles were to be furnished; yet the defendants had the absolute right to demand its delivery before the final payment of the contract price.

As to whether the note for $2,000.00 given November 28th for three months was accepted in payment, it appears that on the same date a note previously given matured, but was not paid, and a renewal note accepted on the request of the defendants, maturing in fifteen days; and two other notes, each for $2,000.00, one for three months and one for four months, were offered by defendants for credit on their account. The plaintiff finally refused to accept the note on four months and returned it, and informed defendants it would give them credit for the note on three months, which it did. It did not, however, discount the note at its bank, but held it; and when it was not paid, recharged the defendants with the amount.

The question is, whether under the circumstances the note was accepted in payment and must be credited on the lien claim. While the presumption is that a note is accepted in payment, this presumption ordinarily is overcome by the fact, that to so accept it, would deprive the payee of security for his indebtedness, as in case of a lien. *Bryant* v. *Grady*, 98 Maine, 389; *Clark* v. *Downes*, 119 Maine, 252. It is always a question of fact upon all the evidence. In this case the sitting Justice found in favor of the plaintiff upon this point.

It is true, credit was given by the plaintiff on its books, but that is not conclusive. The facts that the plaintiff on the day of the acceptance of this note had pregnant warning that the defendants' notes were not always met when due; that the note was not used and discounted by the plaintiff, contrary to the usual custom of business men in case of notes actually accepted in payment, together with the fact that by accepting the note in payment it would lose its lien as security, *pro tanto* at least, may have been sufficient in the mind of the sitting Justice to overcome the presumption of acceptance in payment, and outweigh any evidence in support of such presumption. At least this court cannot say his finding on this point was clearly wrong.

Appeal dismissed.
Decree of sitting Justice affirmed.

STATE *vs.* FRANK VASHON.

Kennebec. Opinion February 8, 1924.

Where the possible maximum punishment provided for a criminal offense is imprisonment for one year, even though a less sentence is actually given, the crime is a felony. Under constitutional provisions a respondent cannot be held on such a charge except on presentment or indictment by a grand jury.

State v. *Cram*, 84 Maine, 271, in part overruled.

The offense of operating an automobile on a public highway when the driver is under the influence of intoxicating liquor, Chap. 211, Sec. 74, Public Laws, 1921, is made a felony by the Legislature, and municipal, police, and trial justice courts, cannot constitutionally be given jurisdiction over the offense except to hold the offender under bond to await the action of the Grand Jury.

On exceptions. The respondent was found guilty in the Waterville Municipal Court upon a complaint and warrant alleging the operating of a motor vehicle upon the public highway while under the influence of intoxicating liquor. Counsel for the respondent filed a motion in arrest of judgment which was overruled by the presiding Justice and respondent's counsel took exceptions. Exceptions sustained.

The case is fully stated in the opinion.

Walter M. Sanborn, County Attorney, for the State.

James L. Boyle and Benedict F. Maher, for respondent.

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

PHILBROOK, J. This case originated by complaint addressed to and warrant issued from a municipal court charging the respondent with the offense of operating an automobile on a public highway while under the influence of intoxicating liquor, in violation of the provisions of Chap. 211, Sec. 74, Public Laws 1921. After hearing the respondent was adjudged guilty. The sentence imposed by the magistrate is not disclosed by the record but the respondent appealed to the Superior Court wherein he went to trial before a jury and was found

guilty. Before sentence he filed a motion in arrest of judgment upon the grounds that the offense with which he had been charged is not one which could be properly set forth in a complaint, and an answer thereto required, and the same was not sufficient in law for any judgment to be rendered thereon, because, as he says, the offense charged is an infamous crime, wherein the punishment is one liable to be in the State Prison, and, as he says, the offense should have been charged in an indictment in accordance with the Statutes of this State, and in accordance with Article I., Section 7, of the Constitution of this State which provides that "No person shall be held to answer for a capital or infamous crime, unless on a presentment or indictment of a grand jury," with certain exceptions not herewith applicable.

The punishment prescribed for the offense under consideration is "by a fine of not less than one hundred dollars nor more than one thousand dollars, or by imprisonment for not less than thirty days nor more than one year, or by both fine and imprisonment."

The various claims made by the respondent may be thus stated:

1. The offense under consideration is liable to a punishment by imprisonment for one year.
2. Imprisonment for one year must be inflicted in the State Prison.
3. Such punishment makes the offense a felony.
4. A statutory felony is an infamous crime.
5. Hence the constitutional provision, above referred to, inhibits holding the respondent on this charge except on presentment or indictment of a grand jury.

Although we have endeavored to state the claims of the respondent in a logical order, yet it may not be convenient, nor even possible when discussing them in that order, to avoid anticipation of later claims while examining earlier ones.

1. Liability to Imprisonment for one year.

As we have already seen, the maximum punishment of the offense in the instant case, so far as imprisonment is concerned, is, "nor more than one year." The first claim of the respondent is, therefore, that punishment for the offense with which he is charged may possibly be by imprisonment for one year. In other words, he says that the expression "nor more than one year" means that the maximum possible imprisonment is a period of one full year, and,

under what is known as the "possibility of punishment" rule, that a sentence of one full year might be imposed upon him. With this claim we agree. "Nor more than one year" is equivalent to "not more than one year," and "not more," according to lexicographers and common usage means no additional or greater amount. To the limit of a full year, however, punishment in this case may go.

2. IMPRISONMENT FOR ONE YEAR MUST BE INFLICTED IN THE STATE PRISON.

R. S., Chap. 137, Sec. 3, provides that "unless otherwise specially provided, all imprisonments for one year or more shall be in the state prison; and all for a less term, in the county jail or house of correction." Section four of the same chapter relating to imprisonment in a work-jail for more than one year, in certain cases, has no application to the instant case and therefore needs no discussion. The statutory provision is plain and this claim of the respondent must be sustained.

3. SUCH PUNISHMENT MAKES THE CRIME A FELONY.

The essential distinction between felony and misdemeanor in England disappeared when the Felony Act of 1870 was adopted. In this country the crime may be defined as "any offense which by statute or common law is punishable with death, or to which the old English law attached the total forfeiture of lands or goods, or both, or which a statute expressly declares to be such." 1 Bishop on Crim. Law, Section 615. In this State we have instances where the statute has expressly declared an offense to be a felony, for example, R. S., Chap. 120, Sec. 38, where desertion of wife or children in destitute circumstances, by the husband or father, is declared to be a felony. But we also have the broader definition in R. S., Chap. 133, Sec. 11, "The term 'felony' includes every offense punishable by imprisonment in the state prison." These legislative enactments have been recognized, adopted and adhered to by this court. *State* v. *Smith*, 32 Maine, 369; *State* v. *Mayberry*, 48 Maine, 218, wherein the court says regarding an offense which prescribed punishment for "not more than three years," that crimes punishable in the State Prison are such as are liable, by statute, to be thus punished,

and not such only as must be thus punished; *State* v. *Goddard*, 69 Maine, 181; *State* v. *Doran*, 99 Maine, 329; *Butler* v. *Wentworth*, 84 Maine, 25; *State* v. *Arris*, 121 Maine, 94. This third claim must be sustained also, as being in harmony with the statutes of this State and the decision of this court.

4. A STATUTORY FELONY IS AN INFAMOUS CRIME.

Under the earlier decisions, both in England and this country, the courts inclined to the doctrine that it is the nature of the crime, and not the punishment, which renders it infamous, but on March 30, 1885, in *Ex parte Wilson*, 114 U. S., 417, speaking for the court, Mr. Justice Gray said at the close of a long and learned discussion, historical and legal, that a crime punishable by imprisonment for a term of years at hard labor is an infamous crime within the meaning of the Fifth Amendment of the Federal Constitution. This express disapproval of the early doctrine, just referred to, has gradually been adopted by the State courts in this country in a line of decisions too long to find place within the limits of this opinion. It is sufficient to say that it has been adopted by our own court when called upon to say what is an infamous crime under our own constitutional bill of rights. *Butler* v. *Wentworth*, supra. In that case the court further said "The purport of all the decisions from the highest court in this country since *Ex parte Wilson*, supra, is that a crime punishable by imprisonment in the state prison or penetentiary, whether the accused is or is not sentenced to hard labor, is an infamous crime; and, in determining this, the question is, whether it is one for which the statute authorizes the court to award an infamous punishment, and not whether the punishment actually imposed is an infamous one." We must hold that it is not a question whether the court, in its discretion, awards a punishment that is infamous or not, but whether the statute authorizes the infliction of such infamous punishment, that is the criterion by which we determine whether an offense is an infamous crime or otherwise. *Butler* v. *Wentworth*, supra.

It is urged by the State's counsel that *Butler* v. *Wentworth*, decided November 10, 1891, and *State* v. *Cram*, 84 Maine, 271, decided less than three months later, both opinions appearing in the same volume of our Maine Reports, are not in harmony and that the reasoning and result in the latter case should here prevail. If, upon full

examination, *State* v. *Cram* appears to negative the conclusion in *Butler* v. *Wentworth*, then the latter, being in harmony with the great weight of authority, must prevail and so much in *State* v. *Cram* as is not in harmony with that weight of authority must be overruled.

In *State* v. *Cram*, the respondent was tried, found guilty, and sentenced, by a municipal court judge, on a complaint charging assault and battery. The case went to the Superior Court by appeal. The real contention of the respondent was that the Constitution of the State forbade infliction of punishment of an offender by imprisonment for more than thirty days by a municipal court magistrate. Under the general contention the defense claimed 1, that irrespective of forms of allegation, or inferences deducible therefrom, municipal courts were of the same grade as trial justices, or as justices of the peace were at the same time when our constitution was adopted; 2, that they cannot exercise a greater criminal jurisdiction than that exercisable by justices of the peace when the State Constitution was adopted; 3, that such jurisdiction, at that date, did not empower justices of the peace to impose punishment in jail for a longer period than thirty days; 4, that such limitation of power to punish defined the constitutional phrase "usually cognizable by a justice of the peace"; 5, that what justices of the peace could do in 1820 they, and all kindred courts, can now do, but no more; 6, that all offenses not then "usually cognizable" by "such justices are to be denominated felonies or infamous crimes"; 7, that it was unconstitutional legislation to endow municipal courts with criminal jurisdiction exceeding that allowed to justices of the peace.

In discussing these claims the court cited *Butler* v. *Wentworth*, which had just been decided, and declared that in this State any sentence to imprisonment for one year or more conclusively implied that an infamous crime was intended to be charged, and that the offender could be so punished only upon indictment and conviction, and not by conviction upon merely a complaint against him; and that any sentence to punishment by confinement in jail for any time less than one year would not indicate that an infamous crime had been charged or committed. It is now claimed by our profession, and perhaps properly so, that a fair interpretation of this declaration would establish the rule that the severity of the sentence actually given should determine whether the offense charged was a felony or a misdemeanor, rather than the maximum sentence which was author-

ized by statute. If such be the correct interpretation then we must hold that the rule so given is not in harmony with the weight of authority, both in federal and state courts, and must be overruled.

But we must not overlook the fact that in *State* v. *Cram* the offense was assault and battery, and that then, as now the offense might be punished by imprisonment for a period not exceeding five years. R. S., 1883, Chap. 118, Sec. 28; R. S., 1916, Chap. 120, Sec. 26. Standing alone this statute would make assault and battery in every instance an infamous crime. But at the time when *State* v. *Cram* was decided, as well as now, the Legislature recognized the doctrine of degree of crime in certain offenses and therefore gave to municipal and police courts and trial justices jurisdiction in cases of assault and battery when the offense is not of a high and aggravated nature. R. S., 1883, Chap. 132, Sec. 4; R. S., 1916, Chap. 134, Sec. 4.

It should further be observed that in *State* v. *Cram* the learned justice who wrote the opinion said "It is true that the usual test of the magnitude of an offense has been considered to be the nature of the charge preferred, rather than the amount of punishment to be inflicted therefor. The crime and not the punishment renders the offender infamous according to the common law." In this respect he was speaking in the past tense and was in harmony with what we have referred to as earlier decisions. But this rule, as we have seen, has given way to the modern one to which we have already called attention.

In *State* v. *Cram* no explicit reference was made to R. S., 1883, Chap. 132, Sec. 4, which expressly gave jurisdiction to magistrates in cases of assault and battery when the offense was not of a high and aggravated nature, although it was there further said "But the innovation in the practice caused by the legislature in the punishment lately prescribed by it for the offense of assault, and assault and battery, necessarily creates an exception to the rule."

It is interesting, in connection with the discussion of the case at bar, to note that none of the respondent's claims in *State* v. *Cram*, were sustained. The phrase "usually cognizable by justices of the peace" was held to contain no assertion nor implication that justices of the peace may not possess an enlarged jurisdiction at a future time, according to the growing requirements of administrative law, provided always that they be not allowed to assume jurisdiction

to punish infamous crimes or felonies; nor is it unconstitutional legislation to endow municipal courts with criminal jurisdiction exceeding that allowed to trial justices.

5. UNDER CONSTITUTIONAL PROVISIONS THE RESPONDENT CANNOT BE HELD ON THIS CHARGE EXCEPT ON PRESENTMENT OR INDICTMENT BY A GRAND JURY.

This claim goes directly to the question of jurisdiction. In section ninety-three of the act which describes this offense, and prescribes the punishment therefor, the Legislature gives municipal and police courts and trial justices, in their respective counties, concurrent jurisdiction with the Supreme and Superior Courts over all prosecutions for all violations of the provisions of the act. Was it in the power of the Legislature to thus confer jurisdiction? We think not.

We have just seen, by authority of *State* v. *Cram*, in a portion of the opinion which is not overruled, that municipal and police courts, and trial justices must not be allowed to assume jurisdiction to punish infamous crimes and felonies. In a recent opinion of this court, *State* v. *Arris*, 121 Maine, 94, it was distinctly held that where a respondent is charged with committing a felony the offense must be charged by indictment. Multiplication of authorities is unnecessary. Such is the established law.

The Legislature plainly exceeded its constitutional limitations when it attempted to give jurisdiction to municipal and police courts, and trial justices in their respective counties, over an offense where the maximum punishment is by imprisonment for "not more than one year."

Exceptions sustained.
Motion in arrest of judgment
to be granted.

MAINE SAVINGS BANK

vs.

CHARLES W. SMALL, Adm'r and LOVISA J. EDGERLY, Adm'x.

Cumberland. Opinion February 8, 1924.

Where a person makes a contract for life support, intending to transfer to her co-contractor a certain sum of money which she claims the right to expend for maintenance during life, but still holds it in her possession and under her control, and fails to so transfer before death, which money was part of the residuum of her deceased husband's estate, such money still remains as part of the residuum of the estate of the deceased husband.

In the instant case said sum with accrued interest by the terms of the will of the deceased husband, passes to Annie O. Small.

On report. A bill of interpleader to determine the ownership of a sum of money deposited in Maine Savings Bank. The case reported on an agreed statement of facts. Decree in accordance with the opinion, and for reasonable counsel fees, to be fixed by the Justice issuing the decree.

The case is fully stated in the opinion.

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

W. R. and E. S. Anthoine, for Charles O. Small, Adm'r.

Bradley, Linnell & Jones, for Lovisa J. Edgerly, Adm'x.

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

PHILBROOK, J. This is a bill of interpleader to determine who is entitled to a certain sum of money which was on deposit in the plaintiff bank at the time when this action was commenced. The case is reported upon an agreed statement of facts. From that statement we learn that A. Howard Buxton died, testate, on January 9, 1917, leaving a widow, Elizabeth A. Buxton, and one daughter, Annie O.

Small. By the provisions of his will he gave to his wife, "during the term of her natural life the use and income of all my estate, real, personal, or mixed, of whatever name or nature, wherever found or however situated, to her own use, during said term of life. And if it should become necessary for her maintenance she shall have the right to dispose of such amount of said real or personal property as may be sufficient for such maintenance. . . . . And at her decease all the residue and remainder of said estate, both real and personal, I give, bequeath and devise to my daughter, Annie O. Small of said Cumberland, to her own use and right forever."

The widow resided on the farm and from time to time in pursuance of the power given by the will, disposed of the personal property embraced in her husband's estate, which was of an appraised value of a little more than twelve hundred dollars. By the same power, in the year nineteen hundred twenty, she disposed of certain timber standing on the farm, for the sum of six hundred dollars. Of the corpus of the estate there then remained a farm consisting of about sixty acres with buildings thereon. On December 10, 1921, still exercising the power given by her husband's will, the widow sold the farm for twenty-five hundred dollars. She deposited the proceeds of the sale in the plaintiff bank where it remained until her death which occurred January 14, 1922, a period of thirty-five days only having elapsed between the day of the deposit and that of the depositor's death.

On or about the day when she sold the farm she went to the home of her sister, Lovisa J. Edgerly, lived with her sister about thirty-five days, and died, leaving the deposit untouched, and in her own name, in the plaintiff bank. From the agreed statement we extract the following:

"At the time of the sale of the farm, on the 10th day of December, A. D. 1921, by Elizabeth A. Buxton to Annie O. Small the said Elizabeth A. Buxton had contracted with the said Lovisa J. Edgerly, her sister, that if the said Lovisa J. Edgerly would take the said Elizabeth A. Buxton to live with her in her home at Bradley, Maine and care and provide for her the rest of her remaining life, the said Elizabeth A. Buxton would turn over to the said Lovisa J. Edgerly the said $2500 received from the sale of said farm; and in consideration thereof the said Lovisa J. Edgerly did agree to take her sister, the said Elizabeth A. Buxton, to live with her in her home at Bradley,

Maine, and provide and care for her the rest of her remaining life; and the said Elizabeth A. Buxton in pursuance thereof, shortly after the sale of the said farm, did go to live with her said sister, the said Lovisa J. Edgerly, and the said parties commenced to perform their said agreement; and at the time the said Elizabeth A. Buxton went to live with her sister, the said Lovisa J. Edgerly, at Bradley, Maine in pursuance of their said agreement, she, the said Elizabeth A. Buxton, intended to transfer the said $2500 received from the sale of said farm from the Maine Savings Bank at Portland, Maine where she had deposited it, to the Old Town Trust Company, at Old Town, Maine in the name of Lovisa J. Edgerly, but neglected so to do and had not done so at the time of her death."

The following questions are submitted to the court:

1. Did Elizabeth A. Buxton under the terms of the will of A. Howard Buxton have authority to appropriate the $2,500.00 received from the sale of said farm and pay said sum to Lovisa J. Edgerly in consideration that the said Lovisa J. Edgerly should support and care for the said Elizabeth A. Buxton for the rest of her life?

2. Is the said $2,500.00 and any interest accrued the property of said Lovisa J. Edgerly, Administratrix of the Estate of Elizabeth A. Buxton, to be paid by the said Lovisa J. Edgerly, Administratrix of the Estate of Elizabeth A. Buxton, to Lovisa J. Edgerly?

3. Is said $2,500.00 and any accrued interest the property of the said Annie O. Small?

Counsel upon both sides have presented able arguments, dealing for the most part with the first question, which in effect is restated in questions two and three. But it seems unnecessary to discuss question one since it is quite plain that at the time of her death Mrs. Buxton had not completed her part of the contract, if indeed such contract was ever made, by transferring the money in the plaintiff bank to her sister, or to anyone authorized to receive it in her behalf. At Mrs. Buxton's death it still remained in her possession as the residuum of her husband's estate, and by the terms of the will passes, with accrued interest, to Annie O. Small.

Decree in accordance with this opinion, and for reasonable counsel fees, to be fixed by the Justice issuing the decree.

So ordered.

OSCAR R. HAHNEL et al.

vs.

ANDREW F. WARREN et als.

Somerset. Opinion February 12, 1924.

When a statutory building lien is created, not by contract with, but by consent of the owner, the claim is barred unless filed in the city or town clerk's office within sixty days after the claimant ceases to labor or furnish materials.

The single Justice who heard the evidence found that the plaintiffs were not entitled to a lien. He apparently refused to give credence to the plaintiffs' evidence. He found in effect that if the plaintiffs did anything in January it was a trifling service without express or implied promise of payment.

The finding of the single Justice was not manifestly wrong.

On appeal. A bill in equity to enforce a lien claim for labor and materials furnished in the erection of a high school building in Madison. A hearing was had before a single Justice who held that no labor or materials were furnished by the plaintiffs under their contract with the defendants, after October 27, 1922, and inasmuch as the notice of lien was not recorded until March 2, 1923, the lien claim was barred. From the decree allowing a personal judgment, but denying the lien, the plaintiffs took an appeal. The finding of the single Justice sustained and the decree affirmed.

The case is stated in the opinion.

Wm. G. Tackaberry and George S. McCarthy, for plaintiffs.

Harry Manser and Charles O. Small, for defendants.

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

DEASY, J. This is a bill in equity to enforce a statutory lien upon the high school building in the town of Madison. The defendants were the so-called general contractors. The heating plant, however, was installed by Arthur B. Fells under a distinct contract. The plaintiffs did the sheet metal work for both.

The contract with the defendants is the only one in issue. No question is now raised as to the town's consent.

The controversy relates to the seasonableness of the filing of the plaintiffs' lien claim. When the lien is created, not by contract with but by consent of the owner, the claim is required to be filed in the town or city clerk's office "within sixty days after he (the claimant) ceases to labor or furnish materials as aforesaid." R. S., Chap. 96, Sec. 31.

The plaintiffs' lien claim was filed on March 2, 1923. The sitting Justice found that the filing was not seasonable, and that the plaintiffs were entitled to a judgment against the Warrens, but not to a lien. From a decree to this effect an appeal is taken.

The plaintiffs apparently completed their work under their contract with the defendants on October 27, 1922. The tools and appliances used were taken away within a few days thereafter. On December 27, more than sixty days after the plaintiff had left the work, apparently completed, no lien claim having been filed, the architect, Harry S. Coombs issued a certificate stating that the Warrens "are entitled to final payment amounting to four thousand two hundred seventeen and 50-100 dollars." This sum was promptly paid by the town.

A short time before this, Mr. Fells, the heating contractor, wrote the plaintiffs calling upon them to complete their contract with him. On December 26 two men were sent for this purpose. They worked about the building nine days ending January 5, 1923, less than sixty days before the filing of the lien.

During this period of nine days the plaintiffs' two men completed the Fells contract and did other independent work for the town for which, including material, $83.50 was paid.

But the plaintiffs say that their men spent one half of their time, four and one half of the nine days, in work under the contract with the Warrens "nailing pipes and fixing dampers . . . because they were rattling and making noise."

In view of the facts, however, that the nailing pipes and fixing dampers was done not at the request of the Warrens or with their knowledge, that the architect had previously certified the final payment under the Warren contract to be due, that the town had made final settlement with them, and that no bill was sent or charge made for the alleged work in January under the Warrens' contract until they became financially embarrassed, the sitting Justice apparently

refused to give credence to the plaintiffs' evidence, and found in effect that if the plaintiffs did anything in January for the purpose of curing defects in the work done for the Warrens it was a "trifling service without express or implied promise of payment." *Cole* v. *Clark*, 85 Maine, 338. See *Hartley* v. *Richardson*, 91 Maine, 430. *Dole* v. *Auditorium Association*, 94 Maine, 532.

The finding of the sitting Justice was not manifestly wrong. We think that it was manifestly right.

Decree affirmed with additional taxable costs.

FRANK E. BROWN'S CASE.

Hancock. Opinion February 12, 1924.

Under the Workmen's Compensation Act, an occurrence to be accidental must be unusual, undesigned, unexpected, and sudden.

The word accident is commonly predicated of occurrences external to the body, e. g., wrecks, explosions, collisions and other fortuitous mishaps in the world of things about us. Such external accidents may or may not cause bodily injuries. But an internal injury that is itself sudden, unusual and unexpected is accidental, none the less, though its external cause is a part of the victim's ordinary work.

If a laborer performing his usual task in his wonted way, by reason of strain, breaks his wrist, nobody would question the accidental nature of the injury.

If instead of the wrist it is an artery that breaks, the occurrence is just as clearly an accident. And if the strain instead of causing a rupture of a subordinate blood vessel produces a sudden dilatation of the heart itself the occurrence is none the less accidental.

On appeal. The claimant while shoveling snow, suffered sudden heart dilatation. The Commission found as a fact that the injury arose out of and in the course of the employment and that it was accidental. An appeal was taken. Appeal dismissed. Decree affirmed.

The case is fully stated in the opinion.

George H. Worster, for claimant.

Andrews, Nelson & Gardiner, for respondents.

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

DEASY, J. On January 12, 1923, the petitioner then in apparent full health, while upon the roof of a building shoveling snow, suddenly became dizzy, faint and short of breath. He also felt a dull pain in the region of his heart. He went home, continued to suffer same symptoms and three days later called a doctor who diagnosed the case as acute dilatation of the heart.

Upon hearing the commissioner found that the petitioner "Frank E. Brown, did, on January 12th, 1923, while in the employ of Otto Nelson Company, receive a personal injury by accident arising out of and in the course of his employment in that while shoveling snow from the roof of a building at Bucksport, Maine, he over exerted the muscles of his heart, thereby causing acute dilatation of the heart."

The defendants contend that there is no evidence of accidental injury; that what occurred was the development of disease, and not the happening of an accident.

The word accident, frequently the subject of judicial interpretation, has been recently defined by this court with copious citation of authorities. *Patrick* v. *Ham*, 119 Maine, 517. By all authorities an occurrence to be accidental must be unusual, undesigned, unexpected, sudden. The word is commonly predicated of occurrences external to the body, e. g., wrecks, explosions, collisions and other fortuitous mishaps in the world of things about us. Such external accidents may or may not cause bodily injuries. But an internal injury that is itself sudden, unusual and unexpected is none the less accidental because its external cause is a part of the victim's ordinary work.

If a laborer performing his usual task, in his wonted way, by reason of strain, breaks his wrist, nobody would question the accidental nature of the injury. If instead of the wrist it is an artery that breaks, the occurrence is just as clearly an accident. So held by this court in the case of *Patrick* v. *Ham*, supra. And if the strain instead of causing the rupture of a subordinate blood vessel produces a sudden dilatation of the heart itself, the occurrence is none the less accidental.

"A strain incurred by the workman in the ordinary discharge of his duties caused the rupture from which he died. . . . . It is not open to this court to say that this is not an accident." *Hughes* v. *Clover*, 2 B. W. C. C., 17.

"By the term 'injury' is meant not only an injury the means or cause of which is an accident, but an injury which is itself an accident." *Carroll* v. *Ind. Com.* (Col.), 195 Pac., 1098.

"It is enough that the causes, themselves known and usual, should produce a result which . . . . is neither designed nor expected." 25 Harvard Law Review, 340.

"It (the word accident) is often used to denote any unintended and unexpected loss or hurt apart from its cause." 1 C. J., 395.

"The physical structure of the man gave way under the stress of his usual labor. . . . . The term accident applies to what happened to him as clearly as it would apply to what happened to the car had it broken down under the assumed circumstances." *Galliland* v. *Portland Cement Co.*, 104 Kan., 771, 180 Pac., 793.

"In the case at bar there was no external accident, no mishap in the environment. The workman was doing his work in the natural, normal and regular way. He was doing his work exactly as he intended to do it. But the injury was accidental." *Mfg. Co.* v. *Wehrle*, (Ind.), 132 N. E., 698.

Numerous authorities to the same effect are cited by Mr. Justice Hanson in the Patrick case. The following are a few of the other cases supporting the same rule. In the last three, heart dilatation is held to be an accidental injury. *State* v. *District Court*, 137 Minn., 30, 162 N. W., 678; *Surety Co.* v. *Owens*, (Tex.), 198 S. W., 662; *Baggot* v. *Ind. Com.* 290 Ill., 530, 125 N. E., 254; *Fenton* v. *Thorley*, (Eng.), 5 B. W. C. C., 4. *Manning* v. *Pomerene*, 101 Neb., 127, 162 N. W., 492; *Horsfall* v. *Ins. Co.*, 32 Wash., 132, 72 Pac., 1028; In re *Gibbons*, 168 N. Y. S., 413; *Uhl* v. *Guarantee Co.*, 161 N. Y. S., 659.

The Michigan Court has adopted a rule which seems to be opposed to these authorities. But so far as we have observed it stands alone in opposition. In a recent Minnesota case it is said that "The exception to this rule seems to prevail in Michigan where it is held that unless some fortuitous event aside from the exertions in the ordinary course of the work is shown to be the cause of the hernia,

it is not compensable. But the courts generally do not so construe accidental injuries under Workmen's Compensation Acts." *Babich* v. *Mining Co.*, (Minn.), 195 N. W., 784.

The case of *JaKub* v. *Ind. Com.*, 288 Ill., 87, 123 N. E., 263, which has been cited as supporting the Michigan doctrine is shown to be clearly distinguishable by the later case of *Baggot* v. *Ind. Com.*, 290 Ill., 530, 125 N. E., 254.

The learned counsel for the defendant does not cite the Michigan cases, nor does he in terms urge upon the court the theory that the word accident implies an unusual and unexpected external cause. But he cites and quotes at length Larocque's case a Commission ruling, not appealed from, in which accidental injury was held not proved.

The finding is well expressed and for the most part commendable. But the conclusion that there was no accident seems to be based upon the finding that the work of the deceased was "in no way different from his work in shoveling similar snow many other days previous." That this is not decisive is held by nearly all authorities.

The learned counsel says quoting from a pamphlet by D. J. Kiser, "It has been held that there must be a definite particular occurrence to which the injury can be attributed." The supporting citations are English cases. So far as we have observed no American Court has adopted this phrase as a part of the definition, though the Illinois Court uses language somewhat similar. The phrase probably means no more than the word "sudden" which is commonly set down as an element in defining "accident."

The petitioner testified "It came on suddenly" and again "The feeling I felt was all practically at once." While the petitioner did not immediately collapse, and notwithstanding that he continued for a quarter or a half an hour trying to complete his work, we think that the Commission was justified in finding that the petitioner's injury was unusual, undesigned, unexpected, sudden, and moreover attributable "to a definite and particular occasion." It clearly is not fatal to the petitioner's case that he failed to show the "particular shovelful or shovelfuls of snow that did the damage."

The case of *Ferris* v. *Eastport*, 123 Maine, 193, is relied on by the defendants. A fireman from exposure and a drenching with water at a fire caught a cold which developed into pneumonia.

This is plainly distinguishable from the instant case. Heart dilatation is a very unusual consequence of shoveling snow. Catching cold is rather a usual result of exposure and drenching in cold water. Brown's injury came suddenly. While he did not at the time appreciate the fact the damage was probably all done almost instantly. Ferris' injury was not in the same sense sudden.

Sudden heart dilatation caused by strain would be we think in ordinary parlance called accidental. Not so catching cold from voluntary exposure, even though pneumonia results.

Other defenses set up in the answer seem not to be well founded and are not urged in the brief of the learned counsel.

Appeal dismissed.
Decree affirmed.

NELSON H. HUSTUS' CASE.

Kennebec. Opinion February 12, 1924.

The word injury as employed in Section 17 of the Workmen's Compensation Act, includes not all impairment or derangement of body or mind, but only injuries which have actually or presumptively resulted in incapacity to earn.

A workman is incapacitated within the meaning of the Act when he has lost his earning power in whole or in part. This is the only test. The law provides no compensation for pain and none for physical impairment, except when it is of such character as to raise a presumption of incapacity to earn. The workman is entitled to make claim for compensation not for mere accidental injury, but for accidental injury resulting in loss of earning power.

The date that incapacity begins is the date upon which the workman becomes entitled to compensation. Until that time he has suffered no injury within the purview of Section 17, i. e., no compensable injury. From that time the law gives him a year to make his claim.

On appeal. Claimant while an employee of Edson Locke at Augusta, met with an accident by slipping and falling while carrying

a box of bread, being engaged in his regular duties, striking his right breast across the corner of the box. Compensation was awarded and an appeal taken from the decree. Appeal dismissed. Decree affirmed.

The case is fully stated in the opinion.

Burleigh & Williamson, for claimant.

Andrews, Nelson & Gardiner, for respondents.

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

DEASY, J. This case involves the construction of a part of Section 17 of the Workmen's Compensation Act, to wit: "No proceedings for compensation for an injury under this act 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."

The defendants contend that the injury occurs at the time of the accident even though no incapacity results until some later time. On the other hand the plaintiff maintains that the injury occurs when and not until it results in incapacity and thus becomes compensable. The decree below in favor of the petitioner is attacked on no other ground. If the petitioner's theory of interpretation is correct he is entitled to compensation. Otherwise his claim is barred because while made within a year from the time of actual disability, and hence within a year after he became entitled to compensation, it was not made within a year after the happening of the accident.

In the last analysis the case depends upon the interpretation of the word "injury" as used in Section 17. If it is to be construed literally as meaning any impairment or derangement of the body or mind, though not incapacitating and not compensable, the defendants are right. But if the word injury as used in this section means accidental injury which has resulted in loss of earnings, then the petitioner's contentions must be sustained.

The petitioner is entitled to prevail for,

1. Under Section 17 *notice* must be given within thirty days after happening of *accident* and *claim* made within one year after occurrence of *injury.* The reasonable inference is that these contrasted phrases were used intentionally and for the purpose of indicating that the two limitations do not necessarily begin to run at the same time.

2. The injured workman has a year to make "claim for compensation with respect to such injury." This means an incapacitating injury, for such injuries only are compensable.

Construing a similar statute the Supreme Court of Errors of Connecticut says, "Therefore when Section 5360 provides that a written notice of a claim for compensation must be made within one year from the date of the injury, the claim spoken of must be a compensable claim under Sec. 5348 as there is no other kind of a claim for compensation referred to in the Compensation Act." *Esposito* v. *Marlin-Rockwell Corp.*, 96 Conn., 414, 114 Atl., 92.

3. A workman is incapacitated within the act when he has lost his earning power in whole or in part. This is the only test. The law provides no compensation for pain and none for physical impairment, except when it is of such character as to raise a presumption of incapacity to earn. "The object of this legislation broadly stated is to compensate for loss of capacity to earn." Honnold, Section 148.

The workman is entitled to make a claim for compensation not for mere injury, but for accidental injury resulting in loss of earning power.

4. When incapacity is to be proved it depends on "wages, earnings or salary," Section 15. Whether a workman's incapacity has increased or diminished depends not upon his physical condition, but upon his earning power. *Ray's Case*, 122 Maine, 108. When the workman's wages, earnings or salary are lost or reduced by reason of an industrial accident, he becomes in theory of law incapacitated. Then he is entitled to claim compensation. Then the year given for making claim begins to run.

5. "If incapacity arises after seven days (waiting period) compensation shall begin on the date such incapacity begins." Section 9.

"The date that such incapacity begins" is the date upon which the workman becomes entitled to claim compensation. Until that time he has suffered no injury within the purview of Section 17, i. e., no compensable injury. From that time the law gives him a year to make his claim.

In seeking for precedents in other jurisdictions we find that in some the statutes differ so radically from ours that from interpreting decisions no help can be obtained. This is true of several states whose statutes require a claim to be made or petition filed within a specified time "after the accident" or "after the date of the accident."

Equally inapplicable are decisions in jurisdictions wherein by express enactment the limitation begins at the time of actual incapacity. This appears to be true of Maryland, Washington and of Michigan since 1919.

Turning now to jurisdictions wherein the statutes so nearly resemble ours as to make interpreting decisions applicable we find three which support the defendant's contention. *Lough* v. *Acc. Comm.*, 104 Or., 313, 207 Pac., 354; *O'Esau* v. *Bliss Co.*, (N. Y.), 177 N. Y. S., 203; *Cooke* v. *Holland Furnace Co.*, 200 Mich., 192, 166 N. W., 1013. After the announcement of the opinion in this case the statute of Michigan was radically changed.

But the following authorities support the petitioners' contention: The Louisiana law bars claims "unless within one year after the injury proceedings have been begun." Claim was held not barred in one year after accident, the disability having developed later. *Guderian* v. *Sterling Co.*, 151 La., 59, 91 So., 546.

Under the Nebraska law a claim for compensation with respect to an accidental injury must be made "within six months after the occurrence of the same." Held claim not necessarily barred in six months after the accident. *Johansen* v. *Stockyards Co.*, 99 Neb., 328, 156 N. W., 511.

In Indiana written notice is required "within thirty days after the occurrence of the injury." Such notice given within thirty days after disablement was held sufficient. *Hornbrook-Price Co.* v. *Stewart*, (Ind.), 118 N. E., 315.

"The injury took place—when the rupture manifested itself and not—when he strained himself." *Brown's Case*, 228 Mass., 38.

True the Massachusetts statute provides compensation for industrial injuries whether accidental or not. But where as in *Brown's Case* the injury is accidental, the question as to when the injury occurred is the same question that we have to answer in the pending case.

Under the Connecticut law which is in essentials like that of Maine it was held that "claim for compensation" means compensable claim since no other kind of a claim for compensation is referred to in the Act.

"A compensable injury is an injury for which compensation is payable, and the date of such an injury is not the time of the accident

or occurrence causing injury, but the time under Section 5348 when the right to compensation accrues." *Esposito* v. *Marlin-Rockwell Corp.*, supra.

The word "injury" is doubtless employed in some sections of the act as meaning mere physical impairment. So properly held in *McKenna's Case*, 117 Maine, 179, construing Section 9 in its original form. But the context plainly shows that as used in Section 17 the word means accidental injury which has actually or presumptively resulted in loss of earning power.

Our problem is to determine and give effect to the intent of the Legislature. The conflict among courts which have been called upon to interpret similar statutes shows that the question is not free from difficulties. We are admonished to construe the act liberally, Section 37. The construction contended for by the defendants while not illogical is rather strict than liberal. When incapacity does not at once occur "compensation shall begin on the date such incapacity begins." Section 9.

The year provided for claiming compensation must be held to begin at the same time.

Appeal dismissed.
Decree affirmed.

E. W. JUDKINS *vs.* R. M. CHASE.

SAME *vs.* H. F. JONES.

SAME *vs.* H. L. ABBOTT.

Piscataquis. Opinion February 19, 1924.

When the language of a contract is susceptible of two meanings, that will be preferred which is fair and reasonable over one which presumes a fraudulent intent.

In this case the evidence does not disclose any fraud on the part of the vendor, and the contract must be interpreted to mean a replacement, in case of failure as a foal getter, by a stallion equal in value to the one sold, if he had met the warranty as a foal getter.

In case of a breach of the warranty as a foal getter, the defendants were limited to the remedy agreed upon in the contract, viz.: to return the stallion and demand another of equal value.

Not having returned the stallion or offered to return him at the time provided in the contract, nor shown that such return was waived by the vendee, or any facts that would excuse the defendants from complying with the contract in this respect they must be held to have accepted the horse as without a warranty and are therefore liable on the notes as declared on.

On report. Actions of assumpsit on notes taken for the sale of a stallion, which were endorsed and delivered to the plaintiff, as he alleges, for value, and before maturity, without any knowledge of any infirmity. The defense set up was fraud and failure of consideration. This is the second trial, the case having been tried before and reported in 121 Maine, 230. Judgment for the plaintiff.

The case is fully stated in the opinion.

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

Harry Manser, for defendants.

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

HANSON, J., did not concur.

WILSON, J. These cases upon other issues have previously been before this court. See 121 Maine, 230. They are now here on a

report consisting of the evidence taken out at the former trial supplemented by testimony relating to the success of the stallion as a foal getter during the year 1918, previous to the sale to the defendants, and also during the year 1920. The plea in each case at the former trial was the general issue. It is now stipulated that the defendants' several pleadings may be regarded as amended by setting up a partial failure of consideration, though it does not appear upon what grounds, whether of fraud or of breach of warranty.

The question of whether the plaintiff is a bona fide holder for value is also raised. Although the jury by a special finding at the first trial found against the plaintiff on that question, it is unnecessary to decide this point now in view of the final conclusions of this court.

As pointed out in the former majority opinion of the court, the evidence does not disclose a total failure of consideration; but either, if no fraud or breach of warranty be shown, merely an inadequacy of consideration, for which no recovery can be had, *McCormick v. Sawyer*, 108 Maine, 405; or, if fraud or a breach of warranty be shown, only a partial failure of consideration.

As to the question of fraud, which is never presumed, but must be clearly shown, the burden is upon the defendants if they urge it. Upon this ground we think they have failed. They rely upon the language of the contract, the transfer of the notes to the plaintiff by the vendor, and the failure of the plaintiff's testimony to satisfactorily show the capacity of the stallion as a foal getter for the year previous to the sale.

It is urged that the contract is fraudulent upon its face, because it provides that in case the stallion failed to get fifty per cent. of the mares bred to him with foal, the only recourse for the vendees under its terms is to return the stallion to the vendor and receive another of "equal value." The contention being that this provision could be complied with by replacing him with another stallion of the same value as the one sold proved to be, i. e., with another stallion worthless as a foal getter.

While as stated in the previous opinion of this court, the contract, if construed literally, may be susceptible of this construction, such we think is not the true interpretation. A construction which renders a contract lawful is preferred over one which renders it unlawful. Williston on Contracts, Section 620. *New Sharon Water Power Co.* v. *Fletcher*, 88 Maine, 571. Fraudulent intent is not to be presumed.

Unless otherwise shown, good faith is presumed between parties to an agreement; and where its language is susceptible of two meanings, that will be accepted which is fair, reasonable and lawful over one which presumes a fraudulent intent.

Nor is this form of contract unusual in sales of animals for breeding purposes, or the redress provided without precedent in the sales of merchandise in respect to its restricting the remedy to replacement in case of failure to serve the purpose for which it was sold. See Notes 50 L. R. A., (N. S.), 753, 774, 778; 24 R. C. L., 241, Section 517; *Nutting* v. *Watson, Wood Bros. & Kelly,* 84 Neb., 464; *Standing Stone Bank* v. *Walser et al.,* 162 N. C., 63.

The form of contract in this case was one evidently prepared for general use and not for this particular sale, its purpose being to guarantee to the vendees the foal-getting capacity of the animal, but to disclaim any other form of warranty, and to limit the vendees' remedy, in case of a failure to conform to a warranty as to foal getting, to a return of the animal and a replacement by a stallion of equal value to the one sold if he had complied with the warranty. The vendees are to be made whole in case of a breach of the warranty, not in money, but by providing them with an animal equal in value to the one they supposed they were purchasing. We think there can be no fraud presumed from this.

The fact that the vendor soon after the sale transferred the notes to the plaintiff, and that the evidence of the stallion's potency as a foal getter during the year previous to the sale to the defendants may not be conclusive as to his ability to comply with the guaranty given to the defendants, might under some circumstances be entitled to be given considerable weight; yet in view of the evidence as to the effect of care and physical condition of both stud and dam, and further in view of the fact that in case of failure, the vendor was obliged to replace with another of equal value, it falls far short of clearly showing any intent to defraud the defendants.

The defendants having failed to sustain the burden of showing that the contract of sale was tainted with fraud, the question then arises whether a failure to comply with the guaranty being shown, they had any other redress than by a return of the stallion with a demand for replacement in accordance with the terms of the contract, unless an offer to return is waived or their demand for replacement is refused.

Such contracts for the sale of blooded animals for breeding purposes have been frequently upheld in other jurisdictions and the vendee limited to the redress therein provided, especially where by the terms of the contract, it is made exclusive. *Nutting* v. *Watson, Wood Bros. & Kelly,* supra; *Standing Stone Nat. Bank* v. *Walser et al.,* supra; *Crouch & Son* v. *Leake,* 108 Ark., 322; *Highsmith* v. *Hammonds,* 99 Ark., 400; *Walters* v. *Akers,* 31 Ky., L. Rep., 259; *Beckett* v. *Gridley,* 67 Minn., 37; *Oltmanns Bros.* v. *Poland,* (Tex. Civ. App.), 142 S. W., 653; *Dunham* v. *Salmon,* 130 Wis., 164.

It was especially provided in the contract in the case at bar that the vendor should not be accountable or responsible except in case the stallion failed to get fifty per cent. of the mares bred to him with foal, and his liability limited to replacing him with another of equal value in case the animal was returned by the vendees within a definite time.

In case of breach of this warranty as a foal getter, upon a return and refusal to replace, or a waiver by the vendor of this provision as to return, the vendees would, of course, have an action for damages; and in an action by the vendor for the purchase price they might invoke as a defense a partial failure of consideration by reason of such a breach, but before they could successfully maintain such a defense they must show a compliance with the contract on their part and a return of the stallion not later than the first week in April, 1920, or a waiver of this provision on the part of the vendor.

Since it is not claimed that any such return was made, was this requirement in any way waived by the vendor or the defendants excused from complying therewith? We find no evidence in the reported case sufficient to warrant a finding that this provision of the contract was waived, nor indeed is it really urged by the defendants. There is some evidence that the vendor was away from Foxcroft in 1918 and 1919, but it does not appear that he was not there during the first week in April, 1920, or that he could not, or would not, if then requested, have replaced the stallion as required under the contract.

Counsel in examination of witnesses apparently assumed that return and replacement were to be made, if at all, in April, 1919. A reading of the contract will disclose that although the year is left blank, this assumption is not correct. The return was to be made at Foxcroft during the first week in April, 1920.

That letters written by one of the defendants to the vendor in 1919, it appearing that he was out of the State during that period, either engaged in war work or for his health, were never returned or answered, does not satisfy the burden resting on the defendants to show a return of the horse in April, 1920, or an offer to return and a refusal to accept and replace, or a waiver by the vendor of this provision of the contract of sale, or furnish a valid excuse to the defendants for not offering or taking any steps to comply therewith at the time fixed in the contract.

Failing to avail themselves of the redress provided in their contract in case of a breach of the only warranty made, they must be held to have accepted the horse as without a warranty and are therefore liable on their note. Entry will be in each action:

Judgment for plaintiff in the sum of $1,400 with interest from date of notes to date of judgment. Interest to be computed by the clerk.

ELIAS S. GIFFORD *vs.* CHARLES E. MOREY.

Androscoggin. Opinion February 26, 1924.

Mere speaking by an employer to an employee, when it does not appear what was said, is not sufficient to sustain an action of negligence against the employer. Doubt and surmise are too frail a substructure to sustain a cause of action.

In this case a nonsuit was properly ordered. The negligent act alleged is simply that the defendant spoke to the plaintiff. What was said may have been a warning or caution that the plaintiff might avoid peril.

On exceptions. An action for negligence to recover damages for personal injuries sustained by plaintiff while in the employment of defendant. The plaintiff while in the employment of the defendant as manager of his large farm, was looking over the premises in company with the defendant, and came upon a four-horse team upon

which other workmen were loading heavy logs. The plaintiff observing that the workmen loading the logs required assistance ran to help them. Some of the men left the team to cut some longer skids. The plaintiff stood facing the load. The defendant spoke to him. What was said by defendant to plaintiff does not appear. Plaintiff turned toward defendant to speak to him and as he did so a large log slid back on the skids striking his left leg and fracturing it. At the conclusion of the plaintiff's evidence counsel for defendant filed a motion for a nonsuit which was granted by the presiding Justice and plaintiff excepted. Exceptions overruled.

The case is fully stated in the opinion.

Frank A. Morey, for plaintiff.

Tascus Atwood, for defendant.

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

CORNISH, C. J. Exceptions by plaintiff to order of nonsuit in a common law action of tort for personal injuries.

The question of the application of the Workmen's Compensation Act, Public Laws, 1919, Chapter 238, has been discussed by counsel but in our view of the case this becomes immaterial.

The defendant at the time of the accident resided in Lewiston and owned a large and costly farm situated partly in Poland and partly in Oxford. The plaintiff was his general manager. On January 9, 1922, the defendant who was visiting the place for a week, in company with the plaintiff, was looking over some of the work that was going on. They first visited the pond where men were cutting ice for the farm and then walked about a quarter of a mile through the woods to the place where a crew was cutting timber to be used in the construction of a barn, and came upon one of the four-horse teams upon which the men were loading some heavy logs. They were having some difficulty and the plaintiff seized a peavy and ran to help them. What followed may best be told in the plaintiff's own language, and it is upon this, and this alone, that the plaintiff rests his claim. "Some of the men decided there would have to be longer skids cut to make a less grade. . . . . They left it and went to cut those skids. The team was like where you are. This big tree was right down across here. Mr. Charles Morey was standing right

here back of me. I was standing this way facing the load. Mr. Morey spoke to me. I cannot recall the request he made at the time. I turned that way to speak to him. As I did the large tree slid back on those skids and broke my leg, both bones, here."

Reduced to its simplest form the negligence on the part of the defendant of which the plaintiff complains, is that while he, the plaintiff, was standing and facing the load of logs, the defendant spoke to him. Surely it requires something more than this to charge an employer with actionable negligence. A situation might possibly be conceived where certain instructions given by an employer to an employee under certain circumstances might be regarded as an act of negligence. But here nothing is proven as to the words spoken. They may have been words of caution uttered with the distinct purpose of enabling the employee to avoid peril. The case fails to disclose the fact and we are left to doubt and surmise, a substructure too frail to sustain a cause of action. This is all there is to this case and the entry must be,

Exceptions overruled.

GUARANTEE FOOD COMPANY *vs.* CONSUMERS FUEL COMPANY.

Waldo. Opinion February 26, 1924.

In an action upon a trade acceptance or draft drawn by plaintiff on and accepted by defendant, there is no variance merely because the clause in the acceptance, "The obligation of the acceptor hereof arises out of the purchase of merchandise from the drawer" was omitted from the declaration. This clause formed no part of the actionable contract and was merely surplusage.

The jury found in this case that the merchandise for which the acceptances were given was not commerical feeding stuff within the definition prescribed by R. S., Chap. 36, Sec. 2, and that there was no misbranding. This finding was justified by the evidence.

On exceptions and motion for a new trial. An action of assumpsit brought by plaintiff, a corporation located at Lewisburg, Pennsylvania, to recover of defendant, a corporation located at Belfast, Maine, on two trade acceptances. The defendant pleaded the general issue, and among other things set up under a brief statement as a defense that the merchandise for which the acceptances were given was not branded according to the requirements of the laws of this State. The case was tried before a jury and a verdict rendered for the plaintiff, and the defendant excepted to the ruling of the presiding Justice admitting certain documentary evidence, and also filed a general motion for a new trial.

Motion and exceptions overruled.

The case is fully stated in the opinion.

Clyde R. Chapman, for plaintiff.

Arthur Ritchie, for defendant.

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

CORNISH, C. J. Assumpsit upon two trade acceptances, or drafts drawn by the plaintiff on the defendant and accepted by the defendant. They are in the following form:

"Trade Acceptances.

$187.50 Lewisburg, Pa., April 14, 1922.

Sixty days (60) after date pay to the order of Guarantee Food Company of Pennsylvania one hundred and eighty-seven 50-100 dollars.

The obligation of the acceptor arises out of the purchase of merchandise from the drawer.

To Consumers Fuel Co.
by C. B. Holmes, Pres.
address Belfast, Maine.

Value received and
charge same to account
of Guarantee Food Company
of Pennsylvania
By Thomas Cummins."

The other was identical in form and amount except that the due date was ninety days instead of sixty.

The Consumers Fuel Company accepted each by writing its name across the face, thereby agreeing to pay the drafts according to their tenor.

The jury rendered a verdict in favor of the plaintiff for $406.66, the full amount due, and the case is before this court on defendant's exception and motion.

EXCEPTION.

The exception relates to a single point, the admission of the trade acceptances in evidence when offered by the plaintiff, the defendant contending that they should have been excluded on the ground of a variance between the acceptances and the declaration, the latter having omitted the clause: "The obligation of the acceptor hereof arises out of the purchase of merchandise from the drawer."

This point is not well taken. The clause omitted forms no part of the actionable contract between the parties. It is mere surplusage. The draft contains the words "Value received" and they make a prima facie case for the plaintiff. What the nature of the consideration was is unimportant so far as the declaration is concerned. If there was in fact a failure of consideration, as the defendant alleged in its pleadings, that defense is still open to the defendant in evidence, the burden being upon it to prove the fact.

The defendant takes nothing by the exception.

MOTION.

What the defense relied on was, first, that the merchandise for which the acceptance was given was commercial feeding stuff within the definition prescribed by the statute: "All articles of food used for feeding live stock and poultry, except hays and straws, the whole seeds and the unmixed meals made directly from the entire grains of wheat, rye, barley, oats, Indian corn, buckwheat, flaxseed and broom corn." R. S., Chap. 36, Sec. 2; and second, that the merchandise was not properly branded according to law.

These were questions of fact and were submitted to the jury under clear and proper instructions. The name of the commodity was the

"Keystone Stock Conditioner," and whether that was commercial feeding stuff within the statutory definition or a sort of animal tonic, like the old-fashioned condition powders, so called, was the disputed point. The burden was on the defendant to prove that it was a commercial feeding stuff. It did not satisfy the jury on that question and the evidence does not convince us that the finding was manifestly wrong. No analysis was offered, and no satisfactory statement as to its ingredients, qualities and uses. Mr. Holmes, the president of the defendant corporation, frankly admitted when the question was put to him squarely, that he did not know whether this is what is called a commercial feeding stuff or a stock conditioner. The name itself, "Keystone Stock Conditioner," would strongly imply that it was merely a conditioner unless it was a misnomer. The evidence offered by the defendant on this point was, at the best, vague, uncertain and indefinite, falling far below the standard which the burden of proof required.

As to misbranding, this becomes unimportant if the merchandise was not a commercial feeding stuff. But the evidence on this contention is equally indefinite and unconvincing. The fact, if necessary, was not proven.

It is significant on both these issues of fact that the only complaint made by the defendant in its letter of May 18, 1922, after the arrival of the goods, was that they had arrived in very bad condition, the bags being broken open, etc., nothing as to the nature of the commodity or its being misbranded. The fault complained of is not attributable to the plaintiff, while those now set up were not in mind at the time.

Exception and motion overruled.

CHAS. A. DAY & CO., INC. *vs.* CHARLES D. BOOTH.

SAME *vs.* WADLEIGH B. DRUMMOND.

SAME *vs.* ALICE B. FARNHAM.

Cumberland. Opinion March 1, 1924.

A petitioner, under R. S., Chap. 51, Sec. 22, whose stockholding is colorable only, or solely for the purpose of maintaining proceedings under said statute, is not a person interested under the statute and entitled as of right to inspect the records and stock book of a corporation and to take copies and minutes therefrom.

On exceptions. Mandamus proceedings in three cases brought by Charles A. Day & Co., Inc., a Massachusetts corporation, to obtain stock lists of Mississippi River Power Company, Railway & Light Securities Company, and United Light and Railways Company. The three cases were heard together and the finding and ruling of the sitting Justice embraced them all. Counsel for the respondents contended that the petitioner is a dealer in unlisted, inactive and defaulted securities, and that its sole purpose in seeking these stock lists is to use them for advertising the petitioner's business as such a dealer. The petitioner held only one share of stock in each of the corporations involved in the proceedings. The petitioner relied upon R. S., Chap. 51, Sec. 22, which provides that the records and the stock books of Maine corporations "shall be open at all reasonable hours to the inspection of persons interested, who may take copies and minutes therefrom of such parts as concern their interests." The sitting Justice found that the stockholding of the petitioner was only colorable, and for that reason ruled that the petitioner was not a person interested within the meaning of R. S., Chap. 51, Sec. 22, and therefore was not entitled to inspect the records and stock books of the respondents, and the peremptory writ was denied in each case, to which ruling petitioner excepted. Exceptions overruled.

The case is fully stated in the opinion.

Ralph W. Crockett, for petitioner.

Verrill, Hale, Booth & Ives, for Charles D. Booth and Alice B. Farnham.

Drummond & Drummond, for Wadleigh B. Drummond.

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

PHILBROOK, J. Exceptions from ruling of single Justice sitting in equity. After careful and repeated examination of the record and briefs of counsel, and the extended findings of the Justice before whom the case was heard, we find it difficult to state the case, the contentions of the parties and the conclusions of law and fact, in more clear, correct, and appropriate language than that used by the sitting Justice. We therefore, adopt that finding as the opinion of the court and quote in full therefrom.

"These proceedings are upon petitions for writs of mandamus against the respondents to permit the petitioner to inspect the stock books of the corporation, of which the respondents are respectively clerks, to take copies and minutes therefrom of such parts as concern the interests of the petitioner, and to make lists of stockholders of the respective corporations. The three cases were heard together.

"The respondent Booth is clerk of Mississippi River Power Company, a corporation having outstanding capital stock consisting of 242,204 shares of the par value of $100 each, and of a total market value, at the date of the return to the alternative writ, of about $11,000,000; the number of stockholders exceeds 2900; the petitioner is the holder of one share of said stock, having a market value of about $28 at the date of the return. The stock of the Mississippi River Power Company is listed on the Boston Stock Exchange.

"The respondent Drummond is clerk of Railway & Light Securities Company, a corporation having outstanding capital stock consisting of 10,000 shares of common stock and 15,000 shares of preferred stock, of the par value of $100 each, and of a total market value, at the date of the return to the alternative writ, of approximately $2,075,000; the number of stockholders in said corporation exceeds 750; the petitioner is the holder of one share of common stock, having a market value of about $80 at the date of the return. The stock of the Railway & Light Securities Company is an 'unlisted stock.'

"The respondent Farnham is clerk of United Light & Railways Company, a corporation having outstanding capital stock consisting of 101,331 shares of First Preferred Stock, 34,087 shares of Participating Preferred Stock, and 37,852 shares of Common Stock, of the par value of $100 each, and of a total market value, at the date of the return to the alternative writ, of about $15,000,000; the number of stockholders in said corporation exceeds 3,200; the petitioner is the holder of one share of the Common Stock, having a market value of about $104 at the date of the return. The stock of United Light and Railways Company is listed on the Chicago Stock Exchange.

"Counsel for petitioner contends that the cases of *Knox* v. *Coburn*, 117 Maine, 409, and *Day* v. *Booth*, 122 Maine, 91, are decisive of this case.

"The present plaintiff is a corporation organized to take over and succeed to the business of Charles A. Day & Company, a partnership composed of the petitioners in *Day* v. *Booth*; one of those partners, acting for the firm, was petitioner in *Knox* v. *Coburn*. The officers of the corporation are former members of the partnership, and its methods of business are the same; the form of organization was simply changed when the partnership formed to the corporate form.

"If the only question here before me is whether in the exercise of my discretion I shall refuse to the petitioner the remedy which it seeks, to enforce an alleged 'absolute and unlimited right to inspect the corporate records and the list of stockholders, whatever may be the motive or purpose in seeking to enforce it,' (*Knox* v. *Coburn*, supra), I think that the counsel may well rely upon the cases which he cited. In *Knox* v. *Coburn* the court said 'It will not be presumed that the motive of the stockholder is an improper one, and if the motive or purpose is charged to be otherwise than proper, the burden is upon the officer refusing the request, or on the corporation, to establish it.' In the present cases I think that the respondents have failed to sustain the burden of showing that the purpose of the petitioner is vexatious, improper or unlawful, or inimical to the interests of either the respective corporations or their stockholders, for the reasons stated at length in the opinion in *Knox* v. *Coburn*, and in the opinion *Day* v. *Booth*.

"The counsel for respondents have raised an issue in these cases not raised in either case above cited. They contend that the manner in which the petitioner intends to use the lists of stockholders which

are sought, is in violation of the 'Blue Sky Law' of this State (R. S., 1916, Chap. 40, Secs. 11-23) and that for that reason the court should exercise its discretion to refuse the list. I very much doubt whether the methods of business followed by the petitioner constitutes a violation of law and I hesitate to base the exercise of discretionary power upon the construction of the law for which counsel contends, especially in the light of the following extract from a letter from Bank Commissioner Lawrence to the firm of Charles A. Day & Company, predecessor of the petitioner, dated March 3, 1922, (Exhibit 12, defendant) 'I suppose the department has no jurisdiction over the United States mails, and it is a question just how far solicitation through the mail of citizens of Maine might constitute infringement of the law.' The ground upon which I base the decision of these cases does not require me to endorse the construction contended for.

"I think, however, that the decision of these cases must depend upon whether the petitioner has shown itself entitled to the right which it claims. The petitioner relies upon R. S., 1916, Chap. 51, Sec. 22, which provides that the corporate records and stock book 'shall be open at all reasonable hours to the inspection of persons interested, who may take copies and minutes therefrom of such parts as concern their interests,' &c.

"Has the petitioner shown itself 'interested' in the affairs of the several corporations, within the meaning of the statute? I think that this question must be answered in the negative.

"From the somewhat bulky record I find the following facts which, with the facts before stated in paragraphs two, three, four and six of this opinion, I think are decisive of these cases.

"I find that the petitioner is the owner of only one share of stock in each of the corporations concerned; that each of these shares was acquired for the sole purpose of laying a foundation to demand a list of stockholders in each company; (testimony of Charles A. Day, President, page 54. Deposition of Wilfred N. Day, Asst. Treas. p. 5); that the business of the petitioner is dealing in unlisted and inactive securities, occasionally in listed securities; that the petitioner and its predecessor, the firm of Charles A. Day & Company, have acquired for the purposes of said business approximately 2,000 lists of stockholders in various corporations, which the petitioner circularizes in the pursuit of its business; that a large proportion of these lists have been obtained by becoming a stockholder and demanding as the

privilege of a stockholder, a list of the stockholders in the corporation; that when the petitioner took over the assets of the firm of Charles A Day & Company, in or about November 1922, it took over and now holds very few shares of stock, from twelve to twenty-five, which it holds, or its predecessors had held, as qualifying shares in order to secure stock lists; (Testimony of Charles A. Day, p. 32, Deposition of Wilfred N. Day, p. 3); that it is the general policy of the petitioner following the policy of its predecessor, the firm, to dispose of the share or shares of stock which it has obtained for the purposes of obtaining stock lists, after such lists have been obtained. (Testimony of Charles A. Day, p. 33); that the purpose of the petitioner in obtaining the lists of stockholders in the three corporations here concerned is to trade in the stocks of those corporations; (Testimony of Charles A. Day, p. 11).

"Upon these facts can the petitioner be regarded as a 'person interested' within the meaning of the statute? I think not.

"In all the reported cases which have arisen in this State upon the statute hereunder consideration, so far as my examination shows, proof of the possession of one or more shares of stock standing in the name of the petitioner seems to have been regarded as sufficient to establish the petitioner's interest, and when that appeared, the interest of the petitioner has not been further questioned; undoubtedly such stockholding is sufficient evidence upon that point until the contrary appears. But where it is shown that such stockholding is only colorable, or solely for the purpose of maintaining proceedings of this kind, I fail to see how the petitioner can be said to be a person interested, entitled as of right to inspect the records and stock book of a corporation, and to take copies and minutes therefrom, of such parts as concern his interest.

"I therefore rule that upon the facts appearing in these cases the petitioner has failed to show that it is a person interested within the meaning of R. S., 1916, Chap. 51, Sec. 22, entitled to inspect the the records and stock books of the respondent.

"Peremptory writ of mandamus denied in each case."

Finding no error in the statemnt of the case or rulings of law the mandate will be,

Exceptions overruled.

GEORGE R. DEERING, Libl't *vs.* MARY A. DEERING.

Knox. Opinion March 6, 1924.

To constitute utter desertion as a ground for divorce three elements must be proved; first, cessation from cohabitation continued for the statutory period of three years; second, intention in the mind of the libelee not to resume cohabitation; third, the absence of the libelant's consent to the separation.

In this case the element of the absence of the libelant's consent to the separation is wanting. By the overt act of the libelant in making and filing his previous libel and maintaining it upon the docket of the court until the April Term, 1920, he declared to the whole world his avowed purpose not to live with his wife but to be separated from her. No better proof of his consent to her absence from his home can well be conceived than this, so long as that prior libel remained on the files of the court.

On report. A libel for divorce alleging "utter desertion continued for three consecutive years next prior to the filing of the libel," under R. S., Chap. 65, Sec. 2. Libelant had filed a previous libel alleging the same charge, which remained on the docket until the April Term, 1920, when it was dismissed without a hearing. The libel in this case was filed August 7, 1922, returnable at the January Term, 1923. Counsel for the libelee filed a motion to dismiss the libel on the ground that within three years a prior libel alleging the same ground, brought by the same libelant, had been pending. By agreement of the parties the cause was reported upon an agreed statement of facts. Libel dismissed.

The case is fully stated in the opinion.

Arthur S. Littlefield, for libelant.

Gilford B. Butler, for libelee.

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

CORNISH, C. J. This a libel for divorce based upon the charge of "utter desertion continued for three consecutive years next prior to

the filing of the libel," under R. S., Chap. 65, Sec. 2. This libel was filed on August 7, 1922, returnable at the January Term, 1923, of the Supreme Judicial Court for Knox County. At the April Term, 1923, the libelee filed a motion asking that the libel be dismissed on the ground that within three years a prior libel for desertion brought by the same libelant had been pending. The cause was then reported to the Law Court on an agreed statement of facts, which recites: "On July 8, 1918, the libelant filed in this Court a libel alleging desertion in 1907. This libel was served for the September Term, 1918, and the libelant was thereafter ordered to pay ten dollars per week during the pendency of the libel, which was paid. The libel was continued on the docket until the April Term, 1920, when without hearing it was entered 'dismissed'."

On this agreed statement the pending libel must be ordered dismissed. The principles of law governing the charge of utter desertion as a ground of divorce have been fully and recently announced in the case of *Moody, Libelant* v. *Moody*, 118 Maine, 454. This court held in that case that to prove utter desertion three elements must concur; first, cessation from cohabitation continued for the statutory period of three years; second, intention in the mind of the libelee not to resume cohabitation; third, the absence of the libelant's consent to the separation. The third element alone is involved here. By the overt act of the libelant in making and filing his previous libel and maintaining it upon the docket of the court until the April Term, 1920, he declared to all the world his avowed purpose not to live with his wife but to be separated from her. No better proof of his consent to her absence from his home can well be conceived than this, so long as that prior libel remained on the docket of the court.

The earliest moment from which utter desertion could possibly be computed would therefore be April, 1920, only two years and four months before the last libel was filed. This falls eight months short of the statutory three years which must be the three years immediately prior to the filing. The libelant must prove absence of consent during all the time since August 7, 1919, and that it is impossible for him to do with the former libel remaining on the docket until the April Term, 1920. That libel did not merely prove a negative absence of consent to separation but a positive and affirmative desire and prayer on his part to make the then existing separation permanent

by means of the order of the court. *Moody* v. *Moody*, supra, is conclusive of this case, and its doctrine is hereby affirmed.

In accordance with the terms of the agreed stipulation the entry must be,

Libel dismissed.

PATRICK CONCANNON *vs.* JAMES C. DAVIS, Agent.

Cumberland. Opinion March 12, 1924.

A finding by a jury that defendant was guilty of negligence, and also that plaintiff was free from contributory negligence, would be warranted under the facts in this case.

In this case a jury would be warranted in finding the defendant guilty of negligence under the facts, in moving a train over this dead line without any previous warning, in having no watch or look-out on the tender of the engine which was pulling the train, and no one at the switch to caution employees, in short in converting a place of comparative safety to one of peril without any notice to employees likely to occupy it in the performance of their duties.

A jury also would be warranted in finding the plaintiff free from contributory negligence, which in any event can only be considered in connection with damages.

On report. An action to recover damages for personal injuries sustained by plaintiff in the yard of the Portland Terminal Company while in its employ by being caught and pinched between the tender of a locomotive and a bulkhead on a buggy track, so called. At the conclusion of the evidence before a jury, by agreement of the parties, the case was reported to the Law Court under a stipulation that if the evidence would sustain a verdict by a jury for the plaintiff the Law Court to assess damages, and if the evidence would not sustain a verdict by a jury for the plaintiff, judgment to be for the defendant. Judgment for plaintiff for $10,000.

The case is fully stated in the opinion.

Joseph E. F. Connolly, for plaintiff.

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

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

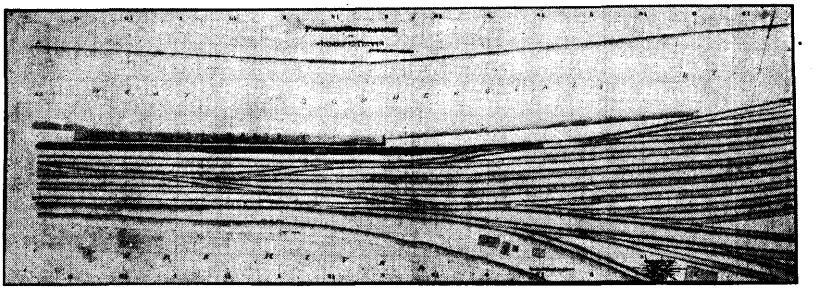
CORNISH, C. J. This is an action of tort brought under the Federal Employer's Liability Act, which is admittedly applicable, to recover damages for injuries sustained by the plaintiff in the yard of the Portland Terminal Company. It is before the Law Court on report under a stipulation which will be considered later. The record is voluminous but there is little contradiction on the essential points.

The topographical situation as clearly stated in the brief of the learned counsel for the defendant, was this: The Portland Terminal Company, transfer agent and switching corporation, owning terminal facilities used by both the Boston and Maine and Maine Central Railroad Companies, has in Portland or had at the time this accident occurred, eight or nine switching yards the purpose of which is to take the incoming freight trains from both roads, break them up, reclassify the cars, part for delivery and part for through shipment, make up the new trains and deliver them to each of the connecting roads ready to be started on the way to their destination.

Among others is yard No. 8 where this accident occurred, and which is situated between Commercial Street on the north and Fore River on the south. The tracks in the yard run in a general easterly and westerly direction. Four main line tracks come in from the west, at what might be termed the neck of the yard and then spread out, fan-like toward the east making about forty tracks in all in the extreme easterly portion. We are concerned in this case, however, only with the section at or near the neck comprising the four main line tracks into which all of the switching tracks converge, and the caboose or buggy track, so called, at the extreme north just beyond what is known as main line track No. 2. This buggy track runs alongside a bulkhead about 300 feet long and four and one half feet high, built of railroad sleepers placed on end. This bulkhead was originally constructed for loading or unloading purposes but for many years has not been used except at very rare intervals and then at the western end by the Telephone Company for the loading and unloading of poles.

The buggy track is so called because it is used for the storage of buggies or caboose cars in which the freight train crews keep their personal belongings. Each buggy comes into the yard with its

respective train and is stored on this track until that particular crew goes out again, when it is attached to the rear of the outgoing train. The accompanying sketch, reduced from a plan in the case, may be of assistance in understanding the locus.



The accident happened as follows: A little after seven o'clock on the morning of July 15, 1919, the plaintiff, who was a section hand in yard 8, was ordered by his foreman to get some tie plates for use in laying rails. These were kept in various places, sometimes around the workmen's shanty near the southern or river side of the yard, sometimes near the coal shed, a little easterly, and sometimes on the above described bulkhead at the north. The plaintiff found no suitable ones at the shanty, was told there were none at the coal shed by two workmen coming from that direction, and therefore he started northerly across the intervening tracks for the bulkhead. When he reached outward main line number two, just south of the buggy track, he saw a shifting engine with seventeen freight cars on the side-track nearest Commercial Street moving slowly westerly in his direction. The engine was then some distance easterly of the switch connecting with outward main line number two, and also easterly of the switch connecting with the buggy track. The engine was backing, tender first and was pulling the train. The plaintiff, assuming that the train would take main line number two, as always in his experience of over eight years such trains had done before, kept his course, crossed main line number two and the buggy track, stood between that track and the bulkhead, a distance of about two and a half feet,

and began to look around for tie plates, unsuspecting any danger, when suddenly he realized that the train instead of taking the main line, as he had expected, had taken the buggy track and the tender was right upon him. It was too late then for him to extricate himself. He shouted, but saw no one on the engine and no one on the engine saw or heard him. He clung as close as he could to the bulkhead, but his body was pinched between the tender or engine and the bulkhead, his right hip crushed and other injuries sustained. Hence this action.

At the conclusion of the testimony instead of submitting the case to the jury it was reported to this court with the stipulation that "if the evidence would support a verdict for the plaintiff, the Law Court is to assess damages for the plaintiff; If the evidence would not sustain such a verdict judgment is to be rendered for the defendant."

In other words the Law Court is to examine and pass upon the evidence as if a verdict had been actually found by the jury in favor of the plaintiff and the case were here on a general motion by the defendant to set it aside as against the evidence, the only difference being that no damages have been assessed.

Is then the assumed verdict for the plaintiff manifestly wrong? That is the clear cut issue.

I. Defendant's Negligence.

The writ contains ten counts, five at common law and five under the Federal Employer's Liability Act. The former are abandoned. The claims under the latter, as supported by the evidence, may be condensed as follows:

Under the long established system of operation in the defendant's yard, recognized and fully appreciated both by the employer and the employees, the buggy track on or at the side of which the accident happened had been exclusively devoted by the Terminal Company to storage purposes for a long period of years, at least during all the eight years and a little more during which the plaintiff had worked in that yard. While that track was connected with other tracks by a switch both at its easterly and westerly end, yet the one at the westerly end had been used almost exclusively. The buggies were set on to the storage track from that end or were "kicked" on, to use the language of the train men. And they were almost always removed at the same westerly end. Occasionally a buggy might be

taken off by a switching engine at the easterly end if the presence of a long string of buggies to the westward rendered that method more convenient. But this was of rare occurrence.

Moreover, section men sometimes temporarily stored their handcars or lorries on this buggy track, when working on the main line in that vicinity. At times the switch at the easterly end had been spiked so that neither entrance nor exit could be made at that point. The other tracks in the yard were regularly inspected but not this buggy track. Its rails had become rusty from disuse so that it looked to be as it was a storage track pure and simple. All this was common knowledge in the yard.

Only once during the eight years covering the plaintiff's term of employment had a train been moved over the buggy track. That happened five years or more before the accident and on that occasion the Company, appreciating the danger arising out of the changed condition and apparently also its own responsibility, gave express warning to the yard employees in advance, in order that they might protect themselves. The foreman of that section notified the section men "to be careful about the buggy track as they were going to use it." This fact is uncontradicted, is proven by testimony both from plaintiff and defendant and is most important and significant.

Its use on this particular morning was occasioned by an emergency. An accident had happened the night before on some portion of the main line toward the west preventing the passage of trains over main line number two and for that reason the defendant brought the buggy line into requisition. No notice however, of this proposed change was given. No warning was communicated to the section men, regardless of the legal duty resting upon an employer to notify employees when without their knowledge a safe place in which to work is suddenly changed into an unsafe and perilous one.

Not only was the unwarned change itself accompanied by danger to the workmen, but no precautions were taken to protect them from the moving train after it had started. The fireman was coaling the locomotive at the time and under the rules of the road and under the dictates of ordinary precaution additional responsibility was then thrown upon the engineer to look out for trouble in the direction in which the cars were moving. But the cab was concealed from the track by the tender and the engineer was looking toward the rear of the train taking signals from the head brakeman who was on the

train six cars back, and he from the second brakeman who was still further back. Furthermore there was no watch or lookout on the tender as it moved from its regular course upon and over this irregular and unusual course, no one to give warning to persons who might be upon or near the buggy track nor to signal the engineer in case of need or emergency. Nor was anyone at the switch to give such warning either by his word or acts or mere presence in that location.

It may be true that the automatic bell was ringing on the engine, but that was usual when the engine was taking its customary course, and gave no indication or warning that it was to take the other track. In short the Company was pulling its train into this storage track without the slightest warning or attempt at warning to employees who in the course of their duties might have occasion, as did the plaintiff, to go upon and about it, a thing it had never done before. The whole situation constituted a trap, not designedly of course, but none the less effectively set to catch not strangers unacquainted with the ordinary situation, but to catch employees of long standing whose very knowledge and experience made them the innocent victims of the defendant's negligence.

Under all these circumstances, we have no hesitation in declaring that a finding of the jury that the negligence of the defendant had been proven should not be disturbed. Granting that the defendant had the legal right to use its own property for its own legitimate purposes, yet the use of one's property in disregard of the legal rights of others liable to be affected or injured thereby is the very gist of negligence.

The defendant seeks to avoid legal liability by invoking the doctrine laid down by the U. S. Supreme Court in the leading case of *Aerfetz* v. *Humphreys*, 145 U. S., 418, where it is held that persons having direct charge of a switching engine and cars upon the tracks in a railroad yard "have a right to act upon the belief that the various employees in the yard familiar with the continuously recurring railroad movement of the cars would take reasonable precaution against their approach," that the railroad company under those circumstances "is not compelled to send some one in front of the cars for the mere sake of giving notice to employees who had all the time knowledge of what was to be expected." This doctrine is followed in many other cases and is undoubtedly sound. The very nature of the railroad business demands such a doctrine. It is but a declaration that the employer

is not bound to guard and warn the experienced employee against what is to be expected in the ordinary and natural course of the business, and the employee must look out for that himself. A railroad switching-yard is a place of known danger, with its frequent and almost continuous movements of engines and cars.

But the distinction between the facts in that line of cases and in the present is sharp and clear. It is that between the peril connected with passage across an actively used traffic track and a practically dead storage track. Had the plaintiff been injured while crossing any of the tracks before reaching the storage track this doctrine might be effectively invoked. But when he reached the storage track, the danger of passing trains had ceased, and another situation arose. What was to be naturally expected there, applying the same legal rule, was the danger from cabooses kicked on from the west, and nothing else. That he was expected to look out for and he says that he did. He looked toward the west where danger might lie. He did not look toward the east for a peril that had never been created before. Nor was he bound to do so. The duty then was shifted to the defendant to see that he and his co-employees were seasonably warned of the change.

No step was taken toward that end and the negligence of the defendant as assumedly found was not a clearly wrong finding.

II. Assumption of Risk.

The defendant further urges that the plaintiff assumed the risk and therefore cannot recover. This defense is a bar to recovery under the Federal Employer's Liability Act if the facts warrant its application. But here they do not. The assumption of risk on the part of an employee necessarily implies prior knowledge of the conditions from which the accident happens. *Clement* v. *Maine Central R. R. Co.*, 117 Maine, 45. That condition here is the passage of a train over the storage track. Of this the plaintiff was admittedly in utter ignorance. He did not know of the risk, had no reason to know it, and therefore he cannot be held to have assumed it.

III. Damages.

The plaintiff was a man fifty-three years of age and in good health. His injuries were grievous and permanent. His right hip and leg

were crushed. The bones of the leg have only partially united and the leg will never be of much use according to the surgical testimony. A serious infection of the leg followed the injury necessitating three or four operations. He was in the hospital one year and eight months of which time he was confined to the bed for one year. He wore a plaster cast for eight months. He can move only by the aid of crutches. His suffering has not wholly ceased. The hospital expenses amount to $1,591. He was earning $3.20 a day at the time of the injury. His earning capacity now is very substantially reduced. Considering all the legal elements that enter into the measure of damages, and also the present purchasing power of a dollar, it is the opinion of the court that $10,000 is a fair award.

IV. CONTRIBUTORY NEGLIGENCE.

Under the Federal Employer's Liability Act, contributory negligence on the part of the plaintiff is not a ground of absolute defense, but may serve to diminish the amount of damages to which the plaintiff might otherwise be entitled.

The defendant invokes such diminution here in case actionable negligence is attributed to the Company.

But we are unable to discover want of due care on the plaintiff's part. He acted as the ordinarily prudent man should have acted under the same circumstances. The same element that enters so largely into the negligence of the defendant favors the plaintiff on the question of his own due care, namely, the sudden and unexpected and unwarned use of a hitherto unused track. When inquired of in regard to his crossing the various tracks from south to north, he said: "I looked up and down the tracks every time I crossed every one, ... Looked up and down the tracks for fear of any trouble coming." As he neared track number two he saw the shifter and cars backing up, tender first, and he warned a fellow workman who was with him to look out for it, thus showing his own alertness. The train was then east of the easterly switch. It was a common occurrence for such a train to be on that track leading into outward main track number two at that time. It was in accordance with the universal method of work in that yard for the train to pass on to that track and he naturally expected this one to do the same. He had a right to so expect. Only on one occasion had the Company used the

buggy track for a train and then the men had been duly and seasonably warned. He had left track two within the zone of danger and crossed on to the buggy track the supposed zone of safety, at least from trains moving from the east. The only danger which he then had reason to apprehend was from buggies kicked down from the west, against which he had been instructed to be careful when crossing over this track, and he says that he was watching for such a kick down. In other words as a prudent and careful man, attentive to his business and watchful for his own safety, he was guarding against the only peril to which he had reason to believe he was exposed, and paid no further attention to the peril which he had good reason to suppose had ceased when he cleared track number two. All this is reasonable and convincing. Again the defendant cites the switch yard cases before referred to, and again they do not apply. When he was on that portion which the Company had devoted to transportation the doctrine of those cases was in point, and it appears that he was vigilant, as he should have been, in looking both ways. When he had left that portion behind and reached the storage track, those cases ceased to be precedents. The defendant itself had lulled the plaintiff into a sense of absolute security by its long continued use of the buggy track, and he must not be held to have failed in due care because he did not watch to determine whether the approaching train would leave the track it had always taken during his eight years of personal experience, with one exception when due warning was given, and take another track that had been free from the passage of trains during all that time.

To hold the plaintiff guilty of contributory negligence under the facts of this case would be contrary to what we conceive to be good law and good sense. Therefore the award is not to be diminished by any contributing fault of the plaintiff and the entry should be,

Judgment for plaintiff for $10,000.

EMMA H. ROGERS, Appellant,

In the matter of the proposed will of LYDIA M. DEERING.

Sagadahoc. Opinion March 13, 1924.

"Undue influence" as a ground for avoiding a will may be established either by proof or a presumption of law. It is never to be inferred from opportunity or interest alone. There must be proof that testator was subjected to some influence destroying his free agency, whatever designing method is pursued to produce such undue influence, and that he was constrained from following or expressing his real, actual will or desire.

In the instant case there was no direct evidence that any one attempted to induce or influence the testatrix to make the will and codicil as they were made with their respective provisions.

Furthermore there was evidence that the intentions of the testatrix and purposes she had in mind as expressed by her prior to the making of the will, were in accord and harmony with the provisions of the will and codicil.

On exceptions. Instruments, purporting to be Lydia M. Deering's last will and the codicil thereto, disallowed by the Probate Court in Sagadahoc County, on the grounds that the maker was wanting in testamentary capacity and that the documents were not duly executed, were brought by appeal to the Supreme Court of Probate. The sitting Justice, unadvised by a jury, dismissed the appeal, basing his decision on the finding of undue influence. Exceptions sustained.

The case is very fully stated in the opinion.

Frank A. Morey and Edward W. Bridgham, for appellant.

William R. Pattangall and Walter S. Glidden, for appellees.

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

DUNN, J. After the finding of undue influence a probate appeal, which sought recognition for instruments as a will and codicil, was dismissed. But the finding lacked the support of evidence.

Lydia M. Deering lived and died at Bath. As far as alienists were concerned it was shown that, in her advanced age, she was affected

by a mental disorder. The medical men theorized rather subtly in relation to the type of that disorder. And they differed utterly concerning the growth of the malady. The conclusion of the one was general physiological atrophy, which, coming from causes not clearly understood, and emphasized by the blocking and hardening of the arterial system, unnourished her brain until, when she made the instruments, the capacity to will was destroyed. The Probate Court so decided. Furthermore that court found undue execution. The other expert deduced that, though the partitions dividing the woman's sense and thought were thinned, yet she made the papers when mind and memory were adequate, when she was intelligent, perfectly rational, perfectly sane, in the sense that she knew and understood the nature and the consequence of her particular act; that her mind rated higher than one merely competent to function legally. But the question is now foreign to inquiry. The cause therefor is, that, in assigning reasons of appeal, it was seen fit to add: Neither instrument was procured by the exerting of undue influence on the mind of her whose hand signed them. The reason was not defined more specifically.

When the appeal came on for trial, certain grandchildren of the decedent continued in effort to upset the documents, because as heirs and kin they held they should have shares of the estate. They did not seriously contend that there was want of proof of proper execution of either of the proposed papers. But they offered resistance to the issue that Mrs. Deering was of sound mind and possessed of testamentary power. And they affirmatively advanced undue influence, which the proponent, this present excepter, she who was named as executrix, countered. The will, as in convenience it may be called, fell. And the codicil fell too. Unadvised by a jury, the sitting Justice determined that the documents were not expressive of Mrs. Deering's "voluntary wishes, but were the result of influences and solicitations on the part of those especially benefitted, which the testatrix no longer had the mental strength to weigh and withstand." Thus the trial judge reasoned and on this basis reached his conclusion that the instruments be vacated and anulled.

The situation ultimately on the probate side, when the essence of every essential in the record has been extracted, may be formulated in this wise: Does any evidence support the decree? Or, as counsel for the contestants well express it, "Is the decision sustained by any

credible evidence?" Such, and not that the decree is equivalent to a jury verdict, is the recognized test. *Eacott, App't,* 95 Maine, 522; *Costello, App't,* 103 Maine, 324; *Palmer, App't,* 110 Maine, 441; *Gower, App't,* 113 Maine, 156; *Thompson, App't,* 116 Maine, 473; *Cotting, App't,* 118 Maine, 91; *Packard, App't,* 120 Maine, 556.

By undue influence in this class of cases is meant influence, in connection with the execution of the will and operating at the time the will is made, amounting to moral coercion, destroying free agency, or importunity which could not be resisted, so that the testator, unable to withstand the influence, or too weak to resist it, was constrained to do that which was not his actual will but against it.

Undue influence often closely resembles and is near akin to actual fraud. But strictly speaking it is not synonomous with fraud. In the making of a will, undue influence is exerted, where the mind of the nominal maker of the document, in yielding to the dominancy and supervision of another's designing mind, does what otherwise the ostensible actor would not have done. Undue and improper influence, to go a little further, presupposes testamentary capacity. Were there no capacity, there could be no will, and the question of whether or not there was influence would be an idle one. The strength of the person's will, in connection with other facts, may be material in relation to whether an exerted influence became operative, but total incapacity negatives the very suggestion of influence. The influence must arise either from proof or presumption of law. It is never inferred from mere opportunity or interest, though these facts if shown should weigh with other facts. But kindness, entreaty, the offer of inducement to gain the making of a will in one's favor, is legitimate, so long as he who made the will had the free choice to make it or not. And a mother's love, her affection, her desire to reward the dutiful conduct of her child, or the promptings of gratitude may properly actuate the doings of a free and voluntary act, notwithstanding it cuts off the reasonable expectations of others upon the bounty of the one who discarded them; save, to be sure, those rights secured by statute. Where there is understanding, where there is volition, what motived a testator's act, even to pique or hostility, is no matter. So the letters on the law's only too familiar guide-post counsel the passer on his way to this case.

Aged eighty-four years, always physically frail, frugal, simple in tastes and habits, keenly deploring the loss of the devoted and

respected husband some four months dead, infirm or weakened by accident, nervous and depressed, emaciated and restless, thus, with her housekeeper and companion, in that home where the family rallied for many a day, was Mrs. Deering on February 16, 1922; the morrow of the day of her son Frank's burial, and the day of the making of the will.

The Deering was a clannish family. Of boys, as the record shows, there were three; Frank, mentioned before, and Harry and Carroll; Emma was the only daughter. The sons, long since grown to manhood, had living-places not far from the old homestead. They were in business with the father in shipping and ship-building. Emma became Mrs. Rogers. Her house was on the same lot as the mother's.

Before the World War the Deerings were of what in these days would be regarded modest means. That war essentially increased business and gains at the Deering yard. The father was generous with the sons. He gave them freely of the capital stock of the Deering corporation, and he owned all virtually, and afterward held less than any of his sons; the holdings of two of the sons were coequal. The father not only gave no stock to the daughter, who was a merchant's wife, but he earlier bought back the few shares that once were hers, paying par for them, likely a fair price at the time, but not comparable to the value that was theirs later. In 1916, about five years before he died, Mr. Deering made his will. A rich man, as worldly riches count in Maine, the sole provision for the wife was a bequest of $2,000. Maybe that was mutually agreed by them; Mrs. Deering had $40,000 of her own; in her will the husband was given nothing.

After Mr. Deering's death Mrs. Rogers was perhaps the widow's chief reliance. The contestants said that Mrs. Rogers acquired ascendancy over her mother; that she signed and endorsed certain checks for her; that she advised her mother concerning the discharge of a servant, the sale of the automobile, and the dismissing of the chauffeur; that she directed the mother to practice economy; that she and her brothers being in league, were together consulted by the mother about business affairs; that eventually Mrs. Rogers substantially became paramount over the mother; that her influence controlled the other woman in all material matters; and that under such dominion Mrs. Deering was wrongfully induced to make the will and the codicil, the last to suffice the dual purpose of enriching Mrs. Rogers and placating her brothers. Frank Deering's widow lived

nearby. She did not come to Grandmother Deering's house at all, nor did any of Frank's children, the contestants here, come there, as a usual thing.

On the afternoon of 16 February, 1922, Mrs. Rogers summoned Edward W. Bridgham, Esquire, a Bath lawyer, to the Deering house. He found Mrs. Deering at the house, and Mrs. Rogers, and a neighbor Miss Morse, and Mellie Lermond, the housekeeper and companion. The lawyer testified that Mrs. Deering told him, in reply,of her wish to make a will; saying next, without suggestion, that she was leaving one thousand dollars to each of the two sons, and the rest to her daughter. She said, besides, said he, that she was not giving to Frank's children, but gave no reason for disinheriting them. A draft of will was written and read to Mrs. Deering; it was silent touching the omission of the grandchildren. She approved and signed. Miss Morse, Mrs. Lermond, and the draftsman attested. Mrs. Rogers was told by her mother to take the will and care for it. The lawyer was paid, by Mrs. Deering's direction, from her purse, and he went away.

Eight days later, and on Mrs. Rogers' call, Mr. Bridgham came again. Mrs. Deering, Mrs. Rogers, and Mellie Lermond were there. Miss Morse came in later. And Harry Deering brought a "waiver." The waiver, if signed by her and filed seasonably in court, would formally renounce the provision of the husband's will, and have Mrs. Deering take instead what would fall by devolution of law. R. S., Chap. 80, Sec. 13. Lawyer Bridgham did not prepare this document, but he explained its nature and what it would effect, only to find Mrs. Deering already conversant. Harry testified that he had informed his mother of her statutory privilege. The waiver was signed. Bridgham asked Mrs. Deering how she was to dispose of the additional property that would now be hers and she replied that it should go to Carroll, Harry, and Emma, share and share the same. And he rejoined: "What for Frank's children?" And she answered: "They have enough." Another witness said she put it: "They had a plenty." A pencil draft of codicil, carrying a clause excluding the now contesting grandchildren was written, and read to and accepted by Mrs. Deering. The lawyer accompanied Mr. Harry Deering to his house and typed what was in pencil. Back at Mrs. Deering's, the printed page was read and signed, and substantiated by the same persons who bore witness to the will. The codicil was

gummed to the will, Mrs. Deering remarking, "Stick it on good and solid," and Mrs. Rogers took the united papers to a safety-box.

Two months passed. Mrs. Deering's savings bank books, representing quite all her private fortune, were made joint accounts by the addition of Mrs. Rogers' name. And the mother transferred to the daughter sundry stock certificates, some dividend paying, of the face value of $33,000, received from Mr. Deering's executor. Two months later, on June 15th, 1922, to be exact, the savings accounts were made to Mrs. Rogers alone. There was evidence that Mrs. Deering said that the father had not been as liberal with the daughter as with the sons; that "Emma was of the salt of the earth," and that she, (the mother) "wanted to reward Emma's devotion." It was argued that ridding herself of as much was an act so unnatural, so contrary to the instinct of prudence, and withal so unjust to the doer as to taint the transaction with grave suspicion, and itself to proclaim that Mrs. Deering did not proceed in free action as to this or the previous acts; perhaps remote in relation to those done before but it need not be thus cast aside. Mrs. Deering was not in result condemned to embarrassment, want, or misery. She had remaining: a checking account, amount not stated; she had $20,000 in cash from her husband's estate, and additional property worth approximately $70,000.

On a day in August Mrs. Deering seemingly suffered a slight paralytic stroke. But she recovered strength. In October Mrs. Rogers was on a trip to Washington for a fortnight. Mrs. Deering died December 18, 1922.

Now the determining factor, be it not overlooked, is not that of the mental soundness of Mrs. Deering at the making of either paper, nor is it whether consistent persuasion resulted in testamentary preference, but whether there is evidence upholding the decree that, in truth, undue influence extorted the effect claimed. On that the contestants had the burden. The testimony, elicited on cross-examination, of the scrivener and the two others who subscribed the documents, and that of other disinterested persons, to the end that undue influence did not extort that effect, was unmet. Ensuing argument stressed the whole evidence, the circumstances, and the inferences of the circumstances. There was no direct evidence that effort was made by any one to induce the testatrix to make the will and codicil, or either of them, in their respective forms. There was no circum-

stance, standing by itself even, showing that the will and codicil would not hold good. There was evidence that they were in accord with antecedent intentions, in unison with avowed purposes. No authorities were cited by the contestants, and an independent investigation has not disclosed any, where, on the ground of undue influence as here set up, a will properly executed was rejected as the last expression of a person's testamentary intent.

In the record are nearly 1,100 pages, to say naught of exhibits. The hearing of that volume, and of combining and reconciling it, of assessing accurately the undesigned incidents of particular acts, of weighing the opinions of experts with regard to nervous diseases and pshchotic symptoms, of judging witness by their appearance on the stand, and of deducing the truth or the lack of any special testimony by the coherence or incoherence of the whole, was the difficult task of the Justice who heard this case. He apparently attempted, amid the numerous perplexities of the trial term, to weld together what he considered to be weakness of mind on the part of the testatrix and opportunity and interest on the part of others and to subsume it all as undue influence. And therein, as this court surveys the terrain, he erred; erred, it might be, in that he mistook effect for cause.

It is not to be said that in the record there is evidence tantamount of the outgrowth of an influence which the law denounces as undue.

What of the situation now? Ordinarily a case is sent back to the Supreme Court of Probate with instructions for a decree, and thence is remitted to the Probate Court from which originally it came. Such a course might work injustice in this instance. The contestants won in the appeal court, not on the issue that they won on in the court of first instance, but not at all the less on one that the proponents tendered. The exceptions raise the single point of whether the appellate decision was evidentially upborne. It was not so sustained. The proponent wins and the contestants lose. But there was at least another issue; it concerned testamentary capacity. On this no decision was made, except by way of presupposition. To send the case down, in final determination that the will and codicil be admitted to probate, would be saying in substance that testamentary capacity is now deemed to have had existence, either because it was implied as preceding in the finding which is held erroneous in its really vital aspect, or because the contestants did not themselves reserve exceptions to the presumed background of their favorable decision. And

the doing of either would be to assimilate the position to one possible in playing at cards. That the last decision may not be indicated at this time is regrettable. But it may not be compatibly with fairness. Hence the mandate will be, simply, that the exceptions be sustained. The case goes back to the Supreme Court of Probate to stand on the docket as it stood on coming from the Probate Court, the sole question of undue influence since decided.

Exceptions sustained.

ASA A. SESSIONS *vs.* NATHAN G. FOSTER et al.

Oxford. Opinion March 29, 1924.

Under common law pleading in civil actions the declaration must contain a clear and distinct averment of the facts which constitute the cause of action, and must set them out with that degree of certainty of which the nature of the matter pleaded reasonably admits. Merely alleging the duty of the defendant, being a conclusion of law only, is not sufficient. The facts which impose the duty must be alleged.

Under the established rules of common law pleading in civil actions, the plaintiff's declaration must contain a clear and distinct averment of the facts which constitute the cause of action, in order that they may be understood by the party who has to answer them, by the jury who are to ascertain the truth of the allegations and by the court that is to give judgment.

It is not enough to refer to matters in an uncertain, doubtful and ambiguous manner as a kind of general drag-net to meet what evidence may be presented.

On exceptions. An action on the case to recover damages suffered by plaintiff, who alleged that defendants as agents of a certain insurance company in return for a consideration paid to them by him, agreed to write, execute and deliver to him a valid policy of insurance in the sum of twelve hundred dollars, on certain property owned by plaintiff, which they failed to do and the property was destroyed by fire. Defendants filed a special demurrer to the declaration alleging

its insufficiency, which was overruled by the presiding Justice, and exceptions entered by defendants. Exceptions sustained. Declaration adjudged bad. Demurrer sustained.

The case is stated in the opinion.

Alton C. Wheeler, for plaintiff.

Aretas E. Stearns, for defendants.

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

PHILBROOK, J. The plaintiff brought suit against the defendants, alleging them to be duly qualified agents of a certain insurance company, and declaring their failure, for and in return of a certain consideration to them by him paid, to write, execute and deliver to him a valid policy of insurance protecting certain property of the plaintiff, which property had been destroyed by a fire for which the plaintiff was in no way responsible. The declaration also alleges that by reason of the defendants' failure, as aforesaid, he has been unable to recover for the fire loss incurred, and alleges that such failure to recover is due to the negligence of the defendants in not delivering to the plaintiff a valid policy of insurance. The defendants filed a special demurrer to the declaration, the demurrer was overruled, and exceptions to that ruling brings the case before us.

It is the opinion of the court that the exceptions must be sustained.

As already seen, the declaration alleges that the defendants were the duly qualified agents of the insurance company; that they undertook to issue to the plaintiff a policy of insurance on his property; that the plaintiff disclosed to them his true interest in the property; that the defendants delivered to the plaintiff a policy in said company which was not a valid policy binding on the company; and that the compensation for the policy was received by the defendants "as agents." The only contract disclosed is with the defendants as agents of the insurance company; the consideration was paid to them as agents of the company, and was a premium which belonged to the company. The defendants did not attempt to bind themselves. Assuming that the plaintiff can prove his allegations has he not misconceived his remedy? Should he not bring an action for deceit? This doctrine is sustained in *Gilmore* v. *Bradford,* 82 Maine, 547; *Noyes* v. *Loring,* 55 Maine, 411; *Kroeger* v. *Pitcairn,* 47 Am. Rep.

718; the latter case being very similar to the case at bar. See also 2 Corpus Juris, Sections 476, Page 803; 478, Page 805; 479, Page 806. If the form of action has been misconceived the point is open on special demurrer. *State* v. *Peck*, 60 Maine, 498, and the plaintiff must fail as making the first error. *Poor* v. *E. & N. A. Railway Co.*, 59 Maine, 270.

But other sufficient reasons exist for sustaining the exceptions and the demurrer. It is doubtless a well-grounded rule of law that in a declaration based upon a contract all that is necessary to state is the making of the contract, the obligations thereby assumed, and the breach. In the obligation assumed by the defendant is found his duty, and his failure to comply with the duty constitutes the breach. When these statements are supplemented with the statement of the amount claimed, and a prayer for judgment, the declaration is good. *Soule* v. *Weatherbee, et al.*, 39 Utah, 580; 118 Pac. Rep., 833; Ann. Cas., 1913, E. 75.

But under the established rules of common law pleading in civil actions the plaintiff's declaration must contain a clear and distinct averment of the facts which constitute the cause of action, and it must set them out with that degree of certainty of which the nature of the matter pleaded reasonably admits, in order that they may be understood by the party who is to answer them, by the jury who are to ascertain the truth of the allegations, and by the court that is to give judgment. *Ferguson* v. *National Shoemakers*, 108 Maine, 192; *Bean* v. *Ayers*, 67 Maine, 488; *Boardman* v. *Creighton*, 93 Maine, 17. It is not enough to refer to matters in an uncertain, doubtful, and ambiguous manner, as a kind of general drag-net to meet whatever evidence may be presented. *Boardman* v. *Creighton*, supra. If the pleader merely alleges the duty in his declaration he states a conclusion of law, whereas the elementary rule is that facts from which the duty springs must be spread upon the record so that the court can see that the duty is made out. *Kennedy* v. *Morgan*, 57 Vt., 46.

Applying these rules of law to the case at bar, without here attempting to point out the various essential allegations which are missing from the declaration, it is enough to say that the ruling below must be reversed.

Exceptions sustained.
Declaration adjudged bad.
Demurrer sustained.

NOVART KAKLEGIAN *vs.* JOHN ZAKARIAN.

Cumberland. Opinion March 31, 1924.

Verdict held not excessive. In cases in tort to recover damages resulting from an assault, exemplary or punitive damages as well as real damages may be recovered, if the assault was gross and malicious.

On motion for a new trial by defendant. An action to recover damages for assaults and batteries committed by defendant upon plaintiff. A verdict was rendered for plaintiff for five hundred dollars and defendant filed a general motion for a new trial. Motion overruled.

The case is stated in the opinion.

William A. Connellan, for plaintiff.

Henry Cleaves Sullivan and Francis W. Sullivan, for defendant.

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

DUNN, J. In relation to the element of liability for the two assaults and batteries which are here concerned, the defendant frankly concedes that the single verdict is not avoidable. The defendant's brief is prepared upon the erroneous conception that, as neither of the misconducts was serious in result, the assessing of five hundred dollars, as damages for the wrongs, was excessive; especially as his own wife must pay one hundred dollars for having participated in the last attack.

In the first instance, this plaintiff, then with child, suffered an untimely delivery and was confined to her bed for several days; in the other, she was struck over the hands with a stick, and she was bruised on the wrists, on one of her arms, on her back and neck, and made unconscious.

Conviction in tort of this class foreruns: Damages commensurate with all the consequences of the injury; and, too, if the assault was gross and malicious, an exemplary or punitive award, not as a matter

of right, but in the sound discretion of the jury, by way of punishing the wrong-doer and for the protection of society and social order.

It is unnecessary to epitomize the entire record. The defendant's version is predicate for saying, that the aggregate of the indemnities, as set in the one assessment, was measured so as to leave the question of any excessiveness, not arguable.

The motion for a new trial must be overruled.

Motion overruled.

EMILY P. DIXON et als. In Equity

vs.

FITZ EUGENE DIXON et al.

Hancock. Opinion March 31, 1924.

The following provision in a will: "Whatever I may die possessed of I Leave to my son, A. and my dear friend, B, in trust, the income to be divided as follows; to my wife, C, one-third, and the balance in equal proportions to my children, D's share to go to his children;" the widow having waived the provisions of the will made in her behalf, creates a dry, naked, simple or passive trust, and the devise and bequest of all the income of the estate is, in effect, a devise and bequest of the principal or corpus of the estate.

In this case as to the corpus of the estate, one third passes absolutely to the widow; the remaining two thirds are to be divided into four parts and those pass absolutely, one to Louise Dixon, one to Helen Dixon Krumbhaar, one to Fitz Eugene Dixon and the remaining part, in equal proportions to Elise Thayer Dixon and Thomas Henry Dixon, children of William Boulton Dixon, the deceased son of the testator.

On report. A bill in equity seeking the interpretation of paragraph two of the will of T. Henry Dixon, who died June 18, 1922, in Philadelphia, Pennsylvania, where he resided, leaving both real and per-

sonal property in this State. A hearing was had upon the bill and answer and by agreement of the parties the cause was reported to the Law Court for determination.

The case is fully stated in the opinion.

Hale & Hamlin, for complainants.

Edmond J. Walsh, for respondents.

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

PHILBROOK, J. T. Henry Dixon, who died June 18, 1922, at the time of his death being a resident of the city and county of Philadelphia, State of Pennsylvania, left a will consisting of only three paragraphs. The instrument was duly proved and allowed by the proper court in the county where he resided at the date of his death. In July, following, the deceased having left real and personal property in this State, the will was also allowed by the Probate Court for the county of Hancock. The respondents, Fitz Eugene Dixon and William Henry Trotter, by the latter court, were appointed executors of the will in July, 1923, and in November of the same year were also appointed trustees. Both qualified for the performance of their duties in each capacity.

The cause comes to this court by report. The bill prays for interpretation of the second paragraph of the will, which contains the sole provision for disposition of the estate, and reads as follows:

"Whatever I may die possessed of I leave to my son, F. Eugene Dixon and my dear friend, W. H. Trotter, in trust, the income to be divided as follows: to my wife, Emily P. Dixon, one-third, and the balance in equal proportions to my children, Bo's share to go to his children."

The person referred to as "Bo" was a son of T. Henry Dixon, who predeceased his father. The widow waived the provisions of the will made in her behalf and now claims the portion of the real and personal estate that would legally pass to her if her husband had died intestate. It follows, without further discussion, that the widow, Emily P. Dixon, as to real and personal property within the jurisdiction of this court, takes the same share of the real estate and the same distributive share of the real and personal estate of the testator as is provided by law in intestate estates. R. S., Chap. 80, Sec. 14.

We are therefore concerned only as to the other two thirds of the real and personal estate which is within the jurisdiction of this court.

Law writers and courts of last resort agree that trusts may be classified into two general divisions; (1) those trusts which arise out of a direct or positive declaration of trust, and known as direct or expressed trusts; (2) implied trusts, or trusts enforced by equity because morality, justice, conscience and fair dealing demand that the relation be established. As to the second division we are not here concerned. The first division may be further classified into active trusts, otherwise called live, or operative trusts, and passive trusts, otherwise called simple, nominal, or dry trusts. An active trust maintains the legal estate in the trustee, to enable him to perform the duties devolved on him by the donor, and gives the cestui que trust only a right in equity to enforce the performance of the trust. *Dodson* v. *Ball*, 60 Penn. St., 492; 100 Am. Dec., 586. By the same authority a passive trust gives to the cestui que trust a right to the possession, control, and disposal of the property, and the legal estate becomes executed in him unless it is necessary to remain in the trustee, to preserve the estate for the cestui que trust, or to pass it to others. Our own court, in *Sawyer* v. *Skowhegan*, 57 Maine, 500, states the principle thus: "Trusts are of two kinds, active and passive. The latter are sometimes called dry, naked, or simple trusts. In the former active duties are imposed. In the latter no active duties are imposed; the trustee is a simple depository of the title. In the former the trustee controls the trust property. In the latter the cestui que trust controls it."

The first contention of the complainants is that the paragraph in the will under consideration creates a passive trust.

In addition to what we have already said the following definitions may be noted. A passive trust is one in which the trustee is a mere passive depositary of the trust property, with no active duties to perform. *Dodson* v. *Ball*, supra; *Harris* v. *Ferguy*, 207 Ill., 534; 69 N. E., 844. A passive or dry trust arises when property is vested in one person in trust for another and the nature of the trust, not being prescribed by the donor, is left to the construction of law. *Cooper* v. *Cooper*, 36 N. J. Eq., 121. A simple, dry, or passive trust, is a simple conveyance of property to one upon trust for another without further specifications or directions. *Cone* v. *Dunham*, 59 Conn., 145; 20 Atl. Rep., 311; 8 L. R. A., 647.

In the case at bar the entire estate is intrusted to these respondents, with no reference to any disposition of the corpus of the estate, the sole direction being as to division of the income. There is no provision for life estate, or for years, with remainders over; no duties are imposed upon the trustees except to divide the income; (but, by operation of law, among the duties and powers of a dry trustee is that of permitting the cestui que trust to occupy and receive the income and profits of the estate, Perry on Trusts, 2d Ed., Sec. 520); there is no direction for management of the estate; nor for investment of funds; nor for payment of any charges against the estate; nor as to when the income shall be divided and paid; no power of sale; nor does it appear that it is necessary that the legal estate should remain in the trustees in order to preserve it for the cestuiis que trustents, nor in order that it may pass to others. The trustees are the simple depositaries of the title. It is, therefore, the opinion of the court that this contention of the complainants must prevail and that the trust created by the paragraph under consideration is a dry, naked, simple, passive trust.

The second contention of the complainants is that the devise and bequest of all the income of an estate is, in effect, a devise and bequest of the principal or corpus of the estate itself. We note, as we have already said, that the paragraph of the will under consideration is the only one which makes any provision for disposition of the estate. It creates no estate in fee, nor for life or years, with remainder over. It does not provide when the income is to be paid, nor is there any limit of time as to its payment. It is perpetual.

It is a well-settled rule of law that a gift of the entire income of real estate is a gift of the real estate itself. The same rule applies as to personal property. *Paine* v. *Forsaith*, 86 Maine, 357; *Sampson* v. *Randall*, 72 Maine, 109. The second contention is therefore well grounded and is sustained.

Returning to the question of passive trusts, in reaching our decision, we observe that under the statute of uses, 27 Henry VIII., Chapter 10, which is a part of the common law of this State, by such a declaration of trust the fee passes directly to the cestui que trust. He has the right to the possession and control of the estate and may convey it in fee. *Blake* v. *Collins*, 69 Maine, 156.

It follows, therefore, upon the principle of passive trusts, and upon that of devise and bequest of income, that the corpus of this estate

passes absolutely to the defendants. We have already seen that the widow, Emily P. Dixon, takes one third of the real and personal estate situated in this State. The other two thirds are to be divided into four parts, one for Louise Dixon, one for Helen Dixon Krumbhaar, one for Fitz Eugene Dixon and the remaining part to be equally divided between Elise Thayer Dixon and Thomas Henry Dixon, children of William Boulton Dixon, the deceased son of the testator.

Decree below in accordance with this opinion.

IOLA B. WILKINS *vs.* ALTA R. COOK, Executrix.

Androscoggin. Opinion April 1, 1924.

Recovery cannot be had on an item, concerning which defendant has paid all he agreed to pay and had no reason to suppose that further claim would be made upon him or his estate, the record disclosing no evidence of any legal or equitable reason why the item should be sustained.

On report. An action for money had and received brought under R. S., Chap. 71, Secs. 12 and 14, an appeal having been taken by the executrix of the estate of Ella M. Booker late of Lisbon Center, deceased, from the report of Commissioners appointed by the Probate Court to pass upon alleged exorbitant claims. By agreement of the parties the cause was reported to the Law Court for determination. Judgment for the plaintiff for $117.50 with interest from date of writ.

The case is stated in the opinion.

Frank A. Morey, for plaintiff.

L. A. Jack, for defendant.

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

HANSON, J. This is an action for money had and received brought under R. S., Chap. 71, Secs. 12 and 14, by way of appeal from the

decision of the commissioners appointed on petition of the executrix to examine and report upon an alleged exorbitant claim. The case is before the court on report. The claimant, Iola B. Wilkins, filed her claim against the estate of Ella M. Booker as follows:

Lisbon Center, May 23, 1922.

For the privilege of the house, heat and light from March 19, 1916 to Feby. 15, 1922, three hundred and six weeks at $2.25 per week,	$688.50
For use of the whole house during last sickness of Ella M. Booker, forty-two days at $2.00 per day	84.00
For cleaning and putting the house in order, cleaning and and repairing damage, and the loss of certain personal property	33.50
In all	$806.00

Before the claim was presented in its present form, a settlement had been made between the executrix and the claimant which was largely based on items extending back twenty-one years. On advice of counsel the check given by the executrix to the claimant was recalled, and these proceedings followed. Counsel for claimant in his brief contends that we should not consider the claim as originally made extending over a period of twenty-one years, with the claim before us comprehending but the last six years of the period first named. Consideration of the full period and of the relations between the claimant and defendant's intestate is unavoidable in reaching a conclusion. In 1895, according to the testimony of the plaintiff, Ella M. Booker, deceased, was invited to visit the claimant. Claimant says, "My aunt was going away on a visit and I asked her to come and stay with me two or three weeks while she was gone." That was the beginning. Miss Booker went on invitation and remained nearly twenty-seven years. The business relations of the parties are stated from the testimony of the plaintiff, as follows:

"Q. Whereabouts in your home did Miss Booker live?

"A. Well, her room was one of my front chambers; the corner chamber, as the street goes both ways; and she had the privilege of the whole house.

"Q. And did she use the privilege?

"A. Yes, sir.

"Q. And for how many years?

"A. Well, if she had lived until June it would have been twenty-seven years.

"Q. When did she begin to pay anything for her use of the room?

"A. After she had been there four years and four months she paid the first money she ever paid.

"Q. And what did she pay along then?

"A. She paid from time to time—I don't know as I have the dates. I guess you have them there; but when she had been there ten years and a half she had paid $136.50, and I told her at that time—well, that summer I fixed my house over, and until then she had used my furniture, and I wanted the furniture, and she bought some that summer for the room; furnished the room herself. I told her as she had that large room and the use of the store room, that I thought she ought to have a stated price for her room, and she paid me twenty-five dollars a year for the next eleven years.

"Q. Did that take into account at all the use of the house?

"A. No, sir; just for her room. And at the end of eleven years—that made twenty-one years and a half that she had been there—she had paid the sum of four hundred and eleven dollars, and fifty cents, making total of not quite thirty-seven cents a week from the time she came there.

"Q. And for the last six years?

"A. Commencing the first of January, 1917, she paid one dollar a week for her room.

"Q. Did she ever board at your place?

"A. She came there for her meals in September, 1917. She was boarding across the street, and it appears she was getting her supper and breakfast there at my house some little time before I knew it; and I came home one Monday noon and she had the dinner on the table, and she had bought some things for the table. I asked her why she wasn't at her boarding place. She said they wasn't going to keep her any longer. So we got the meals together that way, and I guess it ran along two or three weeks; I thought she had perhaps done her part; and finally it was from Friday until the next Thursday and she hadn't contributed anything toward the support of the table,

and she asked me in this manner, 'What is this house going to have for dinner?' and I says, 'Ella, I think it is about time you should begin to think something about what this house is going to have for dinner,' and she says, 'Tell me what to get and I will get it,' and I says, 'Get what you have a mind to.' I says, 'Now I will tell you, if you want to get your meals here with me you give me two dollars and a half a week and I will do the buying, and you will have to assist about the work; and so it went that way until March, 1920, and I told her that I couldn't make myself whole on two dollars and a half a week for her board, and I says 'I will have to have another dollar.' She said 'You could have had it before if you had asked for it.' I said 'I didn't like to ask for it. You knew what things were costing and you knew what you were paying'; and she gave me three dollars and a half a week towards the meals from that time until she was taken sick.

"Q. How long was she sick in your house?

"A. Six weeks.

"Q. How long was it before her death that Alta R. Cook came?

"A. I think about four weeks."

We have read the testimony very carefully and fail to find any evidence to sustain the first item of the account annexed to the writ. There is evidence of a settlement after ten and one half years, and an arrangement under which the parties acted, mutually satisfied, for the next eleven years, or to 1917. Commencing January 1, 1917, decedent was to pay, and did pay, one dollar a week for her room. It is contended that there should be an allowance made for "the privilege of the house, heat and light" beginning March 19, 1916, and the time is fixed as 306 weeks at $2.25 per week. The record fails to disclose any reason, legal or equitable, for sustaining the claim. On the contrary, the plaintiff's own testimony negatives the contention and shows that decedent responded willingly to every demand made upon her for work or money, that from time to time settlements were made, based upon a definite agreement as to time and amount. It is clear that plaintiff never presented any such claim during the life of decedent, and never intended to. Decedent paid all she agreed to pay and had no reason to suppose that further claim would be made upon her or her estate. The parties made their contract as to the use of the room, which, in view of the evidence, included "the

privilege of the house, heat and light," and they lived up to the same. No other contract, express or implied, can be found in the evidence, and we can make none.

As to the remaining items amounting to $117.50, it seems to be conceded that the same are proper charges, and so it appears to us. The plaintiff is entitled to judgment for the sum of $117.50, with interest thereon from the date of the writ.

So ordered.

FRANK LEMELIN'S CASE.

Somerset. Opinion April 7, 1924.

The rights and liabilities of the parties under the Workmen's Compensation Act are fixed and governed by the statute in force at the time of the accident. Sec. 16, Chap. 50, R. S., before the amendment in 1921, Public Laws, Chap. 222, Sec. 7, granted compensation for partial but not for total incapacity for labor after the termination of specific compensation. The statute fixes no limitation of time within which incapacity for labor petitions must be filed.

The claimant's first petition for compensation for total incapacity was rightly dismissed, for there was no authority therefor under the statute in force at the time of the accident.

The present petition for compensation for partial incapacity has not been before this court before and the doctrine of res judicata does not apply.

The record in the instant case contains admissible and substantial evidence upon which the chairman's findings of fact may rest.

On appeal. On May 21, 1918, claimant while in the employ of the American Woolen Company at Fairfield as a tender on a picking machine suffered a compensable accident which resulted in the loss of his right hand at the wrist. The parties entered into an agreement for specific compensation for one hundred and twenty-five weeks which was approved by the Commission August 24, 1918, and paid, the last payment being November 18, 1920.

On January 21, 1921, claimant filed a petition for compensation for total incapacity which was finally dismissed by the Law Court, 121 Maine, 72, for there was no authority therefor under the statute in force at the time of the accident. On April 5, 1923, claimant filed a petition for compensation for partial incapacity which was awarded and respondents entered an appeal.

Appeal dismissed with costs. Decree of sitting Justice affirmed.

The case is fully stated in the opinion.

P. A. Smith, for petitioner.

Andrews, Nelson & Gardiner, for respondents.

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

CORNISH, C. J. This Workmen's Compensation case is before the court for the second time, and a brief history of the prior proceedings is necessary to a complete understanding of the legal situation.

The claimant was injured on May 21st, 1918, while in the employ of the American Woolen Company at Fairfield. An agreement for compensation was entered into by the parties and approved by the Commissioner of Labor August 24, 1918, whereby the claimant was to receive $7.27 per week for a period of one hundred twenty-five weeks, beginning June 4, 1918. This agreed compensation was paid in full, the last payment being made on November 18, 1920.

On January 21, 1921, the claimant filed a petition for compensation for total disability. This petition was dismissed by the Law Court. *Lemelin's Case,* 121 Maine, 72. The court held that the petition could not be sustained as a petition for review, because it was not in the form of such a petition, and if it had been it was barred by the limitation prescribed by Section 36 of the Compensation Act. The opinion then considers it as an "original" petition and held it to be barred by the two-year limitation specified in Section 39, and therefore denied relief.

The petition might perhaps, be termed original in the sense that it was the first one filed in the case, the original claim and adjudication being based upon the approved agreement which had the force of a judgment. But it would have been more technically accurate and have led to less misunderstanding had the petition been considered

by the court as brought under R. S., 1916, Chap. 50, Sec. 16, to obtain compensation for total incapacity for work after the specified period covered by the agreement. However, the result would have been the same. The rights and obligations of the parties are fixed and governed by the statute in force at the time when the accident occurred. *Gauthier's Case*, 120 Maine, 73; *Shink's Case*, 120 Maine, 80.

The accident to Lemelin happened on May 21st, 1918, and therefore came under the provisions of R. S., 1916, Chap. 50, Sec. 16, which provided as follows: "In cases included in the following schedule the disability in each case shall be deemed to be total for the period specified, and after such specified period if there be a partial incapacity for work resulting from the injury specified the employee shall receive compensation while such partial incapacity continues under the provisions of section 15." . . . .

There was at that time no authority for granting compensation for total incapacity for labor after the specified period of total disability. It was only for partial incapacity for labor. The amendment incorporating the words "total or" was passed by the Legislature three years after the accident. Public Laws, 1921, Chap. 222, Sec. 7. Since that amendment went into effect compensation for either "total or partial incapacity for work" can be secured after the expiration of the specified period, if the facts warrant it. But this amendment was adopted too late to avail this claimant. His rights were controlled by the original act and under that his petition could not be granted. The result reached in *Lemelin's Case*, 121 Maine, 72, was therefore correct. This has been already explained in *Morin's Case*, 122 Maine, 338 at 344.

The pending petition now under consideration asks compensation for partial incapacity for labor following the expiration of the specified period. This petition or one asking the same relief has not been before the Commission nor this court prior to this time, therefore the defense of res adjudicata cannot apply, as it does in Graney's Case reported in 123 Maine, . True, nearly five years have elapsed since the accident, but it should be understood by the profession once for all that the statute fixes no limitation within which an incapacity for labor petition should be filed. It is not a petition for review under Section 36, nor the original petition under Section

30, filed in absence of an agreement of the parties and upon which a decree of the Commission and of the court is based. The limitation for that petition is two years under Section 39.

This is a subsequent petition to which no such express limitation applies. This has been squarely and definitely settled. *Morin's Case,* 122 Maine, 338; *Milton's Case,* 122 Maine, 437; *Foster's Case,* 123 Maine, 27; *Collins' Case,* 123 Maine, 74; *Crabtree's Case,* 123 Maine, , 121 Atl., 678. If there is anything in *Lemelin's Case,* 121 Maine, 72, or *Graney's Case,* 121 Maine, 500, which would seem to indicate the contrary, that portion is distinctly overruled.

In *Morin's Case,* 122 Maine, supra, the court in discussing Lemelin's Case said, by way of dictum: "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." This guarded prophecy is now fulfilled.

The Chairman of the Commission having jurisdiction of this petition found the claimant entitled to compensation for partial incapacity to work in the sum of $6.15 per week, commencing at the date of the last payment of the one hundred twenty-five weeks of specific compensation and continuing according to the provisions of the statute in effect May 21, 1918, when the accident occurred. The record contains admissible and substantial evidence upon which this finding of fact may be grounded. It is not therefore to be set aside.

Appeal dismissed with costs.
Decree of sitting Justice affirmed.

ELLEN H. DURYEA, In Equity

vs.

ELKHORN COAL AND COKE CORPORATION, Appellant.

York. Opinion April 11, 1924.

There is a resemblance between statutory limitation and the doctrine of laches but a difference in important particulars. Limitation is concerned with the fact of delay, while laches with its effect. Laches is not merely delay but is delay that prejudices or works a disadvantage to another. There is also a marked distinction between abandonment and laches. Abandonment is voluntary and intentional, while laches defeats intention and operates in invitum. To prove abandonment of property, clear and unmistakable affirmative act or acts indicating a purpose to repudiate ownership must be shown.

In the instant case in 1909 the plaintiff was admittedly entitled to receive certain stock of the defendant corporation. The stock certificate has never been delivered to her, nor was it demanded by her until 1921 when her demand for it was refused on the ground that through laches or abandonment she had forfeited her right to the stock.

Inasmuch as her delay is not shown to have caused substantial prejudice to any other person, she has not lost her right to the stock through laches, and there being no evidence of any affirmative act indicating an intention to repudiate ownership, her stock has not been forfeited by abandonment.

On appeal. A bill in equity seeking to compel the defendant corporation to issue twenty-one hundred and seventy-five shares of its capital stock, of the par value of one hundred dollars per share, to the plaintiff. The defendant corporation in its answer contended that through laches and abandonment the plaintiff had lost her rights to the stock. A hearing was had before a single Justice who found for the plaintiff and ordered the stock to be issued, and defendant entered an appeal. Appeal dismissed.

The case is fully stated in the opinion.

Leonard A. Pierce and F. D. Putnam, for plaintiff.

W. B. Skelton and Robert H. Holt, for defendant.

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

DEASY, J. The defendant, Elkhorn Coal & Coke Corporation, is a Maine organization. In 1905, a Virginia corporation, bearing the same name, transferred and conveyed to the defendant all of its property and rights. By reason of this transaction and the corporate votes authorizing it, the plaintiff, Ellen H. Duryea, a stockholder of the Virginia company, became entitled to receive twenty-one hundred and seventy-five shares of the defendant's stock. She did not ask that it be issued to her nor did she tender her old certificates until 1921 when her demand for the stock was refused. Whereupon she brought this bill praying that the defendant be required to issue to her twenty-one hundred and seventy-five shares of its stock. The defendant sets up the plaintiff's laches.

At the hearing before a single Justice there was much evidence, not now pertinent, relating to the history of the Virginia corporation. The case was further complicated by a second bill brought by one Charles E. Hellier who sought to intervene and to show that he and not the plaintiff was entitled to the stock in question. But Mr. Hellier's bill was dismissed and no appeal taken. Therefore the question now before the court is whether the defendant is, by reason of her laches, absolved from the duty of issuing to her twenty-one hundred and seventy-five shares of its stock.

The doctrine of laches is peculiar to equity jurisdiction. It somewhat resembles statutory limitation but differs from it in important particulars. Limitation is concerned with the fact of delay; laches with its effect. "Laches is negligence or omission seasonably to assert a right. It exists when the omission to assert the right has continued for an unreasonable and unexplained length of time and under circumstances where the delay has been prejudicial to an adverse party and when it would be inequitable to enforce the right." *Leathers* v. *Stewart*, 108 Maine, 101. Laches "is not mere delay but delay that works a disadvantage to another." 10 R. C. L., 396.

In applying the law to the pending case we thus summarize the essential facts: The defendant has always been a holding company. So also in 1905 was the Virginia corporation. The property which the latter corporation in 1905 transferred to the defendant consisted of stock in the Big Sandy Company, a mining corporation, organized

in Maine and owning large tracts of land in Virginia and Kentucky. At the time of transfer the stock of these corporations, being subject to three hundred thousand dollars in bonds, was worthless. The lands though containing large coal deposits were then undeveloped, isolated and almost inaccessible. But in 1906 the region was tapped by a railway. Since then the land has been developed. The stock has become greatly enhanced in value. The defendant's stock having a par value of one hundred dollars per share is probably worth par.

It cannot be plausibly maintained that before 1909 the plaintiff was guilty of laches. Until the latter year no stock in the defendant corporation was issued to anybody. In 1909 the defendant's officers caused stock certificates to be made in the name of the several persons entitled to the stock including the plaintiff. The plaintiff did not receive her stock. She did not refuse to receive it. She remained quiescent. Prior to 1921 she was not informed that her right to the stock was disputed. Her right in fact was not disputed. It was recognized in returns made by the company's officers to the Secretary of State and in the notice of the annual meeting in 1909 which was the first corporate meeting held in ten years. In June, 1920, Colonel Gaston, then the president of the defendant corporation and representing a large stock interest, consulted the plaintiff's attorneys with the view of having the plaintiff take her stock and act with him or his clients in controlling and improving the company's management. This proposal was not refused. It was evidently considered. But it was not carried into effect. On the 18th of May following (1921), the plaintiff made formal demand for her stock, and on March 25th, 1922, brought this bill in equity to compel the issuance to her of twenty-one hundred and seventy-five shares of stock, worth about two hundred thousand dollars.

The defendant contends that she, by reason of laches has forfeited this stock and all interest in it.

That her delay should have this effect it must appear that it has been prejudicial to or worked to the disadvantage of another. See *Leathers* v. *Stewart*, supra, and numerous other authorities.

It goes without saying that the corporation as such has not suffered. This defense is obviously made in the individual interest of stockholders whose holdings will be increased some two hundred thousand dollars in value if the defense prevails.

It does not appear that stockholders have been substantially prejudiced. During what counsel for the defendants aptly term "the lean and anxious years" stockholders submitted to voluntary assessments to pay taxes and other necessary expenses. For these purposes the plaintiff contributed more than ten thousand dollars which has never been repaid. Other stockholders contributed as much or more and kept up payments longer than she did. But it is not shown that any such payments were made, or that they were needed, after 1909 when the defendant first issued its stock to those entitled to it. Before 1909 rail communication had been established. In 1909 the defendant's prosperity had in some degree begun. After 1909 the corporation seems to have been self-sustaining.

For many years no change has taken place in the stock ownership. No stock has been purchased upon any misunderstanding as to the plaintiff's interest.

The defendant's main reliance is upon his argument that the plaintiff by her delay escaped the stockholder's statutory liability which those who took their stock assumed. It is said that if she prevails in this suit other stockholders will have been prejudiced through carrying this burden not only for themselves but for her. The defendant is right in his assumption that those who took stock were subject to a possible contingent liability. If the corporation had incurred debts not secured by mortgage; if there was a deficiency of corporate assets and if the stock were shown to have been issued for property at less than a bona fide and fair valuation stockholder's statutory liability would attach. But the defendant was and is a mere holding company. True as a stockholder in the Big Sandy Company it perhaps incurred a statutory liability which might have been passed on to its stockholders. They could not have claimed immunity under R. S., Chap. 51, Sec. 54. Section 54 which provides that under certain circumstances the judgment of the directors as to the value of property purchased for stock shall be conclusive does not apply to a case like this. The corporation whose stock was purchased was not a producer of "materials or other property necessary for its (the defendant's) business." A mere holding company has no business for which within the meaning of the statute "materials or other property" are necessary.

But it cannot be claimed successfully that the plaintiff was guilty of laches before 1909. After that date the possible contingent

liability of stockholders seems not to have been a matter of serious consequence. The defendant was doing no business. For ten years it held no meetings. The Big Sandy Company was engaged merely in leasing coal mining privileges. Apparently no debts of consequence were being incurred except taxes which were presumably a first lien on the land and the salary of one of the stockholders who was managing the affairs of the corporation. It is not attempted to be shown that there was ever after 1909 any deficiency or reasonable apprehension of deficiency of corporate assets. During some years Mrs. Duryea escaped a theoretical liability. We do not think that for this reason her stock worth two hundred thousand dollars should be forfeited. The punishment would not fit the crime.

The single Justice who heard the case held that "It is apparent that Mrs. Duryea's delay has in no way worked to the disadvantage of the defendant company or any of the other parties in interest." We think that this conclusion is justified by the evidence. At all events, it is not manifestly wrong.

It is further contended by the defendant that the plaintiff has lost her rights through abandonment. Abandonment and laches are radically different. Abandonment effectuates intention. Laches defeats intention. Abandonment is voluntary. Laches operates in invitum. 1 C. J., 5; *Wolff* v. *Railway*, (Cal.), 56 Pac., 453. The purpose of the delay imputed to the plaintiff by the defendant is inconsistent with abandonment. Moreover, to prove abandonment "there must be some clear and unmistakable affirmative act or series of acts to indicate a purpose to repudiate ownership." 1 R. C. L., 5; 1 C. J., 7. Proof of abandonment "must be clear and unequivocal of acts decisive and conclusive." *McLellan* v. *McFadden*, 114 Maine, 249; *Adams* v. *Hodgkins*, 109 Maine, 365.

The defendant relies upon the plaintiff's inaction. The only acts affirmatively shown on her part indicate an intent not to abandon. She retrieved her stock from Hellier in 1909. Through her counsel she negotiated with Gaston about it in 1920. Later she demanded it and brought this suit. No other act on her part appears.

Proof of laches fails because it is not shown that the plaintiff's delay in taking her stock was substantially prejudicial to any other person. Proof of abandonment fails inasmuch as no unequivocal act appears indicating an intent to abandon.

Authorities cited by the learned counsel for the defendant differ from the instant case in one or both of two important particulars. In most of the cases the plaintiff's rights were conditional upon payment by him of money or its equivalent. Delay in such payments until its profitableness becomes manifest is held to constitute laches. But in the present case the plaintiff was entitled to her stock without payment. If necessary to surrender her stock in the Virginia company this old stock had no value for any other purpose except to surrender.

In other cases the plaintiff asked the court to declare void a transfer or conveyance. A right to avoid and nullify a transfer or conveyance must be exercised promptly. In the present case the plaintiff seeks not to nullify but to ratify the transfer to and by the defendant. She claims not against but under that transaction.

Banks v. *Judah*, 8 Conn., 145, cited by the defendant's counsel lends support to the defendant's contention, but in the instant case we think it clear that the defendant has not shown any positive acts indicating an intention to abandon, and has failed to prove such prejudice to others as to justify this court of equity in holding that the plaintiff's stock is forfeited by reason of her laches.

Appeal dismissed.

ELDEN O. BORNEMAN ET ALS. *vs.* H. A. G. MILLIKEN ET ALS.

Lincoln. Opinion April 11, 1924.

When it appears from all the evidence that a doubt exists as to the location on the face of the earth of the starting-point of a line described in a deed, the contemporaneous and subsequent acts of the parties in establishing or recognizing a certain line as the line intended by the deed are admissible.

In this case the facts when produced revealed an uncertainty as to which of two claimed town lines was the actual starting-point in the contemplation of the parties and as bearing on that question the acts of the parties are of compelling force in determining the true construction.

Testimony as to the declarations of a former owner made while in ownership and possession of the land, pointing out the boundaries of the land itself, said owner having deceased prior to this trial, are admissible although said owner had himself testified at a former trial of the case and his evidence at that trial was admitted in evidence at this trial.

Evidence as to occupation by the parties and their predecessors in accordance with a recognized and acquiesced-in boundary was admissible as bearing upon the true construction of the deed.

Record of a suit between one Simmons and one Betsey Studley was admissible as one of the circumstances tending to throw some light upon the situation.

From the charge taken as a whole it is clear that the quotations from an opinion in a Maine case as to the force and effect of a conventional line were employed by way of illustration and were not misleading.

On exceptions and motion. An action of trespass quare clausum in which plaintiffs charge the defendants with breaking and entering their close, described in the declaration, and cutting timber and wood growing thereon. The general issue was pleaded. The case was tried to a jury and a verdict of $1,295.03 was rendered for the plaintiffs. The case has been tried twice before, the first time at the April Term, 1915, when a verdict was rendered in favor of Scott, one

of the defendants, by order of court, and a verdict for plaintiff against the other defendants was rendered by the jury, which verdict was set aside by the Law Court. At the October Term, 1917, it was tried again and a verdict for defendants was ordered by the court and the plaintiffs excepted, which exceptions were sustained by the Law Court and a new trial granted. In this, the third trial, exceptions were taken to the introduction of certain evidence, and a general motion for a new trial filed. Exceptions overruled. Motion overruled if plaintiffs within thirty days from filing of the mandate remit all of the verdict in excess of $600; otherwise, motion sustained and a new trial granted.

The case is fully stated in the opinion.

M. A. Johnson, for plaintiff.

A. S. Littlefield, for defendants.

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

CORNISH, C. J. This is a question of disputed boundary, that is, of the dividing line marking the westerly boundary of the plaintiffs' land, and the coincident eastern boundary of the land of Scott, one of the defendants. The other defendants purchased from Scott the timber and wood standing on the disputed tract and cut and removed the same. For the sake of convenience the Scott land will be spoken of as the land of the defendants. The action is trespass quare clausum and is before the Law Court for the third time. At the first trial a verdict was ordered by the court in favor of defendant Scott and a verdict was rendered by the jury in favor of the plaintiffs against the other defendants in the sum of $553.25. This verdict was set aside by the Law Court as being clearly wrong under the evidence then presented. 116 Maine, 76.

At the second trial the presiding Justice directed a verdict for the defendants and on exception this ruling was reversed, on the ground that much new and important evidence had been introduced by the plaintiffs and the case should therefore have been submitted to the jury. 118 Maine, 168.

At the third trial the jury again found for the plaintiffs, assessing damages in the sum of $1,295.03, and again the case is brought to this court on defendants' motion and on exceptions.

1. MOTION.

The deed which is the foundation of the plaintiffs' title was given by Waterman Thomas to Godfrey Hoffses on December 30, 1779, and conveyed: "All that certain tract or parcel of land lying in Waldoborough bounded as followeth: beginning at a stake and stones in Waldoborough town line at the southeast corner of Vollentine Mink's land one mile to a birch tree marked on four sides, from thence south fifteen degrees east to a stake and stones in John Labe's line, from thence east by land of John Labe one mile to a stake and stones at the town line, from thence north fifteen degrees west as the town of Waldoborough line runs, to the bounds first mentioned, containing one hundred acres."

Through various mesne conveyances the plaintiffs have succeeded to the ownership of a portion of the property covered by this deed, their immediate predecessor in title being George W. Studley who owned the premises from 1868 to 1913, when he conveyed to them.

At the first trial the battleground was the original and true line between the towns of Waldoborough and Warren, Waldoborough having been incorporated as a town by the Commonwealth of Massachusetts on June 29, 1773. The description in the Waterman Thomas deed of 1779 starts in the Waldoborough town line and runs westerly one mile to a birch tree marked on four sides. That birch tree marked the western boundary of the plaintiffs' and the eastern boundary of the defendants' land, but it long since disappeared. Therefore, the parties at the first trial sought to establish the location on the face of the earth of the original town line, to measure westerly one mile therefrom and fix that point as the plaintiffs' westerly bound. The town line as claimed by them was commonly known as the "old town line" and also as the line of 1812. The defendants sought to establish a line farther east, run by Commissioners appointed by the Supreme Judicial Court in 1836, and spoken of in the case as the "Court line" or line of 1836, as the true town line.

If the town line was located as claimed by the plaintiffs, the disputed tract belonged to them and they were entitled to recover in this action. If, however, the town line was as claimed by the defendants the disputed land belonged to Scott, and this action could not be maintained.

At the second trial the issue was somewhat broadened, as is well stated in the opinion, 118 Maine, 170, viz.: "Considerable new evidence at the second trial was introduced by the plaintiffs and the contention of the plaintiffs now is in effect, not that the so called 'old town line' between Waldoboro and Warren is the true town line, but that it was the point of starting when the deed was given by Waterman Thomas to Godfrey Hoffses in 1779, and that by long acquiescence at least of the abutting owners the so called 'old town line' has ever since been regarded and is the easterly boundary of this property; that the westerly line of this property, which is the real issue in this case, was originally fixed by a birch tree and though said birch tree has disappeared through the ravages of time, the western boundary has continued certain and fixed by long occupation and acquiescence of the owners on each side."

The jury were not permitted to pass upon this issue at the second trial as a verdict for the defendants was ordered by the presiding Justice, but the same issue was before the jury at the third trial and a verdict was rendered for the plaintiffs. At this third or last trial the fact that the "old town line" so called was regarded as the easterly boundary of this property and was the starting-point from which the westerly measurement was taken, together with the consequent recognition of and acquiescence in the westerly boundary thereby fixed and the occupation by the contiguous owners up to that time on either side for a very long period of years, was emphasized even more strongly than at the second trial. The court brought this sharply to the attention of the jury in his charge as follows: "Now the real issue in this case, as I am going to put it to you, is whether the east line of the plaintiffs' land began upon what on this plan is denominated the 'old town line' which is admitted to have been located as early as 1812, or whether it is on the court line which was surveyed and located in 1836. Now the rule of law is, with reference to the construction of deeds, that you shall find out what the parties intended to do,—not what they intend to do now, what they have intended to do in the last fifty years,—but what did these parties intend when these early deeds were made. Where did that 1779 deed start from, actually on the face of the earth? What line did they have in mind? What place did they have in mind? . . . . What line, away back there, when they were

deeding these properties, did they intend to deed them from? Because that is the rule that will control in this case. The true town line, actual town line, is not controlling nor binding. Nor is the 1812 line controlling or binding. It is only evidence for you to consider in connection with the other evidence in the case, to determine whether the 1836 line, the Court line is meant or the 1812 line."

The court then went on to say that when it appears from all the evidence that a doubt exists as to the starting-point, the contemporaneous and subsequent acts of the parties in establishing or recognizing a line as the line intended by the deed, are admissible and of probative force. This is sound law. This is not the case of a clear and unambiguous deed as in *Ames* v. *Hilton*, 70 Maine, 36, and *May* v. *Labbe*, 114 Maine, 374, but even under those circumstances a conventional line is held in this State to be the fixed boundary line although it varies from the course given in the deed, *Knowles* v. *Toothaker*, 58 Maine, 172, cited with approval in *May* v. *Labbe*, supra. Here the facts when produced reveal a latent ambiguity, an uncertainty as to which of two claimed town lines was the actual starting-point in the contemplation of the parties, and as bearing on that question the acts of the parties are of compelling force in determining the true construction. *Gove* v. *Richardson*, 4 Maine, 327; *Whitcomb* v. *Dutton*, 89 Maine, 212; *Haring* v. *Van Houten*, 22 N. J., Law 61.

A large volume of evidence was directed by the plaintiffs both toward the old town line as being the true town line, and also toward the fact of the recognition of and acquiescence by all parties in the western boundary as measured therefrom and as now claimed by the plaintiffs as the actual boundary between land of the plaintiffs and land of the defendants. It would be futile to enter upon a detailed analysis and discussion of the evidence bearing on these points. The record contains five hundred printed pages, embracing a vast amount of oral testimony, in addition to seventy-two deeds and other exhibits introduced by the plaintiffs, and twenty-two deeds and other exhibits introduced by the defendants. Commendable diligence on the part of counsel on both sides has brought to light many old plans and a vast amount of well-nigh hidden evidence. Of all this the jury had full benefit. It is sufficient to state that

after careful study it is the opinion of the court that a verdict for the plaintiffs on the question of trespass was amply warranted and should not be disturbed.

EXCEPTIONS.

Countless exceptions were reserved by the defendants during the progress of the trial, but only five are pressed before this court.

1. Exception to the admission of testimony as to declarations of George W. Studley made while in ownership and possession of this land, pointing out the boundaries on the land itself, said Studley having deceased prior to this trial. This evidence was admitted under the authority of *Royal* v. *Chandler*, 83 Maine, 150; *Wilson* v. *Rowe*, 93 Maine, 205; *Emmett* v. *Perry*, 100 Maine, 139.

The defendant would distinguish these cases because Studley was alive and testified at the first trial of this case and a copy of his testimony was introduced in evidence in this third trial without objection. This fact however, does not render declarations under the rule in *Royal* v. *Chandler*, inadmissible. They are not thereby converted into hearsay evidence. They were properly admitted, their weight being for the jury.

2. Exception to evidence tending to prove the boundary of other people's land claimed to be bounded upon the town line, and also as to the fact that the town line as claimed by the plaintiff was commonly known as the "old town line."

In a case of this nature the evidence necessarily takes a somewhat wide range, guided by the wise discretion of the presiding Justice as to what is pertinent. We can see where the bounds of adjoining and nearby owners might throw some light upon the issue in this case and be of some aid to the jury. If not it would be entirely harmless.

3. Exception to the testimony of the plaintiffs that the land in dispute had been continuously occupied by them and their predecessors in title, and never by the defendants or their predecessors in title. This was not introduced to prove adverse possession, but occupation in accordance with a recognized and acquiesced-in boundary, and was clearly admissible.

4. Record of a suit between Simmons, a predecessor in title of the defendants, and Betsey Studley, widow of Jacob Studley, a

predecessor in title of the plaintiffs. The plaintiffs claimed that this record showed that an agreement was made in court that the referee therein should establish the line between them and that they afterwards abided by it and lived up to it. This was but another circumstance touching the situation, the force and effect of which was properly for the jury. Its admission was not prejudicial to the defendant.

5. Exception to instructions by the court with reference to a line agreed upon by the parties and lived up to thereafter.

This refers to the quotations by the court from *Knowles* v. *Toothaker*, 58 Maine, 172. That case involved a conventional line established and agreed upon by the parties, and the soundness of its doctrine is not attacked by the defendants. Their claim is that it did not apply to the pending case where there was no evidence as they say of laying out or establishing a boundary, but at most only of recognizing and acquiescing in a certain boundary. The distinction is well taken, unless it is true as some courts hold, that long continued recognition, acquiescence and occupation imply a tacit agreement, as binding as an express one, as in *Davis* v. *Angerman*, 195 Iowa, 180, 192 N. W., 129; *Bahneman* v. *Fritchie*, 147 Minn., 329, 180 N. W., 215. Some authorities hold such practical location binding as a matter of public policy to prevent the unsettling of old established lines. But even conceding the distinction as taken by the defendants, it is clear from the charge, taken as a whole, that the court used some parts of *Knowles* v. *Toothaker* merely by way of illustration and made it plain to the jury that they were to consider the question of recognition and acquiescence only as bearing on the intent of the parties, as already stated. They could not have been misled.

The defendants take nothing by their exceptions. Even if a technical and academic error crept in, during a long and somewhat complicated trial, it was of such slight importance as to have no reversing effect in view of the convincing evidence in support of the plaintiffs. A just result has been reached and should stand, except so far as the amount.

DAMAGES.

The damages, $1,295.03, are manifestly excessive. Testimony was introduced tending to show the amount of wood and timber cut

from the disputed tract and its value. This might not be the full measure of damage, however. The true rule was, as given to the jury, the difference in value on the plaintiffs' premises before and after the trespass. Two of the plaintiffs testified that that difference was six hundred dollars. They cannot complain if they are awarded the full amount to which they said they were entitled.

The entry will therefore be,

Exceptions overruled.

Motion overruled if plaintiffsw ithin thirty days from filing of this mandate remit all of the verdict in excess of $600; otherwise, motion sustained and new trial granted.

MARCHAVICH'S CASE.

Androscoggin. Opinion April 14, 1924.

The burden of proof to establish an affirmative proposition is on the party asserting it, and under the Workmen's Compensation Act the finding that an injury is compensable may be supported by reasonable inferences, not based upon surmise, conjecture, guess or speculation. Knowledge of the injury on the part of the employer may be communicated through a foreman of claimant. The findings of the Commission will not be set aside on the ground of its method of procedure unless it abuses its discretionary powers.

A room foreman in a mill is an agent through whom the employer may be charged with knowledge of an injury, where the claimant failed to give the written notice required by the Act, and if there be evidence of such knowledge on which the decree can rest it will not be set aside.

Unless it clearly appears that the member of the Industrial Accident Commission who heard the case abused his discretionary powers relating to the extent of time between a first and second hearing, his procedure will not be sufficient reason for setting aside his findings.

It may be entirely proper for the Commissioner with the consent, or, unless waived, in the presence of the parties, to view the locus of the accident, not for the purpose of obtaining information or evidence on which to base his award, but for the purpose of better understanding the evidence presented to him at the hearing, yet the findings of the Commissioner must be grounded upon evidence presented under such circumstances as to afford full opportunity for comment, explanation and refutation.

Whether the view of the locus was without the consent or waiver of the respondent, is a substantive claim, and when set up by the respondent's counsel, we see no reason why the burden of proof does not rest upon the party relying upon it. The fair presumption is in favor of the regularity of conduct on the part of a judicial tribunal.

On appeal. Claimant alleges that on February 16, 1922, while in the employment of the Continental Mills in Lewiston as a weaver, he received a compensable injury to his toe being punctured by a small wire. Infection followed resulting in incapacity for several months. A hearing was had and compensation awarded and respondents entered an appeal. Appeal dismissed. Decree sustained with costs for claimant.

The case is fully stated in the opinion.

Herbert E. Holmes, for petitioner.

Andrews, Nelson & Gardiner, for respondents.

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

PHILBROOK, J. This is a workman's compensation case, heard before the Associate Legal Member of the Industrial Accident Commission. Compensation was ordered and by appeal the case comes to this court.

Briefly stated, the record discloses the following occurrences upon which the finding was based. The petitioner was employed as a weaver in the Continental Mills at Lewiston. It was his custom, after arrival at the weave room, to start his loom, remove the shoes he had worn while walking from home, and put on another pair to be worn while he was at work. On the morning of February 16, 1922, he went to his work, as usual, started his loom, and before he had time to change his street shoes for his working shoes he felt a sharp pain in his left big toe. He stopped work, went to Joel J. Sylvester, a second hand, or overseer, in the room where he worked,

told Sylvester that there was something in his toe and that he wanted to consult a doctor. According to the petitioner's testimony Sylvester gave consent to his leaving work. He immediately consulted a doctor who made an examination, did not succeed in removing the cause of pain, but washed and bandaged the toe. This occurrence was on Thursday. On the following day the petitioner returned to the mill, worked during Friday, Saturday, and the following Monday until the noon hour. At that time he told Sylvester that he did not think the doctor had got the wire from his toe and he wanted to go to the hospital. Sylvester said that the petitioner only made complaint of a sore toe, denied that he had any knowledge of an accident, but thought the petitioner's subsequent absence from work was on account of sickness or taking a vacation. Instead of going to a hospital the petitioner went home and called another physician. After some treatment this physician removed from the toe a piece of fine wire about one half inch long. As a result of this operation the petitioner's troubles began to disappear but were not entirely gone at the time of the hearing for compensation.

On April 22, 1922, the petition for award of compensation was filed, in which the petitioner stated that the accident occurred as follows: "Was working around an overhead shafting and in stepping down stepped on a piece of wire carding. Wire went into foot." The wire taken from the petitioner's foot was an exhibit. There was also exhibited a brush or carder, with wire teeth, which customarily hung on a nail near the place where the petitioner placed his shoes and which he used to clean cloth. The wires in this brush were very similar, if not identically like the one taken from the petitioner's foot. The finding of the Associate Legal Member recites "The wire certainly entered the toe; it obviously came from the carder; it must therefore have dropped into the empty shoe during the day, and in some way have worked into the toe the next morning. It is accordingly found that Mr. Marchavich received his injury by accident arising out of and in the course of his employment."

The first contention of the respondents, and the one which they designate as their principal contention, is that there is no evidence of a personal injury by accident arising out of and in the course of the employment. That the burden of proof is on the claimant is a principle of law too well established to need the support of citation

of authorities, but it is equally well established that the finding that the accident is compensable may be supported by inferences, provided those inferences are reasonable, and not based merely upon surmise, conjecture, guess or speculation, for the Accident Board, in the determination of questions of fact, is permitted to draw such inferences from the evidence and all the circumstances of the case as a reasonable man could draw. If the evidence, though slight, is yet sufficient to make a reasonable man conclude in the claimant's favor on the vital points, then his case is proved. *Sponatski's Case*, 220 Mass., 526; *Sanderson's Case*, 224 Mass., 558; *Westman's Case*, 118 Maine, 133; *Larrabee's Case*, 120 Maine, 242. After a careful examination of the record we cannot hold in favor of this first contention.

The second contention of the respondents is that although the claimant requested permission to leave the mill, yet he gave no notice of an accident as required by the Act, nor did the employer have any knowledge that an industrial accident had been suffered. A room foreman, in this case, Mr. Sylvester, is an agent through whom the employer may be charged with knowledge of an injury, where the claimant failed to give the written notice required by the Act, and if there be evidence of such knowledge on which the decree can rest it will not be set aside. *Simmons' Case*, 117 Maine, 175. Although Mr. Sylvester testified that when the claimant asked permission to leave he made no complaint of an accident and that when the petitioner was absent he (Sylvester) presumed that the petitioner was sick or taking a vacation, yet other evidence, including the testimony of the petitioner, caused the Associate Member to find against this contention of the respondents, and the decree will not be set aside by reason thereof.

It appears that the hearing, in the first instance, was held on June 3, 1922, and the respondents claim that this hearing was closed in the usual form. It further appears that a second hearing was held on October 30, 1922, the respondents being represented by counsel. By them, objection to the procedure was made on the ground that the evidence was fully taken out at the first hearing and the case closed, and there should be some end to such cases. The respondents claim that the petitioner failed to prove his case at the first hearing; that without any request or order for continuance the matter rested there; that subsequently the Associate Member refrained

from issuing a decision, but investigated the case, and granted what was in effect a new trial or a rehearing. The respondents also claimed that during the interim between June 3 and October 20, the Associate Member had been to the mill, with claimant's counsel, and carried on an independent and ex parte investigation. Upon these claims the respondents base their third contention and say that such conduct on the part of the Associate Member constitutes reversible error.

That a second hearing was held on October 30th, is clearly shown by the record. Whether the first hearing was closed, adjourned or continued, the record is silent. The decree awarding compensation, made after the second hearing, and not before, contains this statement by the Associate Member; "At the outset, before taking up the merits of the case itself, it may be well to consider the objections made by the attorney for the respondents as to the right of the Commission to hold the continued hearing, the case having been apparently closed at the end of the first hearing. Although such procedure for obvious reasons is not to be encouraged in cases generally, it has always been the policy of the Commission, exemplified in this instance, to permit such further hearing to be held when newly discovered or newly available evidence, before decision, needs to be presented by either party in the interest of justice. . . . . This procedure in exceptional and meritorious cases appears especially important and desirable since after decree has once been rendered, no matter what further evidence may then be discovered, the case cannot of course be re-opened. (*Connors' Case*, 121 Maine, 37)." Counsel for respondents state in their brief that the Act enjoins a speedy disposition of proceedings. The section referred to (37) does not exactly say that, but does direct that the Commission may prescribe forms and make suitable orders as to procedure adapted to secure a speedy, efficient and inexpensive disposition of all proceedings under the Act. In *MacDonald's Case*, 120 Maine, 52, we held that what constitutes a "speedy, efficient and inexpensive procedure," under the statute, is a question of fact addressed to the discretion of the chairman. "It should be only upon the conclusion that his discretion has been abused that the appellate court should be called upon to exercise its power of review." Akin to this principle is the rule laid down in *Atkins* v. *Field*, 89 Maine, 281, that the "question of further delay was for the presiding justice to decide in the exercise of a sound discretion. The law court will not revise

his action unless it appears that he has clearly abused his discretionary power." We cannot say that in the case at bar there was a clear abuse of discretionary power relating to the extent of time between the first and second hearings although that extent was somewhat longer than would be ordinarily desirable.

As to the claim that between the two hearings the Associate Member visited the mill with claimant's counsel and carried on an independent and ex parte investigation, it should be said that the record shows that the Associate Member did visit the scene of the accident and that as a result, or at least at the visit, additional facts were discovered which were made the subject of record evidence at the second hearing. In a very recent decision of this court, *Hutchinson's Case*, 123 Maine, 250, it was said "It may be entirely proper for the Commissioner with the consent, or, unless waived, in the presence of the parties, to view the locus of the accident, not for the purpose of obtaining information or evidence on which to base his award, but for the purpose of better understanding the evidence presented to him at the hearing, as in case of views by a jury." In *Gauthier's Case*, 120 Maine, 73, it is also held that the findings of the Commissioner "must be grounded upon evidence presented under such circumstances as to afford full opportunity for comment, explanation and refutation." Whether the visit to the mill was without the consent or waiver of the respondents, is a substantive claim set up by the respondent's counsel and we see no reason why the burden of proof does not rest upon the party relying upon it. The fair presumption is in favor of regularity of conduct on the part of a judicial tribunal. But the record is silent upon this question of consent or waiver. Moreover, whatever facts were discovered at the visit were, at the second hearing, so presented "as to afford full opportunity for comment, explanation and refutation." The third contention of the respondents cannot prevail.

Closely connected with the third contention is the fourth, wherein the respondents claim that although the grounds are not recited in the decision itself, yet the testimony shows that the decision must have been based in part, at least, upon the ex parte view and investigation of the Associate Member, and that such member testified in the claimant's behalf. The pages of the record referred to by respondent's counsel as showing testimony given by the Associate member have been examined and while it there appears that the

Associate Member asked questions of a somewhat reluctant, if not biased witness, yet such record fails to meet the claim that the member testified. In view of what we have already said regarding the third contention the fourth cannot prevail.

The fifth and last contention is that at the second hearing the Associate Member erroneously ruled that Mr. Sylvester was the witness of the respondents, and that respondents were prejudiced by the consequent rulings as to the admissibility of questions put to him, and that reversible error was made in the admission of the exhibits. Without entering into a detailed discussion of this two-fold contention we hold that after a careful examination of the record, and the grounds of objection there made, this contention must also fail.

Appeal dismissed.
Decree sustained with costs.

WILLIAM J. PHILLIPS' CASE.

Androscoggin. Opinion April 22, 1924.

A decree awarding a specific compensation under Section 16 of the Workmen's Compensation Act modified.

In this case the compensation agreed upon under Section 16 began to run on the 14th day of August, 1922, the date of the amputation, and the decree is modified by adding at the end the following words: "From the first payment due hereunder there shall be deducted all compensation under the agreement of August 28th, 1922, accruing after August 14th, 1922, and heretofore paid.

On appeal. Claimant was totally incapacitated by an injury on April 5th, 1922, and on April 15th, 1922, an agreement was entered into between the employer and claimant, duly approved, that under Section 14 of the Workmen's Compensation Act, compensation should be paid and was paid according to the terms of the agreement. On August 14th, 1922, it became necessary to amputate the thumb,

third finger and fourth finger of the right hand, and from this date it was agreed that compensation should be allowed and paid under Section 16 of the act. On October 14th, 1922, a petition for review was filed by the insurance company, on which a hearing was held on November 2d, and upon an agreed statement of facts the Chairman of the Commission awarded compensation in the sum of $16.00 per week for a period of eighty-three weeks from August 14th, 1922, as specific compensation for the loss of the thumb and two fingers, and in addition thereto such further compensation as claimant may be entitled to under the provisions of the Act, from which decree respondents entered an appeal. Appeal dismissed and decree modified.

The case is fully stated in the opinion.

George C. Webber, for claimant.

Hinckley & Hinckley, for respondents.

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

SPEAR, J. This case comes up on appeal from the sitting Justice upon the following abbreviated agreed statement of facts dated November 2d, 1922. On April 5th, 1922, while in the employ of the Auburn Electrical Company, William J. Phillips, the petitioner, received a personal injury by accident largely to his right hand so that he was totally incapacitated for work from April 5th, 1922 to date.

An agreement as to payment of compensation under Section 14 of the Workmen's Compensation Act, was entered into between the employer and employee on April 28th, 1922, which was approved by the Commissioner of Labor, May 15th, 1922. Compensation began on April 12th and has continued according to the terms of the agreement to date.

On August 14th, 1922, it was found necessary to amputate the thumb, third finger and fourth finger of Mr. Phillips' right hand because of the injury of April 5th, 1922.

It is agreed that Mr. Phillips is entitled under Section 16 to compensation for eighty-three weeks at the rate of $16.00 a week for whatever period he may be allowed compensation because of the loss of the fingers and thumb.

As presented this case involves simply an interpretation of Sections 14 and 16 of the Workmen's Compensation Act, Public Laws of 1919, Chapter 238, and amendments thereto, which has not yet been fully passed upon in this State. Section 14 provides for compensation in case of total incapacity and the compensation continues, unless otherwise terminated, for a period of five hundred weeks. The agreement for compensation in the present case was of open end—without limit as to the time it should run.

On the 14th day of October, 1922, the insurance company carrying the liability filed a petition for the purpose of modifying or ending the agreement for compensation of April 28th, 1922. The parties met for a hearing whereupon the foregoing agreed statement was made, which brings the case before this court. It now appears from the agreed statement that "the only question at issue in this case is the time from which the period of specific compensation to which Mr. Phillips is entitled, under the provisions of Section 16 of the Workmen's Compensation Act, shall commence to run"; whether Section 16 shall supplant the operation of Section 14 from the beginning, April 12th, 1922, or from the date of the amputations, August 14th, 1922. The chairman of the Commission, in an able and exhaustive opinion, found that the eighty-three weeks under Section 16 should begin to run from August 14th, the date of the amputations. We think his decision is correct.

It should be here noted that no question whatever is raised as to the mode of procedure. And only the issue presented by the agreed statement is considered in this opinion.

Section 14 applies to total disability and contemplates a period of not more than five hundred weeks. It applies to nothing else precisely as if it had been the only provision in the Compensation Act. Up to August 14th, Section 14 applied absolutely and alone, as the employee was entitled to immediate compensation for his injuries. This section as before noted was the only provision that was available, operative and controlling up to August 14th, the date of the amputation. Up to this time the petitioner had lost no members and Section 16, consequently, had no application whatever. No occasion at this time had arisen upon which it could be invoked. Furthermore, it is a matter of common knowledge that amputation, following injuries, may be deferred for days, weeks, or months before the necessity of amputation can be determined. It is a delay based

upon surgical judgment, in a desire and hope to save the injured member. These palpable facts must have been assumed to be matters in contemplation of the Legislature in the enactment of Sections 14 and 16. The Legislature did not, however, give Section 16 retroactive effect. Nor do we find by the phraseology expressed or implied, or by interpretation of the whole act in *pari materia*, that it suggests that Section 16 should be construed to have a retroactive effect. It would seem apparent, however, that unless Section 16 is construed to have retroactive effect the respondent's contention cannot prevail.

Our opinion is, that Section 16 began where Section 14 left off, and that Section 14 covering total disability, plus Section 16 covering loss of members, presents a natural and reasonable interpretation of the two sections, when construed together, is in accord with the intention of the Legislature, is consistent with every other provision of the act and gives the employee no more than just compensation, as the result of his injuries. *Addison* v. *Wood Company*, 207 Mich., Page 319, 174 N. W., 149; *Curtis* v. *Hayes Wheel Company*, 178 N. W., 675. These cases are conceded by respondents to be in point.

Moreover, the construction invoked by the respondent would render the two sections inconsistent with each other and inconsistent with the intent and purpose of the whole act. Suppose in the present case the employee had received compensation, under Section 14, for one hundred weeks, as he might under that section, and at the end of that period it had become apparent that amputation was necessary; then the employee would be entitled to compensation for only eighty-three weeks from the beginning, while he had actually received compensation for one hundred weeks, and would thereby be indebted to the respondent for seventeen weeks.

Our conclusion is, that the able and helpful opinion of the chairman was correct in its analysis of the statute and that the decree should be confirmed as modified.

If any question should arise with reference to the concurrent operation of the two sections it is proper for the court to remark that double or concurrent compensation should not be allowed for the period from August 14th to November 2d, as already pointed out, and if allowed under the decree, should be deducted from the full amount so allowed.

Decree modified by adding at the end the following words: "From the first payment due hereunder there shall be deducted all compensation under agreement of August 28, 1922, accruing after August 14, 1922 and heretofore paid."

PETER WILLIAMS *vs.* INHABITANTS OF VINALHAVEN.

Knox. Opinion April 22, 1924.

The construction of a State-aid Highway must be authorized by the Highway Commission. Such Commission has no authority to order the selectmen of a town to contract in behalf of the town to do such work. It is optional with towns to appropriate money to improve and maintain State-aid Highways. Ultra vires acts cannot be ratified by a town, nor is a town estopped from denying liability under a contract not within the scope of its powers.

The Legislature has taken from towns the improvement of all highways within their limits, once they have been designated by the Highway Commission as State-aid Highways, and once improved, also their maintenance, leaving only optional with the towns whether they will appropriate any money for this purpose.

The use of an improved highway of this class, or the implied acceptance of the work of construction by the payment of sums due under the contract, even if the town had authority to enter into such a contract, would not of itself constitute an acceptance of material and labor furnished outside of the contract, and without authority of the town, in the improvement of such a highway.

A town cannot ratify *ultra vires* acts, nor will it be estopped from denying liability on completed contracts outside the scope of its powers, because of any supposed benefits accruing, at least where the alleged benefits are not shown to have resulted from acts of anyone held out by the municipality as authorized to act in its behalf.

On report on an agreed statement. An action of assumpsit to recover $569.20 which plaintiff alleged was due him for extra work done and material furnished on a State-aid Highway in defendant town in connection with an alleged contract with defendant town to construct certain State-aid road in said town, said contract having

been signed by two of the selectmen of the town. Counsel for defendant town contended that the extras sued for were not included in the contract; that the work was not ordered by either the town or the selectmen, but if ordered at all was ordered by an inspector of the State Highway Department, and furthermore that the town was not liable under the contract as it was never authorized by the town. By agreement of the parties the cause was reported to the Law Court on an agreed statement of facts. Plaintiff nonsuit.

The case is stated in the opinion.

Rodney I. Thompson, for plaintiff.

Arthur S. Littlefield, for defendant.

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

WILSON, J. An action of assumpsit on account annexed to recover of the town of Vinalhaven for materials and labor alleged to have been furnished in addition to that required under an express contract entered into September 18, 1922, by the plaintiff and the selectmen of the town for the construction of a certain piece of highway in said town, and a part of a public way designated by the State Highway Commission as a State-aid Highway.

The case was reported to this court on an agreed statement, from which, though meager in its details and facts stated, it fairly appears, and both sides agree, that the way under construction was what is designated under Chap. 25, R. S., as a State-aid Highway, and had been so classified by the State Highway Commission; that on September 18, 1922, without any vote by the town authorizing it, and, so far as the report shows,—and on this both sides agree,—without any contract between the town and the Highway Commission authorizing the town to construct it, the selectmen entered into a contract in behalf of the town with the plaintiff to construct eight hundred feet of State-aid Highway in said town for the sum of $990.00; that the plaintiff proceeded in the construction of the way and was paid by the town the full amount of the contract price; that in the course of the construction, but at whose request does not appear, the plaintiff claims to have furnished material and labor in addition to that required by the contract and to the amount of $569.20; that following the completion of the work and the final payment on the

contract price the town at a town meeting held December 12, 1922, under an article in the warrant: "To see what action the town will take toward further payment of money to Peter Williams for construction of State Aid Road in year 1922," voted: "To reimburse Peter Williams to the amount of $116.00," which sum was paid to the plaintiff the following day. The plaintiff contends this was paid on account of the extra work, though he has given no credit therefor in his account as sued for; the defendant claims it was voted rather as a gratuity than in recognition of any liability.

The defendant contends that without authority from the Highway Commission in the form of a contract a town has no authority to construct State-aid Highways, and that it could not ratify something it had no authority to do and obligate itself to make further payments.

The plaintiff's contention is not wholly clear, but he appears to claim through his counsel that the Highway Commission, once a town has voted to raise money for State-aid Highways, may order the town to enter into a contract, or contract for it, and bind it through its selectmen. But even so, the report does not show that the selectmen in this case acted by order of the Highway Commission in making the contract.

Assuming an appropriation by the town of Vinalhaven for State-aid work in the year 1922, on which point, however, the report is silent, we do not find in the statutes any basis for this contention. The construction and maintenance of all State Highways and State-aid Highways under Chap. 25, R. S., as amended, is entirely under control and direction of the Highway Commission and the expenses of the construction of State-aid Highways are paid, not by the towns, but by the State out of a joint fund contributed in part by the State and in part by the towns. See Secs. 7, 10, 18, 20, 24, Chap. 25, R. S.

A town has no authority to construct any part of a State-aid Highway as such, except as it contracts so to do with the Highway Commission under Sec. 10 of Chap. 25. Neither has the State Highway Commission any authority to order a town, or its officials, to construct highways of this class within the town, or order, or authorize the selectmen of a town to enter into a contract in behalf of the town for such work. It can only proceed under Section 10.

The general authority and duty of a town to maintain its public ways gives it no authority to construct State-aid Highways; and while the Highway Commission may contract with the town to do such

work, without such a contract, a town, and surely its selectmen in its behalf, cannot enter into a binding contract with an individual to construct highways of this class.

The Legislature has taken from towns the improvement of all highways within their limits, once they have been designated by the Highway Commission as State or State-aid Highways; and once improved, also their maintenance, only leaving optional with the towns whether they will appropriate any money for the improvement of such State-aid Highways within their limits. Once appropriated, however, the money must be paid into the State treasury and be expended by direction of the State Highway Commission, Secs. 7, 10, 18, 24, Chap. 25. Any other proceedings in the improvements of such ways either by the towns or Highway Commission than as provided in the chapter above referred to, are without authority and entail no binding contractual obligations upon either the State or the town.

With respect to the contract entered into with the plaintiff by the selectmen of Vinalhaven, all this is water which has passed, except as it bears upon any alleged ratification by the town. The contract has been completed and the agreed compensation paid in full. We are now only concerned with the alleged extra materials and labor furnished by the plaintiff. No claim is made that they were furnished at the request of the selectmen or of anyone having authority to bind the town. The agreed statement is silent on this point. The only question now is, whether the payment by the town of the sums due under the contract and the use of the way by the public when improved and the action of the town, after it had paid the contract price in full, at a meeting held December 12, 1922, at which it voted to reimburse the plaintiff to the extent of $116.00 in any way rendered the town liable for the extra material and labor sued for in this action.

The use of the improved way by the public or the implied acceptance of the work by the payment of the sums due under the contract, even if the town had the authority to enter into such a contract, would not of itself constitute an acceptance of material or labor furnished outside the contract without the authority of the town. *Boston Electric Co.* v. *Cambridge,* 163 Mass., 64, 68; *Murphy* v. *City of Albina,* 22 Or., 106; 28 Cyc., 1052.

With respect to the vote of December 12, such a vote cannot be held to be a ratification of acts, which, so far as the report shows,

the town never had an authority to perform. A municipality cannot ratify *ultra vires* acts; nor will it be estopped from denying liability on completed contracts outside the scope of its powers because of any supposed benefits accruing, at least, where the alleged benefits are not shown to have resulted from the acts of anyone held out by the municipality as authorized to act in its behalf. 19 R. C. L., 1061, Sec. 350.

According to the stipulations of the parties, the entry must be,

Plaintiff nonsuit.

TICONIC NATIONAL BANK

vs.

THE FASHION WAIST SHOP COMPANY, and Trustee.

Androscoggin. Opinion April 22, 1924.

Trustee process may be maintained in cases where goods are sold in violation of the Bulk Sales Law, and allegations may be filed at time of hearing on trustee's disclosure. Goods conveyed, or if sold, the proceeds thereof, in violation of the Bulk Sales Law, at least in equity or upon trustee process are held by vendee in trust for the creditors. Where vendee in good faith has paid any creditors their respective share of the value of the goods sold shall be subrogated to the rights of such creditors upon trustee process, since equitable principles are frequently applied in determining the rights of parties upon such process.

The knowledge of a member of a Board of Directors of a corporation cannot be imputed to the corporation, unless he was at the time in some way engaged in the corporation's business or acting in its behalf.

To permit the vendee to set off in full the amount paid other creditors would open the door to fraud and furnish a ready avenue of escape from the effect of the Bulk Sales Law.

The vendee having failed to comply with the law must be held to disburse the purchase price at his peril. Any creditor omitted from a list not furnished

in accordance with the statute, is entitled to at least his *pro rata* share of the value of the goods sold, if his delay in presenting his claim is due to no fault of his.

Inasmuch as the maker of an accommodation note is liable to a holder for value with or without notice of the nature of the maker's obligation, the exception of the trustee to the exclusion of evidence to show the notes held by the plaintiff were accommodation notes and that the plaintiff had knowledge of the fact, cannot prevail.

On exceptions. An action to recover on two promissory notes, one for $2,500.00 and interest, and the other for $1,593.00 and interest, brought against defendant corporation and Hyman Margolin as trustee. The plaintiff, before maturity, discounted for defendant the notes in suit, one on August 3, 1921, and the other on September 12, 1921, and defendant, conducting a specialty store in Lewiston, on December 30, 1921, sold all of its assets including its stock of merchandise to the trustee in violation of the Bulk Sales Law, for five thousand dollars which was deposited with Benjamin L. Berman for the purpose of paying the creditors of the defendant corporation.

A list of creditors which did not include the name of the plaintiff was given to Mr. Berman and he, without knowing that plaintiff was a creditor, paid in full the creditors on such list, leaving in his hands $8.75.

A hearing was had on the disclosure of the trustee and the presiding Justice found that the value of the stock of merchandise was $2,000.00, and ruled that the trustee was entitled to a set-off only to the pro rata amount of the sums paid out by him to the creditors, and plaintiff excepted, and also excepted to other rulings of the presiding Justice as did the trustee. Exceptions of both the plaintiff and trustee overruled.

The case is fully stated in the opinion.

Bradley, Linnell & Jones, for plaintiff.

Harry Manser and Benjamin L. Berman, for trustee.

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

WILSON, J. An action brought to recover of the principal defendant on two promissory notes signed by it and payable to its treasurer, one Charles J. Clukey, and by him indorsed and discounted at the

plaintiff's bank, said notes being respectively dated August 3d, 1921, and September 12th, 1921, and maturing in two months after date.

On December 30th, 1921, the principal defendant through its treasurer negotiated a sale of all its business, including its stock in trade, fixtures, lease and good-will to the trustee in this action for the sum of $5,000.00. No inventory of the stock sold was made, nor were the creditors of the defendant notified in accordance with the provisions of Sec. 6, Chap. 114, R. S., which is commonly known as the Bulk Sales Law.

However, for the apparent purpose of carrying out the intent of the statute the purchase price was deposited with the counsel who acted for both parties in the transaction, and a list of creditors represented to be complete, was furnished counsel by the treasurer of the defendant Company, but which did not include the plaintiff; and the entire purchase price, not only of the stock in trade, but of the fixtures, lease and good-will, except $8.75, was, prior to May 22, 1922, disbursed by counsel among the creditors of the defendant Company according to the list furnished by its treasurer and in full of their respective claims.

On May 22d, 1922, counsel for the trustee received notice of the claim of the plaintiff Bank, which it does not appear had any notice of the sale and deposit of the purchase money with counsel, prior to its disbursement, unless knowledge of Mr. Clukey was notice to the plaintiff, he being a member of its Board of Directors during the entire transaction.

On June 8th, 1922, this action was brought, on which the purchaser, Hyman Margolin, was summoned as trustee of the defendant. It also appears that at the time of the bringing of the action practically all of the stock purchased had been sold by the trustee in the usual course of trade.

The writ was made returnable at the September Term, 1922, at which term the trustee appeared and filed his written statement in the usual form setting forth that there were no goods and effects in his hands belonging to the defendant and submitting himself to an examination on oath. It does not appear that he gave notice to the plaintiff's attorney or caused it to be minuted upon the docket of the court in accordance with Rule XII. of the Supreme Judicial Court.

Nothing more was done at the return term, except the defendant was defaulted for want of appearance in his behalf. At the January

Term, 1923, it was agreed that the question of whether the trustee should be charged might be heard by a justice of the court in vacation. On February 5th, 1923, the trustee was examined and his disclosure taken by a stenographer and duly sworn to and notice given by the trustee that at the hearing before the justice allegations would be filed by the trustee under Sec. 30, Chap. 91, R. S., and further evidence offered in their support.

On coming before the justice on February 12th, the trustee filed allegations setting forth certain facts, upon which, being proved, he contended he should not be adjudged trustee, and offered evidence in their support. Counsel for plaintiff objected to the filing of such allegations at this time and to the introduction of the evidence. The justice, however, allowed them to be filed and received the evidence.

The justice upon the disclosure of the trustee and the evidence in support of the allegations found that the purchase by the trustee was made in good faith, without any intent to delay or defraud the defendant's creditors, that the price of $5,000.00 was an adequate consideration and that the value of the stock in trade so sold was $2,000.00, that the trustee should be charged, but only for the *pro rata* amount of the value of the stock of goods that the plaintiff's claim bore to the total indebtedness.

The trustee at the hearing before the justice offered evidence in support of allegations that the plaintiff was not a creditor of the defendant, that the defendant did not owe its treasurer, Clukey, any money when the notes were given and that Mr. Clukey to whom the notes were made payable was at the time, and since has continued to be, a director of the plaintiff Bank, which was excluded.

The court found that the plaintiff was a bona fide creditor of the defendant and as such was entitled to share in the funds obtained from the proceeds of the sale of the goods by the trustee.

The plaintiff excepts to the ruling of the court that allegations might be filed by the trustee after his disclosure and to the receipt of any evidence in support thereof; also to the ruling or finding of the court that the value of the stock of goods was $2,000.00, and to the ruling by the court that the trustee was only charged for the pro rata amount of the plaintiff's claim, contending that the trustee should be charged for the full value of the goods sold, that he had no right of subrogation or set-off by reason of any sums disbursed to other creditors.

The trustee excepted to the ruling of the court excluding the evidence in support of his allegations that the defendant at the time the notes were given was not indebted to Mr. Clukey, that it was a mere accommodation maker and that Mr. Clukey at the time was a director of the plaintiff Bank, for the purpose of bringing home knowledge to the plaintiff of want of consideration as between Clukey and the defendant, and to the ruling that the plaintiff was a bona fide creditor. The trustee also excepted to the ruling of the court and the trustee should be charged for the pro rata amount of the plaintiff's claim, his contention being that he should be allowed to set off under Sec. 64, Chap. 91, R. S., the entire amount he had paid out to the other creditors.

Exceptions having been filed the whole case comes before this court for examination and the court may under Sec. 79, Chap. 91, R. S., correct any errors either in law or fact, *Meserve* v. *Nason*, 96 Maine, 412; *Thompson* v. *Shaw*, 104 Maine, 85, 95.

Reviewing the case, however, upon the points raised by the exceptions of both parties, we find no occasion for reversing or modifying the rulings and findings of the court below.

Allowing the allegations to be filed at the time of the hearing, while not commendable practice, was, we think, discretionary with the court and no abuse of judicial discretion appears in this case. The receipt of relevant evidence in their support follows then as a matter of course. Nor do we find any adequate reason for disturbing the finding of the court below as to the value of the stock in trade. Certainly the testimony of the treasurer, who negotiated the sale, that the goods were alone worth $8,000.00 after agreeing to the sale of the fixtures, the assignment of the lease and the conveyance of the good-will together with the stock in trade for $5,000.00 is not entitled to great weight.

Nor do we think that the plaintiff's contention that the trustee should be charged to the full value of the stock sold regardless of the sums paid to the other creditors is one which should prevail; or on the other hand, that the trustee's claim should be allowed that he be permitted under a right of subrogation or under Sec. 64 of Chap. 91, R. S., to set off the entire amount disbursed by him to other creditors against the value of the stock.

While there is some conflict of authority as to whether trustee or garnishment process is the proper remedy in cases where goods have

been sold in violation of a Bulk Sales Law, *McGreenery* v. *Murphy*, 76 N. H., 338; the weight of authority supports the rule, which seems to us consonant with the spirit and purpose of these laws and the nature of such process; that garnishment or trustee process is a proper remedy to reach goods in the hands of the purchaser which have been sold in violation of such laws, and especially the proceeds if they have again been sold by the purchaser. *Kohn* v. *Fishbach*, 36 Wash., 69; *Holford* v. *Trewella*, 36 Wash., 654; *Appel Mercantile Co.* v. *Barker*, 92 Neb., 669; *Scheve* v. *Vandeskolk*, 97 Neb., 204; *Interstate Rubber Co.* v. *Kaufman*, 98 Neb., 562; *Jaques & Tinsley Co.* v. *Carstarphen Warehouse Co.* 131 Ga., 1; *Linn Bank* v. *Davis*, 103 Kan., 672; *Musselman Grocer Co.* v. *Kidd, Dater and Price Co.*, 151 Mich., 478; *Oregon Mill & Grain Co.* v. *Hyde*, 87 Or., 163; *Owosso Carriage & S. Co.* v. *McIntosh & Warren*, 107 Tex., 307; *Newman* v. *Garfield*, 93 Vt., 16. Also see Sec. 63, Chap. 91, R. S. While this section of our statutes was originally enacted to cover cases of transfers actually fraudulent as to creditors, we see no reason, as was said by the Vermont Court concerning a similar statute in that state, why it should not apply in cases when the conveyance was only fraudulent in law as in case of the Bulk Sales Law.

The result is the same in either case. As to the vendor and vendee and all the rest of the world the title passes, but as to creditors of the vendor the legal title has not passed and they may proceed against them in the vendee's possession or against the proceeds to the value thereof in case of resale by attachment or other appropriate proceedings as though they were still the property of the vendor.

The rule also seems equitable and is supported by authorities and we adopt it, that in case of a conveyance of goods in violation of the Bulk Sales Law, the goods so conveyed or the value thereof in case of resale, at least in equity or upon trustee process, should be treated as held by the vendee as in the nature of a trust fund for all the creditors, *Linn Bank* v. *Davis*, supra; *Kohn* v. *Fishbach*, supra; *Fitz Henry* v. *Munter*, 33 Wash., 629; *Fecheimer-Keifer Co.* v. *Burton*, 128 Tenn., 682; 51 L. R. A., (N. S.), 343; *Owosso Carriage and S. Co.* v. *McIntosh & Warren*, supra; and in case of proceedings in equity or upon trustee process, the vendee having in good faith paid any of the creditors their respective share of the value of the goods, shall be entitled to be subrogated to the rights of such creditor therein. *Linn Bank* v. *Davis*, supra; *Fecheimer-Keifer Co.* v. *Burton*, 128 Tenn.,

682; *Adams* v. *Young*, 200 Mass., 588, 591; *Rabalsky* v. *Levenson*, 221 Mass., 289, 292; *Parham* v. *Potts-Thompson Co.*, 127 Ga., 303, 305; 12 R. C. L., 530, Sec. 59; 27 C. J., Pages 885-887.

It is true that the doctrine of subrogation is equitable in its nature, but this court has frequently applied equitable principles in determining the rights of the parties upon trustee process, even though in form it is an action at law. *Stedman* v. *Vickery*, 42 Maine, 137; *Harlow* v. *Bangor*, 96 Maine, 294, 296.

It is also true that this trustee is in the position of having violated the provisions of the statute relating to the sale of goods in bulk, but there is no evidence that it was done with any intent to delay or hinder any creditor of the defendant. On the contrary, he appears in fact to have acted in good faith throughout.

If suspicions were to attach to anyone, it might more properly under the circumstances shown in this case be directed toward the plaintiff and the treasurer of the defendant company who omits the plaintiff from the list of creditors furnished the trustee and who at the time was a member of the Board of Directors of the plaintiff Bank.

However, the knowledge of the member of its Board of Directors cannot in law be attributed to the plaintiff, it not appearing that at the time he was in any way engaged in the plaintiff's business, or acting in its behalf, 7 R. C. L., 655. Nor does the evidence disclose any collusion between the treasurer of the defendant company and the plaintiff. We must, therefore, assume the plaintiff has also acted in good faith.

We see no valid reason why the plaintiff should occupy any better position than it would, if it had presented its claim earlier, the trustee's present position not being the result of any bad faith on his part. That the other creditors were paid in full is largely due to the fact that he was authorized by the defendant to use for that purpose not only the purchase price of the stock of goods, but also the consideration for the sale of the fixtures, lease and good-will on which the plaintiff could have no claim under the Bulk Sales Law. *Adams* v. *Young*, supra.

On the other hand to permit the trustee to set off in full under Sec. 64, Chap. 91, R. S., the amount paid to the other creditors would open the door to fraud and furnish a ready avenue of escape from the effect of the Bulk Sales Law. Under such a rule the vendor might turn over to the vendee a list of only such creditors as he might wish

to prefer, and if paid by the vendee in good faith and to the amount of the value of the goods sold, would leave the remainder of the creditors without a remedy.

The vendee, however, having failed to comply with the law, must be held to disburse the purchase price at his peril, if a creditor is omitted from the list furnished him, but not in accordance with the statute. Such omitted creditor is entitled at least to his *pro rata* share of the value of the goods sold if his delay in presenting his claim is due to no fault of his. The vendee who has proceeded to pay the other creditors in good faith may in a proceeding in equity or on trustee process still be subrogated to their *pro rata* claims against the goods, or their value in case of resale, and they are not sufficient to pay all claims in full.

The trustee's exception to the exclusion of evidence for the purpose of showing that the notes were accommodation notes, and that the plaintiff was charged with notice thereof by reason of the payee being a member of the Board of Directors, and to the ruling of the justice below, that the plaintiff was a bona fide creditor are also without merit.

If this objection were open to the trustee, we think it should have been raised at the first term before the defendant was defaulted; but inasmuch as the maker of an accommodation note is liable to a holder for value with or without notice of the nature of the maker's obligation under Sec. 29 of Chap. 257, P. L., 1917, his exceptions to the ruling of the court below on these points cannot prevail.

The exceptions of both the plaintiff and of the trustee are, therefore, overruled. The case is remanded to the court below, the clerk to enter up judgment for the plaintiff against the trustee in accordance with the findings of the justice hearing the case, without costs to the trustee

JOHN WALLACE'S CASE.

Waldo. Opinion April 24, 1924.

Section 36 of the Workmen's Compensation Act does not apply to a petition for review of decrees and agreements in which the period of compensation is not definitely fixed. An insufficient petition which might have been amended, where a new petition, based upon such findings of fact, would not be barred, that litigation may be terminated, may be regarded as amended.

In this case the Industrial Accident Commission, treating the petition as amended, had jurisdiction and the findings of the chairman are supported by rational and natural inferences from facts and circumstances proved.

On appeal. On August 6, 1921, the claimant, a coal trimmer, was injured while in the hold of a vessel by a lump of coal falling from a digger and striking him on the left shoulder. An agreement was entered into between the employer and employee, duly approved by the Commission, that compensation should be paid at the rate of $16.00 per week during disability beginning August 13, 1921, which was paid up to February 24, 1923. On April 9, 1923, a petition for review was filed by the insurance carrier alleging that the disability had ended and praying that the compensation be ended.

Hearings on the petition were held June 12, September 19, and October 2, 1923, and the chairman found that the incapacity had not ended, and denied the petition and ordered the payment of compensation to continue from the date of the last payment, and respondents appealed. Appeal dismissed. Decree affirmed.

The case is fully stated in the opinion.

Claimant appeared without counsel.

Andrews, Nelson & Gardiner, for respondents.

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

HANSON, J. This is an appeal from the decree of a sitting Justice affirming the decision of the Chairman of the Industrial Accident Commission.

The claimant was injured on the sixth day of August, 1921, while trimming coal in the hold of a vessel, "when a lump (of coal) dropped from the digger overhead striking left shoulder" and bruised the same. Agreement for compensation beginning August 13, 1921, and continuing during disability, was entered into and approved by the labor commissioner on August 25, 1921, in which the injury and disability are described as "abrasion of left shoulder." Claimant received under the agreement $16.00 per week to February 24, 1923.

On April 9, 1923, appellants filed a petition for review of agreement or decree, alleging "that the disability had ended, and praying that compensation be ended, and for such further relief as may be properly granted."

Hearings on this petition were held June 12, September 19 and October 2, 1923.

It appeared from the testimony of the claimant that he had recovered from the injury to the shoulder, but at the hearing the claimant testified that he had an affection of the heart, and an umbilical hernia, as a result of the injury which was the subject of the agreement. The Commission found that the incapacity to work due to the injury of August 6, 1921, had not ended; that as a result of the accident claimant's heart was seriously affected and an umbilical hernia appeared. The condition of the heart is found "to have improved to such an extent that in so far as the heart is concerned, he would be able to resume some form of remunerative employment, but because of the presence of the umbilical hernia, which exists as a result of the injuries received by Mr. Wallace on August 6, 1921, he is unable to engage in manual labor at this time," and ordered payment continued.

Appellants contend "that there is no adequate legal evidence that the claimant was suffering from any disability due to the accident."

The chairman bases his decision "on the evidence submitted," and must have believed Mr. Wallace, who testified on being questioned by the chairman: "Q. Is there anything that occurred to you at the time of the accident in August, 1921, that prevents you from working today? A. I have a rupture in the navel and I never knew a thing about it until these two doctors examined me. I had never been examined below the belt. I went to Dr. Tapley and he put me on a table and found it—whether it happened then I don't know— I never had any soreness there before. Q. Do you claim that when the coal struck you—that was the only thing that struck

you? A. Yes, it kind of doubled me up and there has been a soreness here ever since (indicating abdomen)." He further states that he told Dr. Clark about the soreness, and that the soreness continued. Dr. Clark, his first physician does not remember this, but says he complained to him several weeks after the accident of "gas, indigestion and heartburn," but that he never examined Wallace below the waist. The chairman then asked Dr. Clark: "Q. Do you recall what his complaint was about the stomach, whether it was soreness or not?" His answer was, "I don't remember—I remember him speaking about his food not digesting properly, and about gas." "Q. Would a ventral hernia cause trouble with the digestive organs? A. Yes. Q. Would it cause symptoms such as he complained of when you first saw him or he first mentioned it to you? A. Possibly it would." Dr. Tapley testified that on his examination he found a rupture of the navel, "that he (Wallace) didn't know much about it before. He might have got it then or might have had it a long time. That might have been caused by the injury. I can't say, I didn't see him before the injury. Further that the rupture would not disable him (Wallace) from manual labor if he wore a band around his navel and was strapped up he could work." At this point in the testimony Mr. Wallace questioned Dr. Clark as follows: "Q. Do you think anybody could work without the strap without knowing it?" His answer was, "No, I don't think so." Dr. Tapley expressed the opinion that a man could not work with the heart trouble and hernia with which the claimant was afflicted when he first saw him, or that he could have worked as a coal trimmer in such condition. Questioned by claimant's counsel, he stated: "Q. He might have had heart trouble coming on? A. He might have. To reach the degree in which it was when he came to me he couldn't have been shoveling coal. He might have had this accident—he might have had this condition and this accident shot him to pieces—may be all it needed was a shock from some accident to light it all up." "Q. It was a small hernia? A. Yes, they look small—it is four inches right through him. . . . . A man might have a rupture a long time and not know it. . . . . I may say in shoveling coal he might have had it but I believe he would have had to have a truss." This witness further stated to the commissioner on being questioned, "Q. He states when this coal struck him it doubled him right down? A. If he had any weakness there whatever and you press

his abdomen that way that increases the abdominal pressure and it has got to bust somewhere, either there or somewhere else wherever there is weakness. I will not say he didn't have a weak abdomen and the starting of a hernia but if he got doubled up like that it would be likely to complete it." Dr. Goodwin of Bangor found the hernia and gave it as his opinion that the hernia existed before the accident. . . . . "Q. Was it a congenital condition? A. It would be pretty hard to say. There is a difference of opinion in regard to hernias. Some men consider the hernias are always there. That is, that there is a congenital weakness there and a man gets some little strain or stress and that causes it to become troublesome." Such is the testimony. The claimant testified that he had no knowledge of trouble in the region of the navel before the accident, and that from the time of the accident he had been troubled in that region. A few weeks after the accident he was examined by Dr. Tapley and a rupture was found where the claimant had complained of pain and discomfort. That rupture was, in Dr. Tapley's opinion, of recent origin. Dr. Goodwin found it and says it was not of recent origin. All, claimant and doctors as well, say there is a rupture now present.

On the evidence could the chairman find that the rupture constituted a compensable injury under the Act? We think the evidence would authorize the Commission to find that the hernia existed before the accident and that the accident caused the surface manifestation of the same to thus appear. *Patrick* v. *Ham*, 119 Maine, 519; *Orff's Case*, 122 Maine, 114. A finding that the hernia was caused by the accident would have some legal evidence to support it. It is settled that if the evidence is wholly or in part circumstantial, and there is a dispute as to what the circumstances are, the determination of such dispute by the commissioner is final. It is for the trier of facts who sees and hears the witnesses to weigh their testimony and without appeal to determine their trustworthiness. *Mailman's Case*, 118 Maine, 177; *Sebastian Uzzio's Case*, 228 Mass., 331; *Brown's Case*, 228 Mass., 31; Negligence and Compensation Cases, Vol. 6, 399. Id., Vol. 17, 190. We think the facts and circumstances shown are more consistent with the commissioner's finding than with any other theory, and that the finding is supported by rational and natural inferences from the facts and circumstances proved. *Mailman's Case*, supra; *Orff's Case*, 122 Maine, 114.

Appellants sought a review under Section 36 of the Act. The commission proceeded thereunder. The agreement in the pending case, however, was an open end agreement. Its point of beginning was fixed, August 13, 1921, but the date of expiration was not fixed. Compensation was to continue "during disability," not exceeding of course the statutory limitation. This court has distinctly and recently decided that Section 36, prescribing a petition for review of decrees and agreements, does not apply to agreements in which the period of compensation is not definitely limited. *Milton's Case*, 122 Maine, 437. Under that authority the petition in this case might be dismissed.

But in our opinion, in order to avoid further litigation, instead of sending the petition back for amendment we may regard the petition as amended so as to present a claim for the determination of present incapacity to labor, under Section 16, a form of procedure not specifically prescribed by statute. This liberal method of procedure was adopted in *Morin's Case*, 122 Maine, 338, 342. Thus treating the petition, the chairman had jurisdiction and his findings of fact that the compensation should not be diminished or ended, stands.

The result is the same as if the petition for review were dismissed.

Appeal dismissed.
Decree affirmed.

FRANK POMERLEAU *vs.* MARIE POMERLEAU.

Androscoggin. Opinion May 2, 1924.

In an action of Forcible Entry and Detainer, by pleading title in a brief statement under the general issue, the defendant waives all other defenses.

A deed to one person upon condition that the grantee support the grantor during his natural life, grants only an estate upon condition, and the covenant to support, unless otherwise expressly provided, is a personal one and can only be performed by the grantee, except with the grantor's consent.

In this case the defendant by her pleadings admits disseizin, and taking no title under the deed or by descent, judgment must be for the plaintiff for possession.

On report. An action of Forcible Entry and Detainer to recover certain real estate situated in the town of East Livermore and described in the writ. Defendant pleaded the general issue and under a brief statement set up title in herself and the case was automatically removed to the Superior Court for Androscoggin County from the Livermore Falls Municipal Court where the action originated. The only issue involved under the pleadings was the question as to whether defendant had title. By agreement of the parties the cause was reported to the Law Court. Judgment for the plaintiff for possession.

The case is fully stated in the opinion.

Albert Beliveau, for plaintiff.

J. Z. Blouin and Frank A. Morey, for defendant.

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

WILSON, J. An action of Forcible Entry and Detainer to recover possession of certain real estate described in the writ, begun in the Livermore Falls Municipal Court in the County of Androscoggin.

The defendant pleaded the general issue, and a brief statement setting up title in herself, whereupon the case was entered at the next term of the Superior Court for that County and on an agreed statement was reported to this court.

Under the pleadings the only issue before this court is the title of the defendant, she having waived all other defenses, *Reed* v. *Reed*, 113 Maine, 522.

In support of her title the defendant offers a deed from the plaintiff to her late husband, Hosea Pomerleau, of the premises in question running in the usual form to Hosea Pomerleau and his heirs, but upon the condition that "Hosea Pomerleau shall maintain and support the said Frank Pomerleau for and during his natural life and shall at all times furnish me (him) on the place hereby conveyed with suitable and proper food," etc.

Hosea Pomerleau died June 27, 1921. The question raised by the defendant is whether this deed passed any title which descended to her and her children and they may perform the condition.

It is clear under the decisions in this State that a deed in these terms only grants an estate upon condition. *Thomas* v. *Record*, 47 Maine, 500; *Bucksport & Bangor R. R.* v. *Brewer*, 67 Maine, 295, 300, and the covenant to support implied by the acceptance of the deed is a personal one and can be performed by no one else than the grantee himself, without the grantor's consent. *Bryant* v. *Erskine*, 55 Maine, 153; *Greenleaf* v. *Grounder*, 86 Maine, 298; *Ridley* v. *Ridley*, 87 Maine, 445. In this case, possession was by the express terms of the deed to remain in the plaintiff, and if it became necessary for the grantee to live there in order to carry out any part of his covenant, as was said in *Greenleaf* v. *Grounder*, supra, his possession would be more that of a servant than an owner.

As the case stands before this court the defendant cannot now raise the issue of nul disseizin. By her pleadings disseizin is, in effect, admitted by her, in case she has no title or rights under the deed, which it is clear, under the decisions above referred to, she has not.

Entry will be:

Judgment for plaintiff for possession.

PARKER & PARKER *vs.* W. E. SOULE COMPANY.

Cumberland. Opinion May 10, 1924.

The holder of a written agreement of sale of an automobile, conditioned that title shall remain in vendor until purchase price is paid in full, where the automobile is seized under Public Laws, 1921, Chapter 63, for illegal transportation of intoxicating liquor, and upon forfeiture proceedings was sold, the vendor making no appearance or claim in the forfeiture proceedings, loses such interest as he may have had in the automobile, and the County acquires full title.

In the instant case had the plaintiff appeared and substantiated its claim at the forfeiture proceedings, only Maccaro's interest would have been forfeited, and as he had none the County could have acquired none. *State* v. *Automobile*, 122 Maine, 280.

But since the plaintiff failed to appear and make claim in the forfeiture proceedings, these proceedings being in the nature of an action in rem and due notice thereof being given, the interest of Maccaro is deemed to be absolute, *State* v. *Paige Touring Car*, 120 Maine, 496, and the County acquired full title.

An action of tort for the conversion of an automobile. The plaintiff entered into a written agreement of sale of an automobile with one Maccaro, the purchase price to be made in installments, and the title to remain in plaintiff until the purchase price was paid in full. Nothing was paid. It was stipulated in the agreement that the car was not to be used for the transportation of intoxicating liquor. Maccaro used the automobile for the transportation of intoxicating liquor, was arrested, the automobile was duly seized and upon forfeiture proceedings legally had under Public Laws, 1921, Chapter 63, was sold by the proper officers to the defendant, the plaintiff making no appearance or claim in the forfeiture proceedings. Subsequently the defendant refused to return the car to the plaintiff on demand and this action was brought, and upon an agreed statement of facts, was submitted to the Law Court under R. S., Chap. 82, Sec. 47. Judgment for the defendant.

The case is fully stated in the opinion.

J. H. Berman, B. L. Berman and E. J. Berman, for plaintiff.

Ralph M. Ingalls, Clement F. Robinson, Carroll S. Chaplin and Franz U. Burkett, for defendant.

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

CORNISH, C. J. This is an action of tort for the conversion of one Buick Runabout Automobile of the value of $300 and is before the court on an agreed statement of facts, in accordance with R. S., Chap. 82, Sec. 47. The agreed facts show that the plaintiff is a corporation under the laws of the State of Massachusetts with its only place of business in Boston in said State. The defendant is a Maine Corporation having its place of business in Portland.

On April 23, 1923, the plaintiff and one Paul Maccaro, a resident of Massachusetts, entered into a written agreement of sale of the automobile in question, under which Maccaro agreed to pay the plaintiff three hundred and seventy-eight dollars, as follows: "one hundred and twenty-five dollars upon the execution of this agreement, and the balance of two hundred and fifty-three dollars in monthly installments . . . . until this lease is paid in full." It was further agreed that "both the car and the title thereto shall not pass by such delivery, but are and shall remain vested in and be the property of the seller."

It is agreed that no part of the purchase price was paid.

In violation of an agreement not to use the car in the transportation of intoxicating liquor, which use was to create a breach of the conditions of said agreement, the conditional vendee did so use said automobile and was apprehended therefor in the County of Cumberland, the automobile was duly seized and upon forfeiture proceedings legally had it was sold by the proper officers to the defendant, the claimant here making no appearance or claim in those proceedings. Subsequently upon demand by the plaintiff for the return of the automobile and refusal by the defendant this action was brought.

The automobile was held by Maccaro under a conditional sale agreement and two at least of the important conditions thereof had been violated by the vendee. He had made no payment as he had agreed and he had violated the condition in relation to transportation of intoxicating liquor, thereby entitling the plaintiff under the agreement to immediate possession of the machine. We are concerned here only with the condition as to payment.

The proceedings for forfeiture were under Public Laws, 1921, Chapter 63, and the rules of law governing the rights of the parties are fully stated in *State* v. *Paige Touring Car*, 120 Maine, 496; *State* v. *Packard Motor Car Co.*, 121 Maine, 185; and *State* v. *Automobile*, 122 Maine, 280. In *State* v. *Paige*, supra, it was distinctly said: "In case no claimant appears the interest of the person unlawfully using said vehicle must under the Act be presumed to be absolute." The amendment created by Chapter 63 of the Public Laws of 1921, which was not in force when the Paige Touring Car case arose, relates only to the burden of proof, *State* v. *Packard Motor Car Co.*, supra, and in no way enlarges the right of a claimant who fails to appear and establish his claim in the forfeiture proceedings. The result therefore is in the pending case that as between the County and Maccaro the County would have acquired the property rights only of Maccaro by forfeiture, provided Parker & Parker had appeared and made claim, and as Maccaro appears to have had no interest because he had paid no part of the purchase price, the County under those circumstances could have acquired none, *State* v. *Automobile*, 122 Maine, 280, a case in which the claimant appeared to enforce his rights. But since Parker & Parker failed to appear and to make claim in the forfeiture proceedings, these proceedings being in the nature of an action *in rem* and due notice thereof being given, the interest of Maccaro must be presumed to be absolute under the authority of *State* v. *Paige Touring Car*, supra, and numerous cases therein cited. The alleged rights which the plaintiff had an opportunity to assert against the County, but failed to avail himself of, he now seeks to enforce against a bona fide purchaser from the County. This cannot be done. His rights had already been precluded, and the entry must be,

Judgment for defendant.

RYAN'S CASE.

Piscataquis. Opinion May 10, 1924.

An agreement or decree covering a specified injury cannot be held to remove the limitations contained in Section 39 of the Compensation Act, as to any other injury, though received from the same accident, except where it is a result of the injury described in the agreement or decree, as in the case of amputations.

The ruling that the filing of an agreement removed the limitations, contained in Section 39 of the Compensation Act, upon the filing of petitions for compensation for further incapacity resulting from the same injury, as in the case of partial following presumed total incapacity, does not apply.

The petition in this case being for an entirely different injury from that described in the agreement of April 9th, 1920, it must be regarded as an original petition and barred by Section 39.

On appeal. On January 29, 1920, petitioner while in the employ of the Veneer Products Company at Greenville received an injury by getting his left hand caught in a nailing machine. On April 9, 1920, an agreement was entered into for compensation based on total incapacity resulting from a "fractured little finger" from date of injury to March 7, which was paid. On February 13, 1923, claimant filed a petition for compensation for an alleged impairment of his left hand due to the same accident. Respondents in their answer contended that the petitioner had not suffered any permanent impairment; that more than two years had elapsed since the approval of the agreement; and that the petition was not brought within the period named in the agreement and the petitioner could not make claim for injury or impairment not mentioned in the agreement. A hearing was had upon the petition and compensation awarded at the rate of $12.98 per week for a fifty per cent. permanent impairment to the left hand, and respondents appealed. Appeal sustained. Decree below reversed. Petition dismissed.

The case is stated in the opinion.

Petitioner appeared without counsel.

Eben F. Littlefield, for respondents.

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

WILSON, J. On the 29th of January, 1920, the petitioner was injured while in the employ of the respondent, the Veneer Products Company. He was totally incapacitated from the date of the accident until March 7th, 1920. On April 9th following, an agreement was entered into to pay him for actual total incapacity resulting from a "fractured little finger" and during the period of his disability, viz.: from January 29th to March 7th, the compensation under this agreement was fully paid.

On March 7th, 1920, the petitioner returned to work and so far as the evidence discloses has worked ever since.

On February 13th, 1923, however, more than three years after the injury occurred, the petitioner filed a petition to determine the extent of an alleged permanent impairment of his left hand by reason of a laceration, or tearing of the hand, and as the evidence discloses, an injury to the tendons of the fingers. The full Commission after hearing, ordered compensation be paid to him for such permanent impairment under Section 16 of the Act.

The respondent and insurance carrier appealed from the decree of the court based upon alleged findings by the Chairman of the Commission, and contend that since the petition was not filed within the two years' limitation fixed by Section 39 of the Act, the right of the petitioner to further compensation is now barred.

The Commission apparently in its decision followed the ruling of this court in *Gauthier's Case,* 120 Maine, 73; *Morin's Case,* 122 Maine, 343; and *Milton's Case,* 122 Maine, 437; but these cases all related to incapacity resulting from the same injury as that covered by a prior decree, or an agreement filed with the Commission, in which cases this court held that an agreement having once been filed, whether approved or not, or a decree made, the limitations contained in Section 39 did not apply to petitions to determine the incapacity following a specific agreement under Section 16, *Morin's Case,* or the present incapacity in case of an indefinite, or "open end," agreement, *Milton's Case.*

In the instant case, however, the present petition is for an entirely different injury from that described in the agreement filed in April, 1920. That was for actual incapacity resulting from a "fractured

little finger." The petition now before this court is for presumed incapacity resulting from permanent impairment of the use of the left hand due to tearing or laceration of the hand, or, as the evidence discloses, the laceration of the tendons of the fingers. It is not claimed that the impairment of the use of the hand is in any way due to the fracture of the bone of the little finger which was the injury covered by the agreement of April 7th, 1920.

The petition in this case, therefore, must be treated as an original petition under Section 30, and subject to the limitations of Section 39. *Spencer's Case*, 123 Maine, 46. An agreement or decree covering a specified injury resulting from an accident cannot be held to remove the limitations of Section 39 as to any other injury received from the same accident, but not covered by the prior agreement or decree, except in cases where the injury described in the petition, though differing from that described in the prior agreement or decree, is a result thereof, as in cases of amputations.

Appeal sustained.
Decree below reversed.
Petition dismissed.

ALINE M. LAUSIER, Appellant *vs.* LOUIS B. LAUSIER.

York. Opinion May 24, 1924.

When the parties are the same, but the cause of action is different, a prior judgment only concludes the parties on issues actually tried in a prior action, and the burden is on the party setting up the claim of res judicata of showing that the same issue was involved in the prior proceedings and determined on its merits.

In the instant case it sufficiently appears from the evidence that in the divorce proceedings the issue of the permanent impotency of the appellee was involved and must have been decided against the appellant, and cannot now be urged by her in these proceedings as a justification for her living apart from the appellee.

There is no evidence that her failure to obtain a divorce on this ground was due to any laches on her part in prosecuting her libel, and such a continuing offense is not susceptible of condonation.

The evidence shows that the justification for her living apart from her husband upon which the decree of the Supreme Court of Probate was based was permanent and incurable, and not a temporary or curable impotency.

While a temporary or curable impotency or abusive treatment, or habits, though insufficient to furnish grounds for a divorce, might be sufficient under certain circumstances to justify a wife living apart from her husband, the decree below was clearly based on a ground which is now *res judicata* between the parties, viz.: the permanent and incurable impotency of the appellee; but as there are still issues raised by the reasons of appeal undecided, the case should go back for further hearing by the Supreme Court of Probate.

On exceptions. A proceeding by petition by a husband for separation under Secs. 10-13 of Chap. 66 of the R. S., alleging that the wife had lived apart from him for more than a year without just cause, in the Probate Court where a decree was entered favorable to the petitioner, which decree was reversed in the Supreme Court of Probate on appeal, on the ground the wife had just cause for living apart from her husband, based solely on her husband's impotency or inability to consummate the marital relations.

The petitioner, the husband, excepted to this ruling on the ground that the wife, the appellant, having previously applied for a divorce for impotency which was denied, the issue of impotency became *res judicata*. Exceptions sustained.

The case is stated fully in the opinion.

Francis W. Sullivan and Henry Cleaves Sullivan, for appellant.

Willard & Ford, for appellee.

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

WILSON, J. This case originated in the Probate Court of York County on petition of the appellee for a judicial separation from the appellant under Secs. 10-13, Chap. 66, R. S. The Judge of Probate after having found that the respondent in that court, Aline M. Lausier on August 13th, 1921, deserted the petitioner without just cause and had lived apart from him for more than one year prior to the filing of his petition, entered a decree in accordance with Section 11 of the above chapter.

From this decree the respondent appealed to the Supreme Court of Probate alleging in part as her reasons for appeal: (1) That she did not desert her husband Louis B. Lausier without just cause, but because of his continuous and unfounded cruel and abusive treatment of her; (2) that said Louis B. Lausier was not deserted without just cause; (3) that said Louis B. Lausier has not lived apart from her for just cause for a period of at least a year prior to the filing of his petition.

The other reasons assigned are not valid reasons of appeal and need not be considered.

At the hearing before the Supreme Court of Probate the sitting Justice reversed the decree of the Judge of Probate, holding that the appellant had just cause for living apart from the appellee, and solely upon the ground of his impotency, expressly stating in his decree: "The issue upon which I base my conclusions is whether the petitioner and appellee was able to consummate the marriage relations by having sexual intercourse with the appellant, his wife; she alleges (claims) that she left him on August 13th, 1921, because he was unable to accomplish that end."

To this decree and the rulings of law involved therein, the appellee excepted and the case is before this court on his exceptions. The

real issue presented by the exceptions, is whether the appellant is now estopped from relying, and the Supreme Court of Probate erred in basing its decree, upon the alleged impotency of the appellee as a justification for her leaving his bed and board, the appellant having prior to the filing of the appellee's petition in the Probate Court brought a libel for divorce against the appellee, alleging as one of the grounds for divorce his impotency existing from the time of their marriage, upon which libel a divorce was denied.

It is a familiar rule of law that in a subsequent proceeding between the same parties for the same cause of action, both parties are concluded by a prior judgment not only upon all issues which were actually tried in the former proceedings, but also upon all which the record shows might have been tried. *Cromwell* v. *Sac Co.*, 94 U. S., 351.

Where, however, although the parties are the same, the cause of action or issue is different, a prior judgment is only conclusive upon such issues as were actually tried, and the burden is on the party setting up the judgment as an estoppel to show that the same issue was involved and determined on its merits in the prior proceeding. *Foye* v. *Patch*, 132 Mass., 110; *Russell* v. *Place*, 94 U. S., 606; *Cromwell* v. *Sac County*, supra; *Embden* v. *Lisherness*, 89 Maine, 581; *Smith* v. *Brunswick*, 80 Maine, 193.

The appellant contends that the issue in these proceedings is not necessarily the same as in the libel for divorce; that a curable or temporary impotency, or abusive treatment, or habits of intoxication which might not be sufficient to constitute grounds for divorce, might justify a wife in leaving her husband's bed and board. *Lyster* v. *Lyster*, 111 Mass., 327, 330; *Newman's Case*, 222 Mass., 563, 567.

The issue, however, presented by appellee's exceptions relates solely to the question of the husband's impotency. Although the appellant stated in her testimony that she left her husband in part because of his treatment of her and his habits, the decree of the Supreme Court of Probate rests solely on the impotency of the husband as a justification for her deserting him and living apart from him since August 13th, 1921. Either because he did not deem the evidence warranted it, or because he deemed it unnecessary, the Justice presiding in the Supreme Court of Probate made no finding as to alleged abuse by the husband, or his habits, but expressly based his decree upon his inability to consummate the marriage relations, which he refers to as "the vital issue in the case."

The appellee urges in support of his exceptions that, inasmuch as the appellant in her libel for divorce brought soon after she left her husband in August, 1921, when required to file specifications, finally relied upon cruel and abusive treatment, gross and confirmed habits of intoxication, and impotency which she described in her specifications as permanent and incurable and existing prior to the marriage, and her divorce being denied, she is now estopped from setting up this same inability to consummate the marriage relations as a justification for living apart from him since August 13, 1921.

In support of his contentions the appellee offered and the court received the record of the divorce proceedings which sustains the husband's contentions as to the grounds for divorce relied upon by the wife under her libel and specifications, his denial of each allegation, and a decree of the court in general terms denying the divorce.

Counsel for the appellant urges that the issue in these proceedings not being necessarily the same as upon the libel for divorce, *Lyster* v. *Lyster*, supra, that the burden was on the appellee to show that the issue here was tried out in the divorce proceedings on its merits and a copy of the entire evidence in the divorce proceedings should have been produced.

It does appear from the evidence before this court, however, that the impotency of the husband was one of the main grounds, if not the main ground relied upon for divorce, it even appearing that at the time of the hearing upon her libel that her husband submitted himself to an examination to determine his condition in this respect and by physicians called to testify in her behalf, who pronounced him normal.

It is also suggested that it does not appear that the decree of the court denying the divorce may not have been due to her laches in prosecuting her libel on this ground, or condonation of the offense. There is no suggestion of either in the evidence. From the evidence on her part, there could have been no adequate defense on the ground of laches. The law approves reasonable delay rather than haste in seeking separation on such a ground, especially where, as in this case, doubt existed in the libellant's own mind as to whether she herself might not be at fault.

Nor do we think such a fault may be condoned. Condonation implies forgiveness for past offenses not continuing ones; an overlooking in consideration of promises of better behavior in the future. 19 C. J., 83, 9 R. C. L., 379, Sec. 171; *Ryder* v. *Ryder*, 66 Vt., 158; *Hooe* v. *Hooe*, 122 Ky., 590; 5 L. R. A., N. S., 729 Note.

It is, therefore, clear that the Justice hearing the libel for divorce must have found that the libellant failed to show any permanent incurable impotency existing at the time of their marriage and that this finding necessarily entered into his decree and is *res judicata* between these parties in all proceedings between them involving the the same issue.

If the appellant has justified her separation in these proceedings because of a curable impotency, which the husband refused to have treated, but compelled her to submit to unnatural practices, and the decree had been put upon this ground, the appellant might not have been estopped by the decree in the divorce proceedings and the appellee's exceptions could not prevail.

The evidence in the case, however, clearly related to the same alleged inability to consummate the marriage relations that was urged as the grounds for her divorce, and the decree of the Supreme Court of Probate is solely based upon the same degree of impotency, existing from the time of marriage. The sitting Justice found no other facts upon which his decree can rest.

Impotency of this nature and continuance, having once been found wanting in the divorce proceedings, could not alone be made the justification for her living apart from her husband in proceedings by the husband for a judicial separation under the statutes of this State. *Civelle* v. *Civelle*, 22 Cal. App., 707; *Tillson* v. *Tillson*, 63 Vt., 411. We are, therefore, of the opinion that the exceptions must be sustained. The other issues raised by the reasons of appeal not being determined by the decree of the Supreme Court of Probate, the case will go back to that court for further hearing. *Rogers, Applt.*, 123 Maine, 459.

One other point, though not raised by appellant, deserves notice. The prayer on the appellee's original petition to the Probate Court appears to have been inappropriate upon proceedings initiated by the husband, in that it sought no other relief than that of having his wife prohibited from putting any restraint upon his liberty. The facts alleged in the petition, however, if proven, warranted the relief actually granted by the Probate Court in its decree. The defective prayer was not made the basis of the appeal; no objection has been raised to it at any stage of the proceedings; and we think it is not vital so long as the relief actually granted was appropriate upon the facts alleged in the petition and proven, and within the power of the

court granting it, a principle well recognized under statutory forms of pleading, 31 Cyc. 110; *Frick* v. *Frendenthal*, 90 N. Y., Suppl. 344; *Mark* v. *Murphy*, 76 Ind., 543, 547; *North Side Loan, etc., Soc.* v. *Nakielski*, 127 Wis., 539. At the proper time in the Probate Court objection might have been raised, but it is now too late; nor should this court *suo motu* take notice of such fault, it not being made the subject of objection by the appellant, and no jurisdictional facts being wanting in the petition.

Exceptions sustained.

BENJAMIN E. BROWN, In Equity

vs.

PHILIP Y. DENORMANDIE ET ALS, Trustees.

York. Opinion May 26, 1924.

The constitutionality of the Mill Act, R. S., Chap. 97, is unquestionably beyond attack, and its validity firmly established. Under it reservoir dams may be constructed upon non-navigable streams, regardless of the distance of such a dam from the mill to be benefitted by the storage water impounded thereby. Damage to property of another by flowage does not affect the rights granted under the Act, unless such property is an existing mill or mill site on which a mill or mill dam has been lawfully erected and used, the right to maintain which has not been lost or defeated.

The history of the Mill Act, beginning with the Provincial Act of 1714, continuing through the Act of 1796 of the Commonwealth of Massachusetts, the Act of 1820 of the State of Maine and now expressed in R. S., 1916, Chap. 97, Sec. 1, shows that there has been no legislative narrowing of the granted right to erect dams and to cause flowage thereby, but rather a broadening.

It is too late now to challenge the constitutionality of the Mill Act. Whether its validity rests upon its great antiquity and long acquiescence, or upon the principles of eminent domain or upon the adjustment and regulation of riparian rights on the same stream so as to best serve the public welfare, having regard to the interests of all and to the public good, the fact of its validity is settled.

The Mill Act includes reservoir dams as well as working dams. The reservoir dam conserves, equalizes and renders more uniform the flow to the mill and is obviously within both the letter and the spirit of the Act.

In the instant case the fact that the mills to be benefitted are located eighty miles below the reservoir dam does not affect the question. The fact of distance does not enter into the proposition.

Nor does the point raised by the plaintiff that the stream upon which the reservoir dam is located is not the same stream upon which the defendants' mills are situated. It may or may not bear the same name but that is of no consequence.

The test is not one of terminology but of hydraulic fact, namely, is the reservoir dam situated upon a non-navigable stream, whose stored water in its natural flow to the sea, regardless of intervening forms of water whether stream, or river or lake, and of the names that may have been given to them, passes through and aids in propelling the wheels of mills belonging to the owners of the reservoir dam? If so, such a stream is within the contemplation of the Mill Act whether it requires an hour or a day or a week or longer for the water to reach its destination.

The fact that flowage would destroy or injure an established summer resort business and thus, as the plaintiff argues, favor one branch of industry at the expense of another, does not place the dam outside the Mill Act.

The present statute grants the right to flow the "lands" of any person, and under R. S., Chap. 1, Sec. 6, Paragraph X.,"the word land or lands and the words real estate include lands and all tenements and hereditaments connected therewith and all rights thereto and interests therein." This includes buildings and improvements on the land as well as the land itself.

The only exception is an existing mill or "any mill site on which a mill or mill dam has been lawfully erected and used, unless the right to maintain a mill thereon has been lost or defeated." No other class of private property is exempt from the provisions of the Act.

On report. A bill in equity brought by plaintiff, proprietor of a summer hotel and camps located on the shores of Upper Kezar Lake in Oxford County, seeking to enjoin the defendants as Trustees of Pepperell Manufacturing Company, a voluntary association, having a place of business in Biddeford in York County, from constructing a reservoir dam across Kezar Lake outlet, a stream not navigable, upon land by them owned, for the purpose of storing water for furnishing power for their mills situated on the same waters at Biddeford eighty miles below. The plaintiff contended that the defendants had no right to erect a storage dam for the use of their mills located at such a distance from the dam, because the mills are not such mills as the Mill Act contemplates being so far distant from the dam, and that the construction of such a dam would result in

raising the water above the natural condition of the lake for a part of the season and then withdrawing the water for the purpose of operating the mills would result in great damage not only to his property on the shore of the lake, but to that of others, used as summer resorts, which is of great value to the State, and hence be contrary to public policy. Defendants contended that they had a right, under the Mill Act, to erect such a dam at such a place for the purpose of storing water for furnishing power to operate their mill at Biddeford. A hearing was had and by agreement of the parties the cause was reported to the Law Court to determine the facts and the rights of the parties upon so much of the evidence as was legally admissible. Injunction denied. Bill dismissed with costs.

The case is fully stated in the opinion.

Frederick R. Dyer and Hastings & Son, for plaintiff.

William B. Skelton, Walter L. Gray and Burton E. Eames, for defendants.

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

CORNISH, C. J. The question for decision is: Shall an injunction be granted to restrain the defendants from building a reservoir dam upon their own land across a stream not navigable, for the purpose of storing a head of water for their mills situated eighty miles below on the same waters?

The pertinent facts should first be stated. The plaintiff is the proprietor of a summer hotel known as Brown's Camps, located upon the shore of Upper Kezar Lake, which for convenience will be called Kezar Lake. The defendants in their capacity as Trustees of the Pepperell Manufacturing Company, a voluntary association, own and operate certain water mills at Biddeford on the Saco River. They own two dams from which water is conducted directly to the wheels of the mills. These dams have a developed head of seven and thirty feet respectively. They own developed and undeveloped water power at Union Falls on the Saco River above Biddeford, where electricity is now generated and transmitted to Biddeford to supplement the water power there, and other mill privileges and dam sites on the Saco and its tributaries, among them being the one in question located on the outlet of Kezar Lake at a point called the Harbor and known as the Thompson Mill privilege. Kezar Lake is a great pond

situated in the town of Lovell, out of which flows a small non-navigable stream known as Kezar Lake outlet, upon which the Thompson privilege is situated at a distance of about two miles from the Lake itself following the course of the stream. This outlet stream flows into or joins the Charles River and these two combined streams flow into what is known as the old Saco River, the three streams combined then flow on to what is locally known as the New Saco River, and thence to the defendants' mills. The terminology of the various waters is unimportant. They all form a part of the Saco waters which finally propel the wheels of the defendants' mills. They are but different sections of a continuous body of water from the outlet of Kezar Lake to the sea.

The proposed dam on Kezar Outlet occupying the site of the old Thompson dam, is to be five feet in effective height from the apron of the old dam as formerly located, and will consist of four feet in height of permanent dam and one foot of flashboards. This would raise the waters of Kezar Lake 2.67 feet above mean summer level and is expected to create from three hundred million to three hundred and sixty million cubic feet of storage. The defendants hold title to flowage rights to a considerable extent on Kezar Lake which were acquired by their predecessors as early as 1879, all the deeds being recorded in that year.

The plaintiff acquired land on the easterly shore of the Lake by several deeds about the year 1900, erected and has maintained a summer hotel there for twenty-two seasons, and has now a plant of some thirty buildings accommodating about one hundred guests. The proposed increase in height of the water is not expected to overflow the plaintiff's premises, but would come so close to the surface that he claims it would flow out the sand beaches now valuable for bathing purposes, would in time destroy the trees near the shore, interfere with the process of filtration in the septic tanks erected near the shore for the purpose of taking care of the sewage, render the surroundings unsightly and unsanitary and otherwise injure or destroy his property and business.

So much for the general situation.

The plaintiff seeks remedy by injunction to prohibit the erection of the storage dam, which the defendants claim the legal right to erect and maintain under the Mill Act, and rests his contention on two grounds which as stated by himself are:

First: That the proposed dam is not within the Mill Act, because "there is no mill near or adjacent to it or within a sufficient distance so that it can be said that the dam is directly and obviously subservient to the purpose of carrying said mill;"

Second: That the proposed dam is not protected by the Mill Act because its erection "would destroy an established business of great value to the State itself, and would thus commit the State to the policy of favoring one branch of industry at the expense of another."

The decision of these questions necessitates a reexamination of the history and scope of the Mill Acts which have been in existence as long as the State itself and for a long time prior thereto, and of our decisions thereunder.

1. THE MILL ACTS.

As early as 1714, the Province of Massachusetts Bay enacted a law for the benefit of water mills in the following terms with the preamble, which shows the purpose of the legislation:

"Whereas it hath been found by experience, that when some persons in this province have been at great cost and expenses for building of mills serviceable for the publick good and benefit of the town, or considerable neighborhood in or near to which they have been erected, that in raising a suitable head of water for that service it hath sometimes so happened that some small quantity of lands or meadows have been thereby flowed and damnified, not belonging to the owner or owners of such mill or mills, whereby several controversies and law suits have arisen,

For prevention whereof for the future, Be it therefore enacted by his excellency the Governor, Council and Representatives in general court assembled, and by the authority of the same, that where any person or persons have already, or shall hereafter set up any water mill or mills upon his or their own lands, or with the consent of the proprietors of such lands legally obtained, whereupon such mill or mills are or shall be erected or built, that then such owner or owners shall have free liberty to continue and improve such pond for their best advantage without molestation." The Act then provides for the summoning of a jury and the determination of the yearly damage. Province Laws, Chapter 111.

It will be noted that this original Province Act was in very general terms. It did not limit the location of dams to streams not navigable, nor did it protect mills and mill sites already existing on the same stream. Land was then of little value compared with the usefulness of grist, saw, carding and fulling mills to the pioneer settlers, and the duplication of mills on the same stream was not anticipated.

After the establishment of the Commonwealth of Massachusetts, and while the territory now embraced within the limits of the State of Maine was a part of it, the Legislature passed "an act for the support and regulation of mills" which provided:

"That where any person hath already or shall erect any water mill on his own land or on the land of any other person, by his consent legally obtained, and to the working of such mill it shall be found necessary to raise a suitable head of water; and in so doing any lands shall be flowed not belonging to the owner of said mill, it shall be lawful for the owner or occupant of such mill to continue the same head of water to his best advantage, in the manner and on the terms hereinafter mentioned." Then follow provisions as to the appraisal, security and recovery of the annual damage. Mass. Laws of 1796, Chapter 74.

It is unnecessary to trace the statutes in Massachusetts farther. Let us turn to the history of the Mill Act in Maine.

The first section of the Mill Act of 1821, Public Laws, 1821, Chapter 45, is an exact transcript of the Massachusetts Act of 1796, before quoted. The words dam, or mill dam, or reservoir dam are not mentioned in this Act of 1821. The mill owner is given the right to raise a suitable head of water to meet his necessities and he is to continue the same head to his best advantage. These words have a broad meaning and would seem to imply the use of a reservoir dam as well as a working dam if thereby the mill owner is enabled to raise a suitable head of water and continue the same to his best advantage. No prohibition against flowing existing mills or mill sites upon the same stream was created.

The revision of 1841 recast the language in these words: "Any man may erect and maintain a water mill and a dam to raise water for working it, upon and across any stream that is not navigable upon the terms and conditions and subject to the regulations hereinafter expressed." R. S., 1841, Chap. 126, Sec. 1. It will be observed

that this act for the first time expressly mentions a dam, inserts a new condition that such dam shall be upon and across a stream not navigable, and in Section 2 provides that no dam shall be built to the injury of an existing mill or mill site as therein specified. It omits the proviso as to necessity. That element seems to have disappeared.

In the revision of 1857 the word "dam" becomes plural, R. S., 1857, Chap. 92, Sec. 1, and has so remained for a period of nearly seventy years and through all the intervening revisions. R. S., 1871, Chap. 92, Sec. 1; R. S., 1883, Chap. 92, Sec. 1; R. S., 1903, Chap. 92, Sec. 1, and R. S., 1916, Chap. 97, Sec. 1, the words of the present statute being: "Any man may on his own land, erect and maintain a water mill and dams to raise water for working it upon and across any stream not navigable . . . . upon the terms and conditions and subject to the regulations hereinafter expressed." Then follow the provisions as to protection of other mills and mill sites on the stream, and the procedure by complaint for obtaining damages.

This brief history of our Mill Acts for more than two hundred years shows that there has been no legislative narrowing of the granted right to erect dams and to cause flowage thereby, but rather a broadening. The development of our water power by private initiative is the settled policy of the State, and the application of the right has broadened with industrial expansion.

2. CONSTITUTIONALITY.

It is too late now to challenge the constitutionality of the Mill Act. Whether its validity rests upon its great antiquity and long acquiescence, *Jordan* v. *Woodward*, 40 Maine, 323, or upon the principles of eminent domain, *Ingram* v. *Maine Water Co.*, 98 Maine, 566, or upon the adjustment and regulation of riparian rights on the same stream, so as to best serve the public welfare, having due regard to the interests of all and to the public good, *Otis Co.* v. *Ludlow Mfg. Co.*, 186 Mass., 89; *Duncan* v. *New England Power Co.*, 225 Mass., 155; *Head* v. *Amoskeag Mfg. Co.*, 113 U. S., 9, the fact of its validity is settled. For a general discussion see *State* v. *Edwards*, 86 Maine, 102; *Brown* v. *Gerald*, 100 Maine, 351; *Opinion of Justices*, 118 Maine at 516.

3. Reservoir Dams.

The Mill Act includes reservoir dams as well as working dams. The statute itself mentions neither class. It simply says dams to raise water for working a mill. It does not specify where they shall be located. Any dam that will raise water for working the mill answers the statutory requirement, and a reservoir dam comes within that class as certainly as a working dam. The reservoir dam conserves, equalizes and renders more uniform the flow to the mill and is obviously within both the letter and the spirit of the act, provided of course, its ownership is the same as that of the mill to be benefitted.

The latest word from the Legislature confirms this view. The Act of 1919 creating the Maine Water Power Commission provided that "every person, firm or corporation before commencing the erection of a dam for the purpose of developing any water power in this State or the creation or improvement of a water storage basin or reservoir for the purpose of controlling the waters of any of the lakes or rivers of the State shall file with said Commission for its information and use copies of plans for the construction of any such dam or storage basin or reservoir, and a statement giving the location, height and nature of the proposed dam and appurtenant structures and the estimated power to be developed thereby; and in case a dam is to be constructed solely for the purpose of water storage and not for the development of a water power at its site, plans and statements shall be filed with the Commission showing the extent of the land to be flowed, the estimated number of cubic feet of water that may be stored and the estimated effect upon the flow of the stream or streams to be affected thereby." Public Laws, 1919, Chap. 132, Sec. 9.

This interpretation of the Act has been continuously upheld in the decisions of our court.

The question first arose more than eighty years ago in *Nelson* v. *Butterfield*, 21 Maine, 220. In that case the mill owners below had erected a reservoir dam as early as 1817 at the foot of Twelve Mile Pond, now called China Lake, in the County of Kennebec, to store water for the use of the several dams and mills on different parts of the outlet stream running from the Lake to the Sebasticook River, a distance of about six miles. The defendants at the time of bringing the complaint owned and operated the first dam which was seventy-five rods below the reservoir dam. Upon a complaint brought by a

littoral proprietor on the lake for flowage between May 1, 1830, and August 8, 1833, counsel for defendants requested the court to charge the jury among other things that "a complaint for flowage under the statute would not lie, for a reservoir dam, used only to save the water and not to create a head and fall of water to carry the mills"; but the court, Chief Justice Weston presiding, declined to give this request, and instructed the jury: "that said stone dam, although it were used only to save the water and not to create a head and fall for the mills, was such a dam as was embraced within the statute, for the erection and maintenance of which a person would be liable to this process." The Law Court sustained this ruling in this unmistakable language: "Another question is, whether the dam, which retains the water of the Twelve Mile Pond and causes it to overflow the land of the complainant is protected by the provisions of the statutes. It is only necessary to raise and preserve the water for the use of the mills on the stream, when the water which usually flows in it has become diminished. And it may be inferred from the report that it is necessary to enable the owners to work their mills at all times during the year. The first section of the statute does not prescribe the manner in which a suitable head of water is to be raised. It only requires that it should be found necessary to raise it. The means by which the object is to be accomplished appear to have been left to the mill owner. There is nothing in the statute to prohibit him from doing it by one or more dams situated at a greater or lesser distance, or by a dam on or near to which no mill is erected. The water may be raised and retained and conducted in a channel to any distance from the dam for use at the mill, and the owner is by the statutes authorized 'to continue the same head of water to his best advantage.' The design appears to have been to authorize the mill owner to raise a suitable head of water and to control and use it in such a manner as to enable him to employ his mill to the best advantage during the whole year. And that he should be restricted only by the jury or commissioners who are authorized to find during 'what portion of the year the said lands ought not to be flowed.' . . The only proper question therefore for consideration is, whether it be necessary that the waters of the pond should be raised and caused to flow over their natural bounds for the purpose of raising a suitable head for the use of the mills. And the facts reported lead to the conclusion that it would be necessary to enable the owners to work their mills to advantage during certain portions of the year."

It will be noted that the element of necessity existed under the statute of 1821 which was in force when *Nelson* v. *Butterfield* arose, and was therefore considered by the court. But this element of necessity was omitted in the revision of 1841, and the scope of the act was thereby broadened.

The question of a reservoir dam being within the Mill Act remained apparently as settled under *Nelson* v. *Butterfield* from 1842, when that case was decided, until 1881, a period of almost forty years, when it again was raised in *Dingley* v. *Gardiner et als, Trustees*, 73 Maine, 63. That was an action on the case to recover damages for the flowage of the plaintiff's meadow in Richmond by reason of the defendants' reservoir dam on the Cobbosseecontee stream in Gardiner. There were seven mill dams below on this stream, two of which, and the mills on the same, were owned by the defendants. The defendants claimed that this action at common law could not be maintained, because the reservoir dam causing the flowage was within the Mill Act and the plaintiff's sole remedy was by complaint under that act. The court so held and tersely upheld the defendants contention: "The reservoir dam is within the Mill Act. It has ever been so held. The statute authorizes the erection of dams. It does not restrict the mill owner to one dam. *Bates* v. *Weymouth Iron Co.*, 8 Cush., 548; *Nelson* v. *Butterfield*, 21 Maine, 220. 'Reservoir dams' remarks Colt, J., in *Norton* v. *Hodges*, 100 Mass., 242, 'for the benefit of mills upon the same stream have been held to come within the protection of the statute; and this, although such a dam may not be immediately connected with or very near the mill.' The defendants are mill owners as well as dam owners. They are within the language and object of the statute. That others may be benefited by the water saved by the reservoir dam does not in the least relieve them from liability. They none the less own the dam, which injures the plaintiff by causing back water, and the mills which are benefited by the water reserved. The dam is directly subservient to the purpose of driving the defendants' mills and increasing their water power though other dams and mills may be nearer the reservoir dam." See also *Gardner* v. *Gibbs*, 70 Maine, 243, and *Monmouth* v. *Plimpton*, 77 Maine, 556, where the right to maintain a reservoir dam was involved and assumed.

The Massachusetts Court have uniformly held the same doctrine. *Wolcott* v. *Upham*, 5 Pick., 292; *Shaw* v. *Wells*, 5 Cush., 537; *Bates*

v. *Weymouth Iron Co.*, 8 Cush., 548; *Drake* v. *Woolen Co.*, 99 Mass., 574; *Norton* v. *Hodges*, 100 Mass., 241.

In view of this array of authority the learned counsel for plaintiff, while not expressly denying that a reservoir dam may be within the Mill Act, contend that the reservoir dam in this case is not within the Act because there is no mill near or adjacent to it or within a sufficient distance so that the dam is directly and obviously subservient to the purpose of carrying the mill. In other words they practically admit by their contention that a reservoir dam within a short distance from the mill may be within the act, but one located on the same waters fifty or eighty miles above could not be, reducing the question to one of mileage, and asking the court to fix the limit and to say thus far and no farther.

This is wholly specious. The right to build and maintain the dam is based upon its holding back the water that would otherwise run to waste in times of flood, storing it and letting it down to the owners' mills when needed in times of low water, thereby increasing the effective water power of the stream and enhancing production. The fact of distance does not enter into this proposition. Nor does the point raised by the plaintiff that the stream upon which the reservoir dam is located is not the same stream upon which defendants' mills are located. It may or may not bear the same name but that is of no consequence. It may be tributary water. The test is not one of terminology but of hydraulic fact, namely, is the reservoir dam situated upon a non-navigable stream, whose stored water in its natural flow to the sea, regardless of intervening forms of water, whether stream or river or lake and of the names that may have been given to them, passes through and aids in propelling the wheels of mills belonging to the owners of the reservoir dam. If so, such a stream is within the contemplation of the Mill Act whether it requires an hour or a day or a week or longer for the water to reach its destination. Such a dam thus located and thus owned meets the purpose of the existing Act and complies with both its spirit and its terms.

True, when the Act of 1821 was passed the idea of a reservoir eighty miles above the mill probably did not enter the legislative mind. But that argument has little force. It is doubtless true that small mills, suited to the actual local necessities of the pioneer settlement, were then contemplated, such as carding and fulling mills, grist mills or saw mills. But the scope of the Act has never been thus

limited. Mills for the manufacture of cotton goods, woolen goods, pulp and paper have increased and multiplied and the manufacturing industries of our State have been built up in absolute reliance upon this broad construction of the Act. Millions in capital have been invested, industrial cities and towns of considerable size have grown up, and tens of thousands of employees are dependent upon these industries for their livelihood. As the Massachusetts Court remarked in answer to a somewhat similar suggestion nearly a hundred years ago: "The encouragement of mills has always been a favorite object with the legislature, and though the reasons for it may have ceased the favor of the legislature continues." *Wolcott Woolen Mfg. Co.* v. *Upham*, 5 Pick., 292.

The Mill Act speaks as of today and the individual who or the corporation which can meet its requirements, as do the defendants in the case at bar, can take advantage of its provisions and aid in building up the industries of the State as the State evidently wishes should be done. Moreover, to ask the court to set an arbitrary limit to the location of a reservoir dam above the benefitted mill is to ask not judicial action on our part but legislative action, a request with which we cannot comply. Shall it be at one mile or ten or one hundred? That is beyond our power. The first objection of distance, which is raised not by the statute nor by any decision, but by the plaintiff, cannot be sustained.

The second objection must meet the same fate. It seeks to place the dam in question outside the Mill Act because the flowage would destroy or injure an established summer resort business, and thus, as the plaintiff argues, favor one branch of industry at the expense of another.

Here again we must go to the statute to ascertain what power is given and what exceptions are made. As to the power given, it is to flow the "lands" of any person, and the only exception is an existing mill or "any mill site on which a mill or mill dam has been lawfully erected and used, unless the right to maintain a mill thereon has been lost or defeated."

The word "lands" is not confined to field or meadow. Under Rules of Construction, R. S., Chap. 1, Sec. 6, Par. X., "the word 'land' or 'lands' and the words 'real estate' include lands and all tenements and hereditaments connected therewith, and all rights thereto and interests therein." This includes buildings and improve-

ments on the land as well as the land itself. The only exception to this broadly inclusive term is other manufacturing industries on the same stream. This exception did not arise until the revision of 1841, at the same time when the element of necessity was dropped out. The evident purpose of both the omission of necessity and the addition protecting other mills on the same stream was the encouragement of manufacturing industries and the injury of none. No other class of private property is exempt from the provisions of the Act. The maxim "Expressio unius est exclusio alterius" may be pertinently invoked. The court cannot arbitrarily by injunction prevent the flowage of any class of property which the statute permits.

In 1881 "a new and independent act of legislation," *Norris* v. *Pillsbury*, 74 Maine, 67, was passed, providing for the assessment of damages in gross instead of yearly damages if the mill owner so elects. Public Laws, 1881, Chap. 88; R. S., 1916, Chap. 97, Sec. 10. It is common knowledge that since the passage of this act damages in gross have been frequently assessed and paid for injury to dwellings and other buildings standing on the flowed property, and certainly a summer hotel with its annexes is no more sacred than a home.

The latest word on this subject from the Legislature is the Act of 1921, which provides in substance that when any person or corporation shall have decided to erect a dam across a non-navigable stream either under the Mill Act or under a special act of the Legislature, and shall have filed the plans and specifications required by Public Laws, 1919, Chap. 132, Sec. 9, already referred to, and it appears that standing timber or other valuable property upon the land to be flowed will constitute a menace to persons below on the stream, authority may be given by the Supreme Judicial Court in equity upon proper proceedings to remove and sell such timber or other valuable property, the proceeds to be under the control of the court. This is an explicit and recent recognition of the validity of the common practice of flowing other property than fields or meadows and refutes the contention of the plaintiff.

Our conclusion therefore is that the contemplated acts of the defendants in constructing this reservoir dam are within their legal rights under the Mill Act, that the plaintiff's legal remedy is by complaint under that act and the damages assessed thereunder will stand as full compensation for the damages to his property. He has the same rights as all other littoral proprietors on our lakes; no more, no

less. He bought the property presumably aware of the liability of flowage. The defendants bought their flowage rights on some parts of the shore anticipating this dam in the future. The plaintiff can claim and the defendants must pay full compensation for the land or other property injured or destroyed. Thus will the rights of both parties be preserved and the purpose of the statute fulfilled.

Injunction denied.
Bill dismissed with costs.

MEMORANDA DECISIONS

CASES WITHOUT OPINIONS

INTERSTATE MANUFACTURING COMPANY

vs.

MAINE CENTRAL RAILROAD COMPANY.

Androscoggin County. Decided June 6, 1923. In an action brought under R. S., Chap. 57, Sec. 63, the plaintiff recovered a verdict of $11,916.18 for damages alleged to have been caused by sparks or cinders from an engine of the defendant company.

Held:

1. That on the primary question of the cause of the fire the plaintiff was permitted to substantiate his case by circumstantial evidence and such permissible inferences therefrom as might be properly drawn from the facts proved, but not by mere surmise or conjecture.

2. The nearness of the property to the railroad track, only sixty-six feet, the presence of the defendant's locomotive with an extra freight train, of about twenty-five cars, and the shifting of one of the cars to a side track just before the fire was discovered, the shifting taking place nearly or quite opposite the plaintiff's mill, the point where the fire started, in a pile of shavings outside and at the corner of the mill if plaintiff's witnesses were believed, and the direction of the wind from the track to the mill, were all circumstances for the consideration of the jury. Some of them were sharply contradicted by the defendant. The case is undoubtedly close but we do not think on this point that the verdict is manifestly wrong.

3. On the question of damages a majority of the court are of the opinion that they are grossly excessive and that the sum of seven thousand five hundred dollars will amply compensate the plaintiff

for all its loss. The entry will therefore be, Motion sustained unless the plaintiff within thirty days from filing of rescript remits all the verdict in excess of $7,500. If remittitur is seasonably filed, motion overruled. *Frank A. Morey,* for plaintiff. *Charles B. Carter of White, Carter and Skelton,* for defendant.

T. F. CASSIDY & SON

vs.

ROGERS AND WEBB and MORISON BROTHERS, Trustees.

Penobscot County. Decided June 12, 1923. This case as it was tried and comes to us upon motion after verdict, presents a pure question of fact.

The testimony is flatly contradictory. The defendant Webb and one witness confuted, absolutely, the testimony of the plaintiffs and their two witnesses.

We are of the opinion, however, that the plaintiffs sustained the burden of the proof.

The controversy was over an alleged oral agreement on the part of the defendants to become responsible, as original promisors, for certain material which had been furnished and to be furnished to the Boston & Penobscot Ship Building Co. for the completion of a ship in which the defendants had become large owners on the date of the alleged promise, July 29, 1919.

Later the plaintiffs took a trade acceptance of the Ship Building Co. for the amount of their bill, $1,646.15, which was renewed once or twice, and then protested for nonpayment. After this had happened the plaintiffs wrote the defendants in regard to the protest, stating the amount of their bill to be $1,646.15. We think the defendants' letter in reply to the plaintiffs' communication, stating the amount of their bill, contains a clause that may be regarded as a recognition of the plaintiffs' bill, as distinguished from the other bills. The letter says, "For your information we beg to advise that we gave the Shipbuilding Company a check covering your bill the day

after the vessel was launched." We are of the opinion that the phrase "covering your bill" construed in connection with the plaintiffs' testimony that the defendants agreed to pay it, could have been fairly interpreted by the jury as corroborative of the plaintiffs' contention. However this may be, the jury, if they believed the plaintiffs and their witnesses, had sufficient other evidence upon which to base their verdict. Motion overruled. *Fellows & Fellows,* for plaintiffs. *Donald F. Snow and Albert T. Gould,* for defendants.

ROBERT J. REILLY *vs.* ANNA W. REILLY.

Penobscot County. Decided June 12, 1923. In the libel for divorce underlying the present case, the allegations of wrong conduct laid by a husband against his wife were those of adultery and cruel and abusive treatment. A decree was entered on the ground of cruel and abusive treatment. But, the record being barren of supporting proof, the granting of the divorce for the cause assigned must be ascribed to the circumstance of finding facts in the absence of evidence, and on this the law frowns. The libellee's exceptions are sustained. *Clinton C. Stevens,* for libellant. *Maxwell & Conquest,* for libellee.

LYDIA DOUCETTE *vs.* E. W. GROSS COMPANY.

Androscoggin County. Decided July 3, 1923. This is an action brought to recover damages which the plaintiff says she received through the negligent conduct of defendant's servants. As usual there is a controversy over the issue as to whether defendant's servants were negligent, and since that issue has been decided by the jury in favor of the plaintiff we would not set the verdict aside on that issue. On the other hand there is no controversy over the conduct of the plaintiff. She told her own story and called witnesses in her behalf; but viewing her testimony in its best light it is plain that

her negligence contributed to the accident and that upon this branch of the case the verdict of the jury is manifestly wrong, hence the mandate must be, Verdict set aside. Motion for new trial granted. *Frank A. Morey,* for plaintiff. *Tascus Atwood,* for defendant.

CLIFTON S. HUMPHREYS et al. *vs.* CHARLES E. OLIVER & SON, Inc.

Somerset County. Decided July 3, 1923. Motion for new trial by defendant. Having failed to convince the court that the verdict of the jury was manifestly wrong, the mandate must be, Motion overruled. *Bernard Gibbs,* for plaintiffs. *C. C. Holman and Gower & Shumway,* for defendant.

MRS. FRED F. O'BRIEN

vs.

INHABITANTS OF THE TOWN OF FARMINGTON.

Androscoggin County. Decided July 16, 1923. This was an action brought by the plaintiff against the town of Farmington to recover damages for personal injuries alleged to have been received on account of a defect in the sidewalk which it was the duty of the defendant town to keep in repair. The alleged defect was caused by a broken plank in the sidewalk, and the only question in controversy in the case is the date when the plank was broken and when the twenty-four hour notice of the defect was communicated to one of the selectmen.

The case involved pure questions of fact. The evidence was contradictory upon the vital issue. The finding of the jury depended absolutely upon whether the jury believed the evidence of the plaintiff and her witnesses or of the defendants and their witnesses. The

plaintiff and her husband both testified squarely that the plank was broken before Monday, October 24th, the day upon which the defendants claim that the plank was broken and the notice given. The jury saw and heard all the parties and decided the case in favor of plaintiff, and we are unable to discover any reason why the province of the jury in determining the issue between the parties should be interfered with. Motion overruled. *Benjamin L. Berman, Jacob H. Berman and William H. Hines*, for plaintiff. *Frank J. Butler and Sumner P. Mills*, for defendants.

SARAH G. BLACK *vs.* EDGAR O. STEPHENSON.

Cumberland County. Decided July 16, 1923. On general motion for a new trial. The record presents only a question of fact, peculiarly within the province of the jury:—whether the plaintiff when she received her injury was an invitee of the defendant, in a place where she was invited to go, as a prospective customer, and was injured through the negligence of the defendant, or was injured in a place to which she was neither invited nor expected to go, but went against the warning of defendant.

The evidence was conflicting; the jury found for plaintiff after a charge in which the presiding Justice clearly defined the rights of the plaintiff as a prospective customer and the duty of the defendant towards her, both while and if, according to her contention, she was in a part of the premises to which the public was invited and to which the defendant led the way, and when and if she went against his warning, as claimed by defendant, into a narrow space not provided for the public, not apparently open to them, and into which the public were neither expected nor invited to go.

Upon the evidence as disclosed by the record we cannot say that the verdict was manifestly wrong, and therefore are not justified in disturbing the finding of the jury. Motion overruled. *William B. Mahoney*, for plaintiff. *Howard Davies*, for defendant.

PAULINE E. BULDUC, Complt. *vs.* VERNER F. ROBINSON.

Hancock County. Decided July 16, 1923. The testimony of the parties to this proceeding was squarely contradictory; the one affirms, and the other denies the act of sexual intercourse alleged. The jury saw and heard the witnesses and found for the respondent.

The record discloses no ground which will justify this court in setting the verdict aside. Motion overruled. *Wiley C. Conary,* for complainant. *Gray & Sawyer,* for respondent.

FRED A. CRABTREE'S CASE.

Hancock County. Decided August 20, 1923. Appeal from the decision of the Chairman of the Industrial Accident Commission. *Held:*

1. That a petition for further compensation for partial incapacity for work, after the expiration of the specific period for which a claimant has been awarded and paid compensation for presumed total incapacity, is expressly authorized by the Workmen's Compensation Act, Public Laws, 1919, Chap. 238, Sec. 16; *Morin's Case,* 122 Maine, 338; *Walker's Case,* 122 Maine, 387.

2. The record discloses admissible facts supporting the Commissioner's finding as to the amount of compensation to be awarded. *Scott's Case,* 121 Maine, 446. Appeal dismissed. Decree of sitting Justice affirmed with costs. *William B. Blaidsell,* for plaintiff. *Gillin & Gillin,* for defendant.

LIONEL G. TRAFTON *vs.* U. S. BOBBIN & SHUTTLE CO.

Somerset County. Decided September 24, 1923. This case is before us upon a general motion for a new trial filed by defendant, but without a general verdict. If the motion is overruled, we have

no basis, other than the amount claimed in the writ, upon which to enter judgment. The parties have agreed, however, that if the motion fails, an auditor shall be appointed, whose report shall be accepted as final, and that judgment shall be entered thereon. Upon that agreement we proceed to consider the case.

The parties are at issue as to the price per thousand feet of logs to be paid by the defendant to the plaintiff under an oral contract made in the spring of 1918 and performed the next winter. Their respective contentions are thus stated in the brief filed for defendant:

"The plaintiff claimed that the defendant promised to pay $19.50 per thousand feet, and in event that amount did not cover the cost to the plaintiff such further sum as would make him whole. In other words, if the plaintiff were able to perform the contract at a cost less than $19.50 per thousand feet, the difference would be his profit on the transaction. If it cost more, his profit would be eliminated, but he would be entitled to receive the additional amount required to equal the cost.

"The defendant, on the other hand, contended that a flat price of $20 per thousand feet was agreed upon."

This issue was submitted to the jury who sustained the plaintiff's contention upon a special verdict, and the motion for a new trial followed.

The record does not disclose any ground which will justify us in sustaining the motion. The evidence was flatly contradictory; three witnesses testified, the plaintiff and one other in support of his contention, and the defendant's manager, with whom the contract was made.

Under the business conditions existing in 1918 which are disclosed at length in the record, it cannot be said that the terms of the contract as claimed by plaintiff are unreasonable or improbable; the jury may have found that under such conditions it is highly improbable that the plaintiff would have made a contract for a flat sum as claimed by defendant, and we cannot say that such a view would be unwarranted, considering the further fact that defendant might call for hauling some of the logs on wheels.

Again, the jury may have found that the defendant paid the plaintiff, on account of the logs delivered under the contract, at the rate of $19.50 per thousand, and have regarded this fact as sustaining plaintiff.

On the other hand the defendant relied upon certain letters between plaintiff and Mr. Skinner, defendant's manager, in particular a letter written by the latter to plaintiff dated February 25, 1919, containing a reference to the terms of the contract in harmony with defendant's contention. But this letter is not original evidence of the terms of the contract; its force lies in the fact that no answer was returned by plaintiff; but the plaintiff made his explanation of that fact, and the sufficiency of that explanation was for the jury's consideration.

Upon such a record as is presented here, we cannot say that the jury erred; on the contrary we think that the evidence justified their verdict. Motion overruled. By agreement of parties the cause is remanded to nisi prius, for the appointment of an auditor, who will determine the amount due from defendant to plaintiff according to the finding of the jury. By agreement the auditor's report shall be accepted as final and judgment entered thereon. *Gower & Shumway*, for plaintiff. *Harry Manser*, for defendant.

JANE M. BERRY *vs.* HOWARD MCDOUGALL.

Cumberland County. Decided October 1, 1923. This is an action brought to recover compensation for personal injuries, expenses of medical treatment, hospital charges, nursing and other incidental outlay, which resulted from an automobile collision in which the plaintiff was the sufferer. The case comes to us on report. The car in which she was riding was neither owned nor driven by the plaintiff but for convenience will be referred to as the plaintiff's car.

The locus of the collision was at the intersection of a country road with a stretch of state highway still under construction. On the latter, although somewhat rough as to surface, there was a large amount of traffic. The plaintiff's car was travelling the country road. Its occupants on the rear seat were the plaintiff, and her daughter, Mrs. Robertson; on the front seat the husband of the latter and Bion Berry, grandson of the plaintiff, who was driving.

These occupants testified that plaintiff's car was approaching the state highway at a rate of speed from eight to ten miles an hour and that the horn was sounded. Two of the occupants, Mr. and Mrs. Robertson, have brought suit to recover their damages arising from the same accident and their testimony should be examined in the light of their interest in the case at bar. The driver of the car, a boy sixteen years old, testified as the other occupants did as to rate of speed when approaching the intersecting way, and the sounding of the horn. He stated, however, that when he first saw defendant's car it was only a little over one hundred feet from him but he "continued on to cross the state highway as there was plenty of time to cross"; although defendant's car, according to Bion's testimony, was approaching at a rate from sixteen to twenty-four miles an hour. He further stated that the time between his first glimpse of defendant's car and that of the collision "wasn't more than two or three seconds."

The defendant testified that the plaintiff's car was approaching the point of collision at a rate of approximately twenty-five miles an hour, and increased its speed as it came nearer to the state highway on which defendant was driving. This testimony was corroborated by disinterested witnesses, some of whom were even strangers to the parties to this suit. Defendant further testified that although he was using all proper power and opportunity for observation, he did not see plaintiff's car until it and his own, were so near that avoidance of a collision was impossible although he did all in his power to prevent it when he did realize the situation.

A long analysis of the record would be of no interest except to the parties. There are no peculiar or novel questions of law involved. The arguments of counsel are confined to their views upon questions of fact. We are of opinion that the evidence does not preponderate in favor of the plaintiff upon the issue of defendant's negligence. The recklessness or immature judgment of a mere boy allowed to operate a car, a thing of too frequent occurrence, brought about a sudden emergency in which defendant had only a few ticks of the watch in which to act. Not being persuaded that this emergency was created by defendant's negligence the mandate must be: Judgment for defendant. *Frank H. Haskell*, for plaintiff. *William H. Gulliver and W. B. Mahoney*, for defendant.

ALFRED W. MCKUSICK *vs.* MAURICE C. BAKER.

Penobscot County. Decided October 2, 1923. This is an action of assumpsit for labor and materials furnished in finishing a new house owned by the defendant. The jury returned a verdict for the plaintiff for $186.35, the sum sued for. The defendant filed a general motion for a new trial.

The testimony was conflicting as to the contract, the manner of its performance, and the additional work claimed by the plaintiff. The questions raised were tried before a competent tribunal. It was in the circumstances a jury question solely. The record does not disclose that the verdict is manifestly wrong. Motion overruled. *Maxwell & Conquest*, for plaintiff. *Phillips B. Gardner*, for defendant.

FRANKIE M. BEANE, Complainant *vs.* RAYMOND CARL.

Somerset County. Decided October 27, 1923. This is a complaint in bastardy. The jury returned a verdict for the plaintiff, and the case is before the court on general motion. The case had been tried before. At the first trial a verdict for the plaintiff was set aside, on motion, by the presiding Justice. There were no technicalities involved. The proper preliminary steps were complied with. The single question in the case is whether the evidence is sufficient to justify the verdict. The printed case is unusually long, showing upon the principal question of guilt or innocence conflicting testimony throughout. It was peculiarly a question for the jury, to determine from the mass of contradictory evidence what to believe or disbelieve.

From a careful study of the case we are not able to say that the verdict is manifestly wrong. Motion overruled. *Merrill & Merrill*, for plaintiff. *Pattangall & Locke*, for defendant.

WILLIAM F. ROBINSON *vs.* JAMES F. MCCARTHY.

Penobscot County. Decided November 14, 1923. On the twenty-eighth day of July, 1922, defendant, James F. McCarthy, who was an employee of the United States Post Office Department, as the driver of a mail truck, in Bangor, Maine, at about five o'clock in the afternoon, left the Post Office in Bangor and drove to the mail box located on the curb near the entrance to the Bijou Theatre, on the right-hand side of Exchange Street, in Bangor, Maine, going towards the Railroad Station, for the purpose of collecting the mail that had been deposited in the box. He was driving a truck known as a "ton truck" about twenty-two feet long, with the body enclosed with a wire cage, and a hood over the driver's seat. In front of him was a glass wind-shield upon which there were sides. He stopped his car on the right-hand side of the street in front of the box, proceeded to collect his mail, and then started to turn back and go up Exchange Street towards York Street. In doing this, he swung his car around across the street at right angles with the curb, with the rear wheels of the truck on or near the right-hand rail of the car tracks laid upon that street. It was impossible for him to turn by making a circle, and he was obliged to back his car, before he could complete his turn, and proceed up Exchange Street.

While he was stopped in the middle of the street, with his car across it, the plaintiff approached upon the right-hand side of the street, driving between the car track and the curb, somewhat nearer the car track than the curb. At a distance of fifty feet or more away from the truck, plaintiff saw the truck standing in the street and drove at a moderate rate of speed down said street, and behind the truck, between the truck and the curb. Just as he was opposite the rear end of the truck, the defendant backed up, in the operation of turning around, and collided with the automobile of the plaintiff, a corner of the tail-board of the truck striking the automobile of the plaintiff in the panel between the doors, puncturing the panel, making a hole somewhat ragged, and extending over a surface of about six inches in diameter.

The jury rendered a verdict for the plaintiff in the sum of $194 and the case comes up on a general motion for a new trial. The case involved pure questions of fact. A careful examination of the

evidence does not disclose that the jury erred to the extent of authorizing the Law Court to interfere with the verdict upon the question of liability.

The plaintiff, however, claims that even if the defendant was liable the damages assessed by the jury were excessive The assessment of damages is peculiarly a question for the judgment of a jury. The verdict was for $194. While large, yet it was a matter of judgment for the jury, and is not so excessive as to warrant the intervention of the court. Motion overruled. *Fellows & Fellows*, for plaintiff. *Frederick R. Dyer*, for defendant.

JAMES H. GRAY, Adm'r *vs.* AMANDA M. BASLEY AND TRUSTEE.

SAME *vs.* ETHEL BASLEY AND TRUSTEE.

Washington County. Decided November 15, 1923. This is an action of trover brought by James H. Gray, Administrator of the estate of John S. Calkins, deceased, against each of the defendants for the alleged conversion of the stock in trade of said John S. Calkins, described in a bill of sale marked Defendant's Exhibit 1, the admitted value of which is $6,823.43, and is before this court upon a motion for a new trial upon the usual grounds.

The case depends upon the validity of this bill of sale which in turn hinges upon the mental capacity of said John S. Calkins at the specific time when said Calkins signed this bill of sale, i. e., about one o'clock in the afternoon of July 8, 1920.

The evidence upon the mental capacity of John S. Calkins to execute the bill of sale in question was very conflicting, and may be said to have left the decision of the case upon the preponderance of the evidence; in other words, the case was so close that the court is of the opinion that a verdict either way rendered by a jury would be based upon such evidence as would fail to justify the court in interfering. Accordingly whatever decision the court might have rendered had they the powers of a jury, they are of the opinion that, inasmuch as the jury has found a verdict upon the evidence which presented a

pure question of fact, they are not justified in disturbing the verdict. Motion overruled. *J. H. Gray and Gray & Sawyer*, for plaintiff. *H. E. Saunders, Oscar L. Whalen and L. H. Newcomb*, for defendants.

STATE *vs.* RALPH KEATING.

Somerset County. Decided November 17, 1923. This is a criminal prosecution by complaint and warrant against the respondent for transportation of intoxicating liquor with intent that the same should be sold in the State of Maine in violation of law, and upon appeal from the Western Somerset Municipal Court the case was tried before a jury in the Appellate Court. In the lower court the respondent pleaded guilty but in the Appellate Court, by consent of the presiding Justice, he was allowed to retract that plea and thereupon pleaded that he was not guilty.

After completion of the evidence his counsel moved that the court direct a verdict for the respondent, which motion was overruled, and thereupon exception was taken to that ruling. The complaint and warrant, plea, the evidence, and all docket entries are made part of the bill of exceptions.

The case was then submitted to the jury and verdict of guilty was returned.

That the respondent had the legal right to except to the refusal of the presiding Justice to direct a verdict in his favor, and that when the evidence in support of an indictment or complaint is so slight that a verdict based upon it would not be allowed to stand, it is the duty of the presiding Justice to direct the verdict in favor of the respondent, are such familiar and well-settled principles of law that citation of authorities is not necessary. The decision of this court upon the merits of the exception must rest upon a careful examination of the record, which task has been done. The defense was somewhat unique but to court and jury was not credible. On the other hand the testimony offered by the State, and the reasonable inferences to be drawn therefrom, justify the ruling of the presiding Justice. Exceptions overruled. Judgment for the State. *James H. Thorne, County Attorney*, for the State. *Pattangall, Locke & Perkins*, for respondent.

SAMUEL W. HERRICK *vs.* ELDREDGE BROTHERS.

Somerset County. Decided November 17, 1923. The amount of lumber belonging to the plaintiff taken by defendant's truck driver, is the only question in dispute.

A tally of the entire pile taken by plaintiff's son when the lumber was hauled from the mill showed 4879 feet by the mill scale. The load admitted to have been hauled away contained 3732 feet according to defendant's tally of the mill scale given by defendant to plaintiff. This tally was not produced by plaintiff, but he testified to the amount.

The accuracy of both tallies, as stated by the witnesses was in issue, and this issue as the trial progressed resolved itself into another question which the jury may have considered decisive of the case, viz.: Did the defendant's servant haul away the entire pile of plaintiff's lumber?

Upon this point the evidence was conflicting; the testimony given in support of either contention, if believed, would warrant a verdict. Reasonable men, wishing to ascertain the truth might arrive at opposite conclusions. The jury found in favor of the plaintiff, that the entire pile was taken, and assessed damages in accordance with the tally of same taken by plaintiff's son; upon this record we cannot say that they were manifestly wrong; the defendant has not sustained the burden of so showing. Motion overruled. *L. B. Waldron,* for plaintiff. *W. B. Pierce,* for defendant.

STATE OF MAINE *vs.* JOHN H. BREEN.

SAME *vs.* SAME.

Knox County. Decided November 22, 1923. These two cases present the same defense as was raised in *State* v. *Mallett,* 123 Maine, 220, decided herewith, and the findings in the latter case are decisive of the two cases at bar. Motion and exceptions overruled. Judgment for the State. *Z. M. Dwinal, County Attorney,* for the State. *Frank A. Tirrell and Oscar H. Emery,* for respondent.

CHARLES W. DAVIS *vs.* DENNIS F. CROWLEY.

Penobscot County. Decided November 28, 1923. This is an action to recover damages for personal injuries received by the plaintiff September 26, 1921, while the plaintiff was in the service of the defendant in the construction of a sewer in the town of Orono.

Under the provisions of Public Laws of 1919, Chapter 238, plaintiff's contributory negligence is not involved. The jury returned a verdict for the plaintiff for the sum of $1,004.25. The case is before us on general motion.

We have examined the record with great care and are unable to discover where the jury erred in finding that the defendant was negligent, and that the injury complained of was caused by such negligence.

As to the claim that the damages are excessive, it clearly appears that prolonged suffering and total incapacity for labor for many months resulted from the injury. To fix the amount of damages was a duty of the jury. We cannot say from the record that the damages are excessive. Motion overruled. *F. W. Knowlton and Frank Fellows,* for plaintiff. *George E. Thompson,* for defendant.

JOHN MCGLINCHEY *vs.* WILLIAM H. MURPHY.

Aroostook County. Decided December 20, 1923. Defendant's motion that the verdict, which is adverse to him, be set aside and avoided, on the grounds that it offends the law, is against the evidence, and carries an excessive award of damages, is overruled.

The major premise of the case was one of credence between the immediate parties, and that closely disputed point of fact was settled in the jury's province favorably to the conclusion for which the plaintiff contended. Another jury, on a similar record, might have found that the defendant never owed wages to the plaintiff, or that the latter already had been fully paid for caretaking at the lumberman's supply camps on the shore of Telos Lake in the northern

woods, and such a finding should seem to resist an attack made on the score of plain wrong. But that would not affect this situation.

The underlying issue being decided, in conformity to legal rules, the amount of damages was fixed appropriately enough. Motion overruled. *Nathaniel Tompkins,* for plaintiff. *George E. Thompson,* for defendant.

THEODORE MARATTA'S CASE.

Washington County. Decided December 21, 1923. The record in the above case and the accompanying motion present so many irregularities that the Law Court deem it for the best interest of all parties to dismiss the appeal without prejudice, annul the finding of the Commission, and order a hearing on the petition de novo. Appeal dismissed without prejudice. *Pattangall, Locke & Perkins,* for petitioner. *Curran & Curran,* for respondents.

FRED O. HERRICK

vs.

ELDRIDGE BROTHERS AND UNITED STATES FIDELITY & GUARANTY CO.

Penobscot County. Decided January 24, 1924. This is a Workman's Compensation case in which compensation was awarded. From the decree so awarding, an appeal was taken by the insurance carrier. The record clearly shows that the accident was such in its nature, and in the place and time of its occurrence, that the petitioner is not entitled to the benefits arising under the provisions of the Workmen's Compensation Act. The finding of the Chairman of the Industrial Accident Commission is error. Appeal sustained. *W. B. Peirce,* for petitioner. *Merrill & Merrill,* for respondents.

LEMPIE CHRISTINE OLSEN *vs.* UNO ILVONEN.

Knox County. Decided February 9, 1924. This was a bastardy proceeding tried at the September Term of the Supreme Judicial Court for Knox County. The jury returned a verdict of guilty, and the case is before us on a general motion for a new trial, and also a motion on the ground of newly-discovered evidence.

As to the general motion.

A careful examination of the record discloses a case replete with conflicting testimony, and in which important testimony of the complainant is corroborated by the testimony of the defendant. We are not convinced that the verdict is clearly wrong. On the contrary, our view of the record is that there was sufficient evidence to support the verdict. The parties have had a fair trial without prejudicial error in law. The weight to be attached to the testimony, and the credibility of the witnesses, were questions to be answered properly by the jury alone. With their conclusion in the instant case, we are not authorized to interfere.

Newly-discovered evidence.

The record presented has received our careful consideration, and our conclusion is that the additional testimony is not of such character, weight and value, considered in connection with the evidence already in the case, that it seems to the court probable that on a new trial, with the additional evidence, the result would be changed. Further it does not appear that injustice is likely to be done if a new trial is refused. The entry will be, Motions overruled. Judgment on the verdict. *George E. Thompson,* for plaintiff. *Henry L. Withee,* for defendant.

HARRY DALTON *vs.* NORMAN SMITH.

Cumberland County. Decided February 26, 1924. Action of replevin of two wagons. The defendant pleaded title in himself. The verdict was in favor of the plaintiff and the case is before the

Law Court on defendant's exception to the refusal of the court to direct a verdict in his favor, and on a general motion, the same question being involved in both. The issue was one of fact.

The evidence is very contradictory and the inferences to be naturally drawn therefrom vary according to the view-point. It is not improbable that this court, if it had been the original tribunal, might have reached a different result. Much depended upon the appearance of the witnesses. Without discussing the evidence in detail, all of which has been carefully examined and considered, it is sufficient to say that the verdict does not seem to us to be manifestly wrong. The testimony for the plaintiff, if believed, is sufficient to sustain it. Motion and exception overruled. *Henry N. Taylor and John J. Devine,* for plaintiff. *Clifford E. McGlauflin,* for defendant.

STATE OF MAINE *vs.* WILFRED MATHON, Appellant.

Androscoggin County. Decided March 20, 1924. This prosecution for the alleged operation of an automobile by the respondent while under the influence of intoxicating liquor, under Public Laws, 1921, Chap. 211, Sec. 74, was begun by complaint in a Municipal Court and thence by appeal to the Superior Court of Androscoggin County, where a verdict of guilty was rendered. The respondent filed exceptions to certain instructions of the presiding Justice as to what constitutes the operation of a car, and the case is before the Law Court on the exceptions.

This court, however, has held in the very recent case of *State* v. *Vashon,* decided January 17, 1924, that cases under this statute must be brought by indictment and that the Municipal Court, and therefore the Superior Court on appeal had no jurisdiction thereof. It follows that the only disposition that can be made of the case at bar is, Exceptions dismissed. Complaint to be dismissed in the Superior Court. *James A. Pulsifer, County Attorney,* for the State. *Louis J. Brann,* for respondent.

SANTO DI BIASE *vs.* LOUIS MOULTON.

Cumberland County. Decided March 29, 1924. Action to recover damages for depositing poison by defendant, whereby plaintiff's cow ate the same and was thereby sickened and died. The verdict was for defendant and plaintiff moves for new trial on the customary grounds. The issues were questions of fact upon which the verdict is founded and after careful examination of the record we cannot say, under well-established rules, that the verdict should be disturbed. Motion overruled. *Angelo J. Urbano and Harry E. Nixon,* for plaintiff. *Henry C. Sullivan,* for defendant.

ALBERT L. JELLEY

vs.

ANDROSCOGGIN AND KENNEBEC RAILWAY COMPANY.

Kennebec County. Decided March 31, 1924. Action on the case for damages to plaintiff's automobile. The jury returned a verdict for $812.50. The case is before the court on defendant's general motion and exceptions.

About midnight on August 29th, 1923, the electric car of defendant company came into collision with the automobile of the plaintiff at a point on its track one mile north of Gardiner. The highway between Gardiner and Hallowell was, at the time, under construction, and closed to traffic. At the Farmingdale line, the next town north of Gardiner, a barrier extended across the street, at a point where a detour, through Northern Avenue, turned off to the left. This barrier was comprised of two horses, a plank and sleepers laid on the ground. The barrier was lighted by lanterns at night, and bore two signs, one stating that the road was under construction and closed to traffic, the other, a detour sign with an arrow pointing to said Northern Avenue, which was near at hand, with a street light covering the above-named objects and location. South of the

barrier was another detour sign. The upper end of the road was closed in a somewhat similar manner. Plaintiff belonged in Nashua, N. H. He arrived in Gardiner from Portland at about midnight, and proceeded north towards Hallowell. Before reaching the barrier he saw a detour sign. He states that he made some effort to find the detour, and then proceeded on past the detour sign. He then came to the barrier in the road, at Northern Avenue, where the detour road was visible at his left. He saw the sign on the barrier at this point, but passed by the barrier on to the road then under construction without reading the words on the sign. He at once encountered rough and heavy wheeling and after progressing a half mile or so came to a stranded car, which he says he could not pass in the limits of the traveled road, and therefore directed his car over one rail of defendant's car line and passed along some distance on the track until he came to a rough portion of the track from which he was unable to emerge. He was stalled on the defendant's car line, through no fault of the defendant. This is very clear from the plaintiff's own testimony. It is equally clear that the plaintiff was not exercising due care when he passed the barrier without reading the warning on the sign.

The plaintiff testified that, finding himself "in a predicament," he sought to find a plank or other means to aid in removing his car to the traveled way, and was thus engaged when he discerned defendant's car coming down the grade toward him. He then ran forward sixty or sixty-five feet, waving his hands at the approaching car. He was asked: "Q.—Why didn't you go back further than you did? A.—I presumed they would not take my signals." He testified also that there was no decrease in the speed of the car before the collision. It had been raining and was foggy. The motorman testified that on approaching the scene of the accident, he was standing in his proper place and "looking ahead all of the time"; that he saw first the reflection of his headlight on the back window of the automobile, and applied the emergency brake as soon as he noticed it, after which he saw a man "standing right near the rail, the rail next to the road, and 18 or 20 feet from his car, waving both hands." The motorman says the plaintiff stated as a reason for not going back further to flag the electric car, that he thought he could see him in time to stop. This is substantially as testified by the plaintiff. The record shows that the motorman was standing

at his post, alone; the car had an open vestibule; the motorman was in plain view of the conductor and passengers; that on seeing the automobile on the track ahead the motorman exclaimed "Just look at that," and put on the emergency brakes; that when he saw the plaintiff the car was about one hundred and twenty to one hundred and twenty-five feet distant from the point where the plaintiff was standing. The conductor and passengers corroborate the motorman in all important particulars.

The case shows a street light between the stalled automobile and the defendant's car, a fixed light facing an approaching car light, both lights subject to the effects of a very recent rainfall and a then present heavy fog or mist. We have examined the record with care, and we are convinced that the plaintiff has failed to establish either his own due care, or the negligence of the defendant. The jury erred in finding otherwise. The evidence for the plaintiff, and particularly the testimony of the plaintiff himself, fails signally to establish these essential propositions. As to the rule of the last clear chance, invoked by the plaintiff, the testimony of defendant is ample, and the fact that the plaintiff went back but sixty or sixty-five feet to give warning to the approaching car on a night like the one in question, tends to corroborate the same, that the motorman on defendant's car acted promptly as soon as he knew, or in the exercise of due care should have known, that plaintiff's car was on the defendant's car line. There is nothing in the evidence to support any other theory, and no facts proved from which any other inference could legally be drawn.

A review of the case impels the conclusion that the verdict of the jury is manifestly wrong. The motion for a new trial must be sustained. It is unnecessary to consider the exceptions. Motion sustained. Verdict set aside. New trial granted. *Beane & Beane,* for plaintiff. *Andrews, Nelson & Gardiner,* for defendant.

EDWARD H. MARTIN *vs.* FRED E. ELDRIDGE ET AL.

Penobscot County. Decided April 5, 1924. An action to recover for personal injuries received by falling through an open trap-door into the basement of a potato house owned by the defendants and

in which the plaintiff had potatoes stored, it being claimed by the plaintiff that the trap door was negligently permitted by the defendants to remain open in a dimly-lighted room through which he was invited to pass in reaching the room, on floor, where his own potatoes were stored.

The jury found for the plaintiff. The case comes before this court on a motion for a new trial on the usual grounds. The only grounds urged by the defense in support of their motion are that the plaintiff was not an invitee in passing through the room in which the trap door was located, and that in leaving it open, if he did, the servant of the defendant was not acting within the scope of his employment at the time.

Both grounds involved questions of fact which were submitted to the jury, presumably under proper instructions, as no exceptions are presented here. An examination of the evidence does not disclose that the jury were not warranted in their findings. Motion overruled. *W. B. Peirce and C. W. & H. M. Hayes*, for plaintiff. *Fellows & Fellows*, for defendant.

MAY PALMER *vs.* PHILOMENA ORLANDELLO.

Cumberland County. Decided April 5, 1924. The plaintiff recovered a verdict before a jury for personal injuries received in the Winter of 1922 while crossing a street in the city of Portland, being struck by the defendant's horse which was running away, out of control, having, as the plaintiff alleged, been left in the street insecurely fastened.

The case comes before this court on a motion for a new trial on the usual grounds. The only ground urged by the defendant in support of her motion is that the evidence fails to disclose any affirmative proof of due care by the plaintiff or from which it can be legitimately inferred.

The plaintiff says the snow was piled very high alongside the sidewalks, that she had just stepped off the curbing on to the cross-

walk when she was struck by the horse, that she heard nothing or saw nothing. It appears that both her hearing and sight were considerably impaired.

Other witnesses corroborated her testimony that the snow was piled very high along the sides of the street following a big storm, perhaps six feet, or higher than the average height of man, and one witness corroborated her testimony that she had just stepped off the sidewalk on to the cross-walk when she was struck.

What a reasonably prudent person with her physical defects would have done to assure a safe passage across the street under the circumstances shown to have existed here, and whether the evidence fails to show that she complied with that standard of care; or if in any respect she failed, it contributed in any degree to her injuries, was a question of fact for the jury as this court has frequently held. *Shaw* v. *Bolton,* 122 Maine, 232.

While the case is not entirely free from doubt it is not so clearly wrong as to require this court to interfere. Motion overruled. *Harry E. Nixon,* for plaintiff. *Henry C. Sullivan and Francis W. Sullivan,* for defendant.

JAMES GRANEY'S CASE.

Cumberland County. Decided April 7, 1924. In 1922, the petitioner having suffered injury through an industrial accident received by approved agreement certain compensation. He also under a commission decree recovered, and received, during a specified period, other compensation for presumed total disability. After such specified period he filed his petition asking further compensation for continuing incapacity.

An appeal from a decree in his favor was sustained by this court. *Graney's Case,* 121 Maine, 500.

For the same accidental injury, the same petitioner now asks the same compensation that was denied him in 1922.

Res adjudicata is pleaded and is decisive of the case. The subject matter, the parties, the cause of action, the issue and even the evidence are in this case the same as in that previously passed upon.

Counsel for the petitioner strenuously argues that a different cause of action is now presented. But a cause of action is simply a legal right of action. *Anderson* v. *Wetter*, 103 Maine, 266. Obviously the petitioner relies upon the same right of action now as at the first hearing.

The issue too is the same. It is whether the petitioner's case is included in "the following schedule," (Compensation Act, Section 16) and whether after the specified period of presumed total disability his incapacity continued. Section 16. It is not questioned that the subject matter and the parties are the same. A judgment whether right or wrong cannot by a party to it be collaterally impeached. Appeal sustained. Decree reversed. *C. L. & P. E. Donahue*, for plaintiff. *Robert Payson*, for defendants.

UTTERBACK-GLEASON COMPANY *vs.* ADDIE L. MITCHELL.

Penobscot County. Opinion April 25, 1924. On the merits of the case it is the opinion of the court that the entry should be, Motion overruled. *Charles P. Conners*, for plaintiff. *Howard M. Cook*, for defendant.

QUESTIONS SUBMITTED BY THE HOUSE OF REPRESENTATIVES TO THE JUSTICES OF THE SUPREME JUDICIAL COURT, APRIL 6, 1923, WITH THE ANSWERS OF THE JUSTICES THEREON.

STATE OF MAINE

HOUSE OF REPRESENTATIVES April 6, 1923.

It appearing to the House of Representatives that the following is an important question of law and the occasion a solemn one—

Ordered: the Justices of the Supreme Judicial Court are hereby requested to give to the House of Representatives, according to the provisions of the Constitution in this behalf, their opinion on the following questions, to wit:

Whereas the State of Maine has spent large sums of money in constructing highways and bridges, which are used to a great extent by the owners and operators of motor vehicles, and

Whereas all the people of the State are benefited by the maintenance of an adequate system of properly constructed highways and bridges, and

Whereas the gasoline and other combustion fuels are used in the driving of motor vehicles on the highways and bridges:

QUESTION 1.

Has the Legislature the right and authority under the Constitution of the State to levy and assess a reasonable tax or charge per gallon upon all gasoline and other internal combustion engine fuel except kerosene sold within the State, the net proceeds of such tax to be used in the maintenance of such highways and bridges, as follows: Fifty per cent. thereof for the maintenance of state and state-aid highways, interstate, intrastate, and international bridges, the balance to be added to the fund for the construction of third-class highways, so called?

QUESTION 2.

Has the Legislature the right and authority under the Constitution of the State to levy and assess a reasonable tax or charge per gallon upon all gasoline and other internal combustion engine fuel sold within the State—the net proceeds of such tax to be used in the maintenance of such highways and bridges, as follows: Fifty per cent. thereof for the maintenance of state and state-aid highways, interstate, intrastate, and international bridges, and the balance to be added to the fund for the construction of third-class highways, so called?

QUESTION 3.

If the Legislature has the right and authority to levy and assess the tax referred to in either Question One or Question Two, would the Legislature have the right and authority to assess such tax without an exemption as to gasoline and other internal combustion engine fuel sold for use in motor boats and farm tractors when not using the highways?

QUESTION 4.

If the Legislature has the right and authority to levy and assess such tax referred to in either Question One or Question Two, would the Legislature have the right and authority to assess such tax with an exemption as to gasoline and other internal combustion engine fuel sold for use in motor boats and farm tractors when not using the highways?

QUESTION 5.

If the Legislature has the right and authority to levy and assess the tax referred to in either Question One or Question Two, can such tax be legally assessed to and against the original distributor selling gasoline and other internal combustion engine fuel within the state?

QUESTION 6.

If the Legislature has the right and authority to levy and assess the tax referred to in either Question Three or Question Four, can such tax be legally assessed to and against the original distributor selling gasoline and other internal combustion engine fuel within the state?

Presented by Mr. Nichols of Portland.

House
April 6, 1923

Read and passed.

CLYDE R. CHAPMAN,
Clerk.

A true copy.

Attest: CLYDE R. CHAPMAN,
Clerk.

TO THE HOUSE OF REPRESENTATIVES
OF THE EIGHTY-FIRST LEGISLATURE:

The undersigned Justices of the Supreme Judicial Court have fully considered the questions submitted to them under House Order passed April 6, 1923.

Before answering these inquiries, however, it should be stated that some of the Justices entertain the view that the constitutional provision by virtue of which they are obliged to give their opinion upon important questions of law and upon solemn occasions when required by the Governor, Council, Senate or House of Representatives, Constitution of Maine, Art. VI., Sec. 3, has no application to this instance. They think that while important questions of law are raised, the occasion cannot properly be regarded a solemn one because the submission of the questions was voted on the eve of the final adjournment of the Legislature and therefore any answers that might be returned could be of no practical advisory effect as the time for action had already passed.

Moreover, as these questions were propounded only one day before the final enactment of a law embodying some at least of the principles therein involved, Public Laws 1923, Chapter 224, the individual rights of citizens may be thereby affected. Those rights can be determined only in a judicial proceeding where the privilege of hearing and argument is accorded, and ought not to be prejudiced by an advisory opinion, which although it does not have the binding force of a judgment may yet be regarded as detrimental to the interests of those to whom it is adverse.

However, as the questions relate to certain abstract propositions of law and not to any existing statute, with this expression of respectful protest, these Justices have concluded to unite their associates in the unanimous opinion which follows.

QUESTION 1.

"Has the legislature the right and authority under the Constitution of the State to levy and assess a reasonable tax or charge per gallon upon all gasoline and other internal combustion engine fuel except

kerosene sold within the state, the net proceeds of such tax to be used in the maintenance of such highways and bridges, as follows: Fifty per cent. thereof for the maintenance of state and state aid highways, interstate, intrastate, and international bridges, and the balance to be added to the fund for the construction of third class highways, so-called?"

ANSWER.

The answer to this question depends upon the nature of the contemplated tax. If a property tax, it obviously offends the Constitution of Maine, Article IX., Sec. 8: "All taxes upon real and personal estate, assessed by authority of this State shall be apportioned and assessed equally according to the just value thereof." Amendment XXXVI. as to intangible property is not involved. To single out any particular species of property, or any particular commodity, gasoline, internal combustion engine fuel or what not and impose a property tax upon it unequal in comparison with the tax upon other commodities as to value would be void. The equal apportionment and assessment upon all real and personal estate required by our organic law would be violated. This proposition is too plain for discussion.

If, however, the proposed tax is an excise tax then it would be authorized and valid. The vital words of this propounded question are "a reasonable tax or charge per gallon upon all gasoline &c. . . . sold within the State." In other words, it is not the value of the gasoline and fuel as property owned which is the subject of taxation but the sale of and dealing in the article whatever its value. The tax is measured not by the worth of the commodities but by the amount of business transacted in dealing with them computed by gallons, and this fits the definition of an excise tax which is: "a tax imposed upon the performance of an act, the engaging in an occupation or the enjoyment of a privilege." 26 R. C. L., Page 236.

In this State the full power of taxation is vested in the Legislature and is measured not by grant but by limitation. "As to the executive and the judiciary the Constitution measures the extent of their authority, as to the Legislature it measures the limitations upon its authority." *Sawyer* v. *Gilmore*, 109 Maine, 169; *Laughlin* v. *Portland*, 111

Maine, 486. The provision before quoted marks the limitation of legislative power in the taxation of real and personal estate. But our Constitution contains no provision limiting the legislative imposition of excise taxes or, to use the language of the Court: "Our Constitution imposes no restriction upon the Legislature in imposing taxes upon business." *State* v. *Telegraph Co.*, 73 Maine, 518, 531.

Acting in pursuance of its power the Legislature has imposed excise taxes from time to time in various forms, using the term excise in the sense of other than a property or poll tax. Many of these have been passed upon and upheld by the Court, thus: corporate franchise tax upon railroads. *State* v. *Maine Central R. R. Co.*, 74 Maine, 376; Express Companies, *State* v. *B. & P. Express Co.*, 100 Maine, 278; Telegraph Companies, *State* v. *W. U. Tel. Co.*, 73 Maine, 518; Inheritance or Succession taxes, *State* v. *Hamlin*, 86 Maine, 495. Within this general class are automobile registration taxes and occupation taxes, such as licensed auctioneers, R. S., Chap. 41, Sec. 3, and itinerant venders, R. S., Chap. 41., Sec. 17.

In this respect of absence of limitation upon the power of the Legislature to impose excise taxes the Constitution of Maine differs from that of New Hampshire which restricts the Legislature of that State "to proportional and reasonable assessments, rates and taxes." The court has construed this to include excise as well as property taxes. Hence it is that the New Hampshire Court held an inheritance tax with a sliding scale of rates unconstitutional in *Curry* v. *Spencer*, 61 N. H., 624, while the Maine Court under our Constitution has held a similar law valid. *State* v. *Hamlin*, supra.

Because of the same restriction the New Hampshire Justices in an advisory opinion to the House of Representatives under date of April 2, 1923, held a proposed tax levied upon the sale of gasoline unconstitutional as an excise tax, although they sustained it as in the nature of a toll for the use of public highways when the sale of the commodity is confined to consumption in the operation of vehicles upon the highway.

The Constitution of Massachusetts also differs from that of Maine in this respect. It limits the legislative authority and power regarding excise taxes in these express words: "To impose and levy reasonable duties and excises upon any produce, goods, wares, merchandise and commodities, whatsoever brought into, produced, manufactured or being within" the Commonwealth. The earlier cases construed

this provision liberally and the word "commodity" has been held to include privileges, inheritances and stock sales. *Portland Bank* v. *Apthorp*, 12 Mass., 252; *Commonwealth* v. *Bank*, 5 Allen, 428. In 1883, a narrower construction was adopted, *Gleason* v. *McKay*, 134 Mass., 419, which was criticized in *Minot* v. *Winthrop*, 162 Mass., 113, but in part affirmed in *O'Keeffe* v. *Somerville*, 190 Mass., 110. The true construction of this limitation was a matter of disagreement among the Justices in Opinions of Justices, 196 Mass., 603, and in consequence of this divergence of views the Attorney General of Massachusetts in an opinion to the House of Representatives dated May 14, 1923, upon the constitutionality of a proposed gasoline tax bill in that State said that he would not hazard an opinion upon its validity as an excise tax, but he sustained it on the New Hampshire theory as a toll for the use of the public highways of the Commonwealth.

In Maine, however, in the absence of any such constitutional restriction we are of the opinion that the Legislature has the power to assess the tax in question as an excise tax upon the selling of gasoline in this State.

A similar question arose in New Mexico where the Constitution provides that "taxes levied upon tangible property shall be in proportion to the value thereof and taxes shall be equal and uniform upon subjects of taxation of the same class." The Legislature passed an act imposing an excise tax of two cents for each gallon of gasoline sold or used and an annual license tax of $50.00 for each distributing station or place of business. Its constitutionality was challenged on the ground among others that it was a property tax and not levied according to value. Upon this branch of the case the Supreme Court of the United States said: "The tax imposed by the act under consideration upon the 'sale or use of all gasoline sold or used in this State' is not property taxation, but in effect, as in name, an excise tax. We see no reason to doubt the power of the State to select this commodity as distinguished from others, in order to impose an excise tax upon its sale or use; and since the tax operates impartially upon all, and with territorial uniformity throughout the State, we deem it equal and uniform upon subjects of taxation, within the meaning of the State Constitution." *Bowman* v. *Continental Oil Co.*, 256 U. S., 642, (decided 1921) and see *Askren* v. *Continental Oil Co.*, 252 U. S., 444, the same case previously heard before the court.

The same reasoning applies with even greater force in Maine where our Constitution imposes no restrictions whatever upon the imposition of excise taxes.

It should be added, however, that any act which imposed excise taxes upon the sale of any commodity in such a manner as to create a burden upon or to interfere with interstate commerce would be a violation of the commerce clause of the Constitution of the United States and would to that extent be void. Constitution U. S., Art. I., Sec. 8, item 3; Art. I., Sec. 10, item 2; *Askren* v. *Continental Oil Co.*, supra; *Bowman* v. *Same*, supra, and see *Sonneborn Bros.* v. *Atty. Gen. of Texas*, 43 Sup. Court of U. S., 643, decided June 11, 1923; *Mexican Petroleum Co.* v. *South Portland*, 121 Maine, 128.

It should also be added that an excise tax, like a property tax, which is so unreasonable or oppressive as to be confiscatory would be held invalid. But this point does not arise here because the questions propounded assume a "reasonable" tax.

With these qualifications we answer the first question in the affirmative.

QUESTION 2.

"Has the legislature the right and authority under the Constitution of the State to levy and assess a reasonable tax or charge per gallon upon all gasoline and other internal combustion engine fuel sold within the State—the net proceeds of such tax to be used in the maintenance of such highways and bridges, as follows: Fifty per cent. thereof for the maintenance of state and state aid highways, interstate, intrastate, and international bridges, and the balance to be added to the fund for the construction of third class highways, so-called?"

ANSWER.

This question is the same as number 1, except that number 2 excludes kerosene from the various kinds of engine fuel sold within the State, upon the sales of which a tax is imposed.

This exception does not affect the Constitutional question involved. As we have already stated, the Legislature has the power to impose an excise tax upon the sales of such commodities as it deems wise. The choice lies with that branch of the government, and its selection stands.

We therefore answer this question in the affirmative.

In both these questions the purposes to which the tax is to be devoted are specified. This, however, is immaterial. So long as the purpose is a public one, the particular use to which it shall be applied is within the power of the Legislature.

QUESTION 3.

"If the Legislature has the right and authority to levy and assess the tax referred to in either Question One or Question Two, would the legislature have the right and authority to assess such tax without an exemption as to gasoline and other internal combustion engine fuel sold for use in motor boats and farm tractors when not using the highways?"

ANSWER.

We answer yes.

Possibly this element of non-exemption as to sales of gasoline and other internal combustion engine fuel for use in motor boats, and farm tractors when not using the highway, was inserted with a view to the theory of sustaining the tax as a toll, as in New Hampshire. But in our view of the nature of the tax, the use to which the gasoline or other fuel may be put by the purchaser is not a factor in the problem; whether upon land or water, the highway or the farm is entirely beside the question.

QUESTION 4.

"If the legislature has the right and authority to levy and assess such tax referred to in either Question One or Question Two, would

the legislature have the right and authority to assess such tax with an exemption as to gasoline and other internal combustion engine fuel sold for use in motor boats and farm tractors when not using the highways?"

ANSWER.

This interrogatory is the same as Number 3 except that gasoline and other internal combustion engine fuel sold for use in motor boats and farm tractors when not using the highways are exempted.

Our answer is in the affirmative for the reasons given to Question No. 3.

QUESTION 5.

"If the legislature has the right and authority to levy and assess the tax referred to in either Question One or Question Two, can such tax be legally assessed to and against the original distributor selling gasoline and other internal combustion engine fuel within the state?"

ANSWER.

Our answer is in the affirmative, provided the tax as laid and assessed does not interfere with interstate transactions and infringe upon the commerce clause of the Federal Constitution, as before stated.

QUESTION 6.

"If the legislature has the right and authority to levy and assess the tax referred to in either Question Three or Question Four, can such tax be legally assessed to and against the original distributor selling gasoline and other internal combustion engine fuel within the state?"

ANSWER.

Our answer to this question is in the affirmative with the same qualification as in the answer to Number 5.

Respectfully submitted,

(Signed)

LESLIE C. CORNISH, Chief Justice.

(Signed)

ALBERT M. SPEAR,
GEORGE M. HANSON,
WARREN C. PHILBROOK,
CHARLES J. DUNN,
JOHN A. MORRILL,
SCOTT WILSON,
LUERE B. DEASY,
Associate Justices.

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Contemporaneous and subsequent interpretation by those in interest, where there is uncertainty in the meaning of a town's charter, may assist in construing it, but an erroneous recognition of the location of a town's boundary line, though universal and long continued, must yield to the authority of the act of incorporation, for the Legislature can establish and change the boundaries of towns at will. *Shawmut Manufacturing Co.* v. *Benton*, 121.

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Where the possible maximum punishment provided for a criminal offense is imprisonment for one year, even though a less sentence is actually given, the crime is a felony. Under constitutional provisions a respondent cannot be held on such a charge except on presentment or indictment by a grand jury.

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It is a well-established principle of the common law, that in all actions for torts the jury may inflict what are called punitive or exemplary damages, having in view the enormity of the offense rather than the measure of compensation to the plaintiff. *Larose* v. *Berman*, 187.

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A deed which in terms purports to convey one half of the grantor's interest in certain premises cannot by oral testimony be made to embrace the whole. *Spencer* v. *Bouchard*, 15.

A deed conveying a dwelling and "land belonging thereto" embraces such land as is reasonably necessary to be used with the dwelling as such. A deed by an attorney with a written power authorizing him to convey "village property appertaining to the tanneries or necessary to their enjoyment," conveying village property, the legality of which is unquestioned for seventeen years, in absence of testimony pro or con, is supported by a presumption of fact that the land so conveyed did appertain to the tanneries or necessary to their enjoyment. A grantee is not estopped to dispute his grantor's title unless there remains in grantor some right, and there is some duty toward him in grantee. A deed

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Clark v. *Anderson*, 165.

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In a trial on indictment for receiving stolen goods under R. S., Chap. 122, Sec. 12, four other men having been engaged in the larceny, the testimony of one of the other four persons who were engaged in the larceny as to what another one of the four had told him the respondent had stated, showing his knowledge of the proposed larceny, is merely hearsay and not admissible. *State* v. *Davis*, 317.

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A bill in equity to enforce a lien claim against the property of the owner in invitum for work and materials furnished under a contract to which the owner was not a party and over which he had no control should not go beyond the natural import of the evidence offered to prove consent. The consent of the owner must be shown, and whether it appears in any given case will depend wholly upon the facts in that case.

Greenleaf & Sons Co. v. *Free-Andrews Shoe Co.*, 352.

If the well-settled principles of law are applied directly to the undisputed facts in this case, there is no adequate evidence that brings to the knowledge of the owner any explicit information as to the nature and extent of the alterations and repairs which were being made in his building.

Greenleaf & Sons Co. v. *Free-Andrews Shoe Co.*, 352.

The plaintiff's contract to furnish all doors for the building was not completed until the door in question was furnished; the door in question appears to have been furnished in good faith to complete its contract and not merely to keep alive its lien claim; value of the material does not govern, nor that it was not furnished before was due to oversight of the plaintiff.

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Hahnel et al. v. *Warren et als.*, 422.

MASTER AND SERVANT.

The relation of master and servant exists whenever one person stands in such a relation to another that he may control the work of the latter and direct the manner in which it shall be done. *Flaherty* v. *Helfont*, 134.

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Whitman v. *Allen*, 1.

Pleadings signed by counsel are presumed to be authorized only so far as they concern the case in which they are filed. *Webber* v. *Austin*, 95.

In case of a general allegation of negligence in an action for personal injuries, any lack of certainty in this respect is a defect of form and not of substance and must be taken advantage of by a special demurrer or by motion to make more definite and certain.

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When an offense consists of a series of acts or a habit of life, the complaint or indictment may charge the offense in general terms, and the particular acts which establish the guilt of the party need not be stated.

State v. *Burgess, App't,* 393.

Under the established rules of common law pleading in civil actions, the plaintiff's declaration must contain a clear and distinct averment of the facts which constitute the cause of action in order that they may be understood by the party who has to answer them, by the jury who are to ascertain the truth of the allegations and by the court that is to give judgment.

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Pomerleau v. *Pomerleau,* 522.

PRESCRIPTIVE TITLE.

An oral grant may ripen into a legal title by adverse possession under certain circumstances, but the circumstances here prohibit such a ripening in the defendant's grantor, who was a co-owner in reversion of a certain undivided interest and also a tenant for life in another undivided portion.

Spencer v. *Bouchard,* 15.

PRESUMPTION.

A deed by an attorney with a written power authorizing him to convey "village property appertaining to the tanneries or necessary to their enjoyment," conveying village property, the legality of which is unquestioned for seventeen years, in absence of testimony pro or con, is supported by a presumption of fact that the land so conveyed did appertain to the tanneries or necessary to their enjoyment.

Webber v. *Austin,* 95.

PUBLIC UTILITIES COMMISSION.

A ruling by the Public Utilities Commission to constitute exceptional error must be shown to have been prejudicial to the interest of the excepting party.

In re Municipal Officers of Newport v. *M. C. R. R. Co.,* 383.

The findings of the Public Utility Commission on questions of fact if based upon any substantial evidence are final, and its findings on questions of law only are subject to review.

Public Utilities Commission v. *Lewiston Water Commissioners,* 389.

PUNITIVE DAMAGES.

RAILROAD CROSSING.

REAL ACTION.

REDEMPTION.

RENTS AND PROFITS.

REPLEVIN.

In a suit on a replevin bond, if damages were not determined and recovered in the replevin suit, special or actual damages may be recovered. If the property is restored in damaged condition, or not restored at all, further recovery may be had. Depreciation if property is returned, and the value of the property plus decline in market value if not returned, may be recovered. Counsel fees not recoverable. Expense of feeding and caring for cattle replevied not to be deducted from damages. Judgment to be for damages proved, and not for penal sum of the bond. *Kimball* v. *Thompson*, 116.

Where defendant, in a replevin action, pleads title in himself, he waives his right to question the matter of description of the property as set out in the writ. *Hartford Fire Ins. Co.* v. *Stevens*, 368.

REPORT.

On report the court can give effect to any contention in defense which is supported by the evidence and could have been pleaded in the action. *Harvey* v. *Roberts*, 174.

RES GESTAE.

In a trial for attempted rape upon a child nine years of age the testimony of the mother as to details of a complaint made to her by the child a week after the commission of the act complained of is not a part of the res gestae. *State* v. *King*, 256.

RES JUDICATA.

When the parties are the same, but the cause of action is different, a prior judgment only concludes the parties on issues actually tried in a prior action, and the burden is on the party setting up the claim of res judicata of showing that the same issue was involved in the prior precedings and determined on its merits. *Lausier* v. *Lausier*, 530.

RESCISSION.

A vendee rescinding a contract of sale for default of the vendor must act within a reasonable time; what is a reasonable time is a question of law when the facts are ascertained; under other conditions it is a mixed question of law and fact, for submission to a jury. *Ray Motor Co.* v. *Stanyan*, 346.

RIGHTS OF DESCENT.

A husband joining in a deed with his wife, the grantor, in the testimonium clause only, not as a grantor properly, bars his rights of descent only.
Burnham v. *Wing*, 237.

SEAL.

An instrument purporting to be a writ, unattested by the clerk of any court, and having no seal of any court impressed upon, is absolutely invalid and confers no jurisdiction upon the court in which it is entered.
Pinkham v. *Jennings*, 343.

SEGREGATION.

See *Lawrence* v. *Lincoln County Trust Co.*, 273.

SET-OFF.

A depositor, as a general rule, who is indebted to the bank, is entitled to set off the amount to his credit against his indebtedness even though the bank is insolvent. But in case of segregation of depositor's notes under R. S., Chap. 52, to secure a savings account, the deposit cannot be set off against such segregated notes. *Lawrence* v. *Lincoln County Trust Co.*, 273.

STATE-AID HIGHWAY.

The construction of a State-aid Highway must be authorized by the Highway Commission. Such Commission has no authority to order the selectmen of a town to contract in behalf of the town to do such work. It is optional with towns to appropriate money to improve and maintain State-aid Highways. Ultra vires acts cannot be ratified by a town, nor is a town estopped from denying liability under a contract not within the scope of its powers.
Peter Williams v. *Inhabitants of Vinalhaven*, 505.

STATUTE OF FRAUDS.

The Statute of Frauds, R. S., Chap. 114, Sec. 12, not available to defendant as a defense, inasmuch as the first contract was mutually rescinded by the contracting parties by the substitution of a subsequent contract within a year of date of the action. *Hoskins* v. *Wolverton et al.*, 33.

A part payment, though deferred, of the purchase price of certain potatoes by check drawn by the agent of the buyer and delivered to the agent of the seller, though payable to a third person, if the check is cashed and the proceeds given to the seller with the subsequent approval of the payee, removes the contract from the statute of frauds. *Dean* v. *Given Co.*, 90.

STOCK SUBSCRIPTION.

A prospectus issued by the authority of the officers of a corporation may be relied upon by a person in subscribing for stock, and if it contains a false representation, and the subscription is made by reason thereof, such representation is binding upon the corporation; but in this class of instruments some high coloring and exaggeration is allowable. When offers to receive subscriptions are made by the company, accepted by the persons to whom the offers are made, and an absolute, unconditional subscription for a definite number of shares is made by each subscriber, with an express promise to pay the par value of the shares, an allotment is not expressly or impliedly required. *Kennebec Housing Company* v. *Barton et als.*, 293.

STOCKHOLDER—COLORABLE RIGHT ONLY.

A petitioner, under R. S., Chap. 51, Sec. 22, whose stockholding is colorable only, or solely for the purpose of maintaining proceedings under said statute, is not a person interested under the statute and entitled as of right to inspect the records and stock book of a corporation and to take copies and minutes therefrom. *Chas. A. Day & Co., Inc.* v. *Booth et als.*, 443.

STORAGE DAM.

See *Brown* v. *De Normandie et als.*, 535.

TAXATION.

In the instant case, before the alleged merger, the mileage in question was street railroad mileage, the railroads being street railroads. They were different in nature, in condition and class from steam railroads. Can a merger, if actually accomplished, constitute an electric street railway a part of a line of commercial steam railroad so to actually include the mileage of the former as an extension of the latter's line or system under the laws of Maine? We find no authority or reason for such inclusion, and therefore hold that it does not.

The electric roads operate as in the beginning, and their business is kept distinct and separate from the business transactions and records of the main line of defendant's road.

TAXES.

TENDER.

A tender in extinguishment of a right absolutely need not be preserved by producing the money in court. *Drake & Sons* v. *Nickerson*, 11.

TESTIMONY.

In a trial for attempted rape upon a child nine years of age the testimony of the mother as to details of a complaint made to her by the child a week after the commission of the act complained of is not a part of the res gestae.
State v. *King*, 256.

TOWN MEETINGS.

A majority of the selectmen may lawfully change the place of holding the annual town meeting. If the place designated is the only place of that name in the town, the omission to state that the place is in the town is not fatal. If an attested copy of the warrant is posted in a public and conspicuous place in the town the statute requirement is met. The acts of a constable de facto in posting an attested copy of the warrant are as valid so far as the public is concerned as though he were an officer de jure. A return by a constable to the town clerk not required. The fixing of the time and place of holding town meetings is left to the discretion of the selectmen. A town meeting called by a justice of the peace without an unreasonable refusal by the selectmen to call a meeting is illegal. *Allen et als.* v. *Hackett et als.*, 106.

TRESPASS DE BONIS.

Plaintiff must have either title to, or possession, or right of possession of property involved, in order to maintain trespass de bonis. *Harvey* v. *Roberts*, 174.

TRUSTS.

For want of written evidence no enforcible express trust appears, and the ruling cannot be sustained on the ground that a resulting trust is shown, for the plaintiff paid but a very small part of the consideration. *Wood* v. *White*, 139.

But a constructive trust is sufficiently proved. There existed between the parties a confidential or fiduciary relation. The defendant secured the advantage, which he seeks unconscientiously to retain, by abusing the trust and confidence reposed in him by his son-in-law who was his business associate.
Wood v. *White*, 139.

The following provision in a will: "Whatever I may die possessed of I leave to my son, A, and my dear friend, B, in trust, the income to be divided as follows;

The evidence to sustain the second defense is wholly inadequate, and clearly of the nature of "dealers talk," and, further, the alleged collateral agreement was without consideration, and was evidently disregarded by the jury; as upon this defense, if sustained, the plaintiff could in no event have recovered more than two hundred and forty-six dollars.

The jury's verdict must have been based on a right of recoupemnt for an alleged failure to furnish aid in selling the machines in accordance with the agreement of sale, and that if this defense were available under the pleadings the damages allowed by the jury for the breach and recoupment are clearly excessive.

Hence upon any view of the case the verdict was clearly wrong.
Empire Cream Separator Company v. *Curtis*, 247.

Upon all the evidence the verdict not clearly, palpably wrong, hence must stand. Plaintiff guilty of contributory negligence. *Paradis* v. *Judkins*, 270.

The evidence in this case is overwhelming that the Bulk Sales Act, so called, R. S., Chap. 114, Sec. 6, rendered void the attempted sales by the bankrupt to the defendants.

The jury in rendering a verdict for the defendants must either have failed to comprehend the significance of the testimony or have been swayed by sympathy. *Conquest* v. *Atkins*, 327.

A directed verdict should be set aside if there is evidence in the case which would sustain a contrary verdict should such be rendered by a jury.
Hartford Fire Ins. Co. v. *Stevens*, 368.

WAIVER.

The court is committed to the settled rule that points not made at the trial are considered as waived. *Pouliot* v. *Bernier*, 148.

The prosecution of a motion for a new trial, addressed to the presiding Justice and overruled by him, is a waiver of all exceptions in both criminal and civil cases. *State* v. *Power*, 223.

Where defendant, in a replevin action, pleads title in himself, he waives his right to question the matter of description of the property as set out in the writ.
Hartford Fire Ins. Co. v. *Stevens*, 368.

WARRANTY.

There is no implied warranty, as a general rule, where there is an express warranty, and if an implied warranty may exist it must not be inconsistent with the express warranty. *Ray Motor Co.* v. *Stanyan*, 346.

See *Boyle* v. *Ward*, 376.

WILLS.

A decree of the Probate Court in Maine admitting a will to probate as a foreign will cannot be collaterally attacked for want of jurisdiction by attempting to show that the testatrix was a resident of this State at the time of her decease, no fraud being shown. *Spencer* v. *Bouchard*, 15.

A devise of a life estate in all the estate to the wife, if she survives testator, and a further provision that, at the death of the wife, after payment of numerous legacies, all the rest, residue and remainder of the estate should "be disposed of according to the laws of inheritance of the State of Maine in force at the date thereof," the wife having survived the testator and died testate, does not give any interest in the residuary estate to the widow which could pass by her will to the beneficiaries named therein, the heirs at law and next of kin of the testator takes the entire residue and remainder of the estate.

McCarthy v. *Walsh*, 157.

In the instant case the testator devised to A certain real estate, "to have and to hold to her, her heirs and assigns forever"; then followed these words: "If, however, she shall die without leaving lawful issue then I give and devise said land and buildings to the surving sons of my said nephews, B, in equal shares the child or children of any deceased son to take by right of representation, to have and to hold to them and their heirs and assigns forever."

The words, "if she shall die without leaving lawful issue," must be construed to mean an indefinite failure of issue, and that A takes an estate in fee tail.

McCarthy v. *Walsh*, 157.

The members of a voluntary unincorporated association, if the identity of the persons can be determined, may take by will the legal title in trust to a devise and bequest, the association itself being the beneficiary.

Pushor, Executor v. *Hilton*, 225.

Where a person makes a contract for life support, intending to transfer to her co-contractor a certain sum of money which she claims the right to expend for maintenance during life, but still holds it in her possession and under her control, and fails to so transfer before death, which money was part of the residuum of her deceased husband's estate, such money still remains as part of the residuum of the estate of the deceased husband.

Maine Savings Bank v. *Small, Adm'r*, 419.

"Undue influence" as a ground for avoiding a will may be established either by proof or a presumption of law. It is never to be inferred from opportunity or interest alone. There must be proof that testator was subjected to some influence destroying his free agency, whatever designing method is pursued to produce such undue influence, and that he was constrained from following or expressing his real, actual will or desire. *Emma H. Rogers, Appellant*, 459.

The following provision in a will: "Whatever I may die possessed of I leave to my son, A, and my dear friend, B, in trust, the income to be divided as follows: to my wife, C, one third, and the balance in equal proportions to my children, D's share to go to his children"; the widow having waived the provisions of the will made in her behalf, creates a dry, naked, simple or passive trust, and the devise and bequest of all the income of the estate is, in effect, a devise and bequest of the principal or corpus of the estate. *Dixon* v. *Dixon*, 470.

WORDS AND PHRASES.

WORKMEN'S COMPENSATION ACT.

An agreement for compensation, duly approved, is in effect a judgment and final as to facts agreed upon. Compensation may be granted for loss of earning capacity after the expiration of the compensable period.

Stephen C. Foster's Case, 27.

"Status" under the Workmen's Compensation Act as defined and determined in *Fennessy's Case*, 120 Maine, 251, as being the relation in which the claimant stands toward his employer at the time of the accident, but not comprehending the degree of disability, reaffirmed. An erroneous ruling by the Chairman of the Industrial Accident Commission, as a matter of law, is subject to appeal.

Mike Zooma's Case, 36.

of the Act. Such claimant is an official excepted under paragraph "e" of the Act, and not an "employee." A finding by the Chairman of the Industrial Accident Commission that such a claimant, as a matter of law, is an "employee" within the meaning of the Act is erroneous, hence reversible.

Eva E. Bowden's Case, 359.

Injuries sustained in the course of employment, by reason of horseplay, practical joking, fooling or skylarking, done independently of or disconnected from the performance of any duty of the employment, do not arise out of the employment within the meaning of the Workmen's Compensation Act.

Fred B. Washburn's Case, 402.

Under the Workmen's Compensation Act, an occurrence to be accidental must be unusual, undesigned, unexpected, and sudden.

Frank E. Brown's Case, 424.

The word injury as employed in Section 17 of the Workmen's Compensation Act, includes not all impairment or derangement of body or mind, but only injuries which have actually or presumptively resulted in incapacity to earn.

A workman is incapacitated within the meaning of the Act when he has lost his earning power in whole or in part. This is the only test. The law provides no compensation for pain and none for physical impairment, except when it is of such character as to raise a presumption of incapacity to earn. The workman is entitled to make claim for compensation not for mere accidental injury, but for accidental injury resulting in loss of earning power.

Nelson H. Hustus' Case, 428.

The rights and liabilities of the parties under the Workmen's Compensation Act, are fixed and governed by the statute in force at the time of the accident. Sec. 16, Chap. 50, R. S., before the amendment in 1921, Public Laws, Chap. 222, Sec. 7, granted compensation for partial but not for total incapacity for labor after the termination of specific compensation. The statute fixes no limitation of time within which incapacity for labor petitions must be filed.

Frank Lemelin's Case, 478.

Under the Workmen's Compensation Act the finding that an injury is compensable may be supported by reasonable inferences, not based upon surmise, conjecture, guess or speculation. Knowledge of the injury on the part of the employer may be communicated through a foreman of claimant. The findings of the Commission will not be set aside on the ground of its method of procedure unless it abuses its discretionary powers. *Marchavich's Case*, 495.

In this case the compensation agreed upon under Section 16 began to run on the 14th day of August, 1922, the date of the amputation, and the decree is modified

WRIT.

WRITTEN AGREEMENT.

APPENDIX

STATUTES AND CONSTITUTIONS CITED, EXPOUNDED, ETC.

CONSTITUTION OF THE UNITED STATES.

CONSTITUTION OF MAINE.

CYC.

SPECIAL LAWS OF MAINE.

SPECIAL LAWS OF MASSACHUSETTS.

SPECIAL LAWS OF NEW HAMPSHIRE.

STATUTES OF MAINE.

ACT OF THE PROVINCE OF MASSACHUSETTS BAY.

STATUTES OF MASSACHUSETTS.

STATUTES OF NEW HAMPSHIRE.

REVISED STATUTES OF MAINE.

ERRATA.

Substitute "392" for "395" in last line on page 81.
Substitute "Chap. 157" for "Chap. 137" in line 17, from bottom on page 239.
Substitute "99" for "95" in line 6, from bottom on page 355.
Substitute "1919" for "1909" in line 19, page 484.