MAINE REPORTS

124

CASES ARGUED AND DETERMINED

IN THE

SUPREME JUDICIAL COURT

OF

MAINE

JUNE 1, 1924—OCTOBER 1, 1925

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. SCOTT WILSON, CHIEF JUSTICE[2]
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HON. CHARLES J. DUNN[3]
HON. JOHN A. MORRILL[4]
HON. LUERE B. DEASY[5]
HON. GUY H. STURGIS
HON. CHARLES P. BARNES
HON. NORMAN L. BASSETT[6]

[1]Resigned March 1, 1925
[2]Appointed March 1, 1924
[3]Reappointed February 5, 1925
[4]Reappointed March 5, 1925
[5]Reappointed September 25, 1925
[6]Appointed March 26, 1925

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[1]Term expired March 2, 1925
[2]Resigned May 14, 1924 and appointed Active Retired Justice of the Superior Courts July 29, 1924
[3]Died November 4, 1924
[4]Appointed May 21, 1924
[5]Appointed November 25, 1924
[6]Appointed March 12, 1925

ATTORNEY GENERAL

HON. RANSFORD W. SHAW to January 8, 1925
HON. RAYMOND W. FELLOWS from January 7, 1925

REPORTER OF DECISIONS

FREEMAN D. DEARTH

ASSIGNMENT OF JUSTICES

FOR THE YEAR 1924

LAW TERMS

BANGOR TERM, First Tuesday of June.

SITTING: CORNISH, Chief Justice; PHILBROOK, DUNN, DEASY, STURGIS, BARNES, Associate Justices.

PORTLAND TERM, Fourth Tuesday of June.

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

AUGUSTA TERM, Second Tuesday of December.

SITTING: CORNISH, Chief Justice; PHILBROOK, MORRILL, WILSON, STURGIS, BARNES, Associate Justices.

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CASES

IN THE

SUPREME JUDICIAL COURT

OF THE

STATE OF MAINE

ALBION L. SAVAGE

vs.

NORTH ANSON MANUFACTURING COMPANY.

Franklin. Opinion June 5, 1924.

Under a plea of res judicata, if extrinsic evidence is necessary to establish identity of parties, or cause of action, and from the evidence different conclusions may be reached by different minds, it is not a question of law, but of fact for a jury. If from the evidence a tender does not appear to have been made in full settlement of a claim, and accepted as full settlement, as a matter of law it cannot be said to constitute accord and satisfaction of full claim, but is a question of fact for a jury under appropriate instructions.

In the instant case the plaintiff not being a party to the former action, nor a privy, and it not appearing from the evidence that his claim was included in the former action at his request, he was not bound by the judgment thus obtained.

The mere fact that he was interested in the result and testified is not alone sufficient to bind him; it must appear that he was represented by the plaintiff in the former action.

From the evidence in this case it cannot be said, as a matter of law, that the plaintiff was represented by the parties who included his claim with their own in the former action.

An analysis of the written agreement between these parties discloses that it did not obligate the plaintiff to furnish any fir logs sued for in this action, and that the oral agreement to pay the price for fir logs which is the basis of this action was, when the logs were delivered, a valid obligation based upon an adequate consideration.

On exceptions. An action of assumpsit on account annexed to recover a balance alleged to be due for fir logs. The defendant, entered into a written agreement to purchase of plaintiff spruce, fir and pine logs he was about to cut paying therefor $24.00 per thousand for pine and spruce and $20.00 per thousand for fir. Subsequently it was agreed between the parties orally that the price for the fir was to be $24.00 per thousand. An action was brought by Hanscom and Blanchard, its purchasing agents, against defendant for the same fir logs at $20.00 per thousand and the money recovered paid to plaintiff who testified in the trial. This action was brought to recover what plaintiff claims is due him as a balance for the fir logs at $24.00 per thousand. Under the general issue and brief statement the defense of res judicata was pleaded. At the close of plaintiff's evidence on motion by defendant the presiding Justice ordered a verdict for defendant and plaintiff excepted. Exceptions sustained.

The case is fully stated in the opinion.

Frank A. Morey, for plaintiff.

Butler & Butler and Frank W. Butler, for defendant.

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

MORRILL, DEASY, JJ., concurring in result. DUNN, J., dissenting.

WILSON, J. In July, 1918, the defendant made an offer in writing to the plaintiff to buy at a stipulated price per thousand feet, pine, spruce and fir logs, the written offer being in part of the following tenor:

"We understand that you are about to make a contract with the Stratton Mfg. Co. for whatever pine they may have on their *hands* situated in Coplin Plantation. We will buy this from you cut down to 10″ on the stump, etc.

"For this pine we will pay you $24.00 delivered into the Dead River Corporation in due course for the drive of 1919.

"On the spruce, fir and pine which you think you may cut on the Mary Potter Lot so called we would take the spruce and pine of this cut in the same way and at the same price, and for the fir saw logs which you may get in cutting this lot we would pay you $20.00 per M feet. And the same terms and prices and conditions, etc. would apply on the Bert Hammond Farm, if you decide to cut that."

The omitted parts of the offer have no bearing upon the question at issue in this case. The above proposal was accepted by the plaintiff by simply writing the word "accepted" at the bottom of the proposal and affixing his signature thereto.

Before beginning operations on any of these lots the plaintiff, in the Fall of 1918, called the manager of the defendant company on the telephone and in substance said to him, that the expense of operating had so materially increased since July when its proposal was made and accepted, that he could not afford to cut any logs at the prices fixed therein. The manager himself testified that, as it was of great advantage to the defendant to obtain all the logs it could that season, he told the plaintiff to go ahead and cut and the defendant would make it right with him.

Before actually beginning operations, however, the plaintiff, accompanied by one Hanscom of the firm of Hanscom and Blanchard, purchasing agents of the defendant at that time, visited the offices of the defendant and had a conference with its manager in person for the purpose of fixing the price of the logs which might be cut and delivered by the plaintiff during the coming Winter.

As a result of this conference it was finally orally agreed that the plaintiff would proceed to cut and the defendant would pay him the same price for fir logs as had been previously fixed for spruce and pine, viz.: $24.00 per thousand, which was $4.00 more per thousand than the sum named for such fir logs as might be delivered under the original proposal.

Acting upon this offer, the plaintiff began operations and, as appears by his declaration in this action, cut fir logs not only on all the lots mentioned in the original written proposal, but also upon a fourth lot, not mentioned therein, and described in the declaration as the "Dudley land," and delivered to the defendant in the Spring of 1919 a total of 437,705 feet of fir logs, for which he claims he is entitled to be paid at the rate of $24.00 per thousand.

It appears, however, that he has already received on account of the fir logs delivered the sum of $8,754.10, or at the rate of $20.00 per thousand. This action of assumpsit on an account annexed is now brought to recover what he claims is the balance due him for fir logs at the price of $24.00 per thousand agreed upon at the conference with the defendant's manager.

Upon the evidence presented, the presiding Justice at the close of the trial, on motion of the defendant, directed a verdict for the defendant, and the case is now before this court on the plaintiff's exceptions to this ruling.

It appears from the evidence that the same fir logs at $24.00 per thousand were included in an action brought against this defendant by Hanscom and Blanchard, its purchasing agents, and that this plaintiff testified in that action; that the presiding Justice in that action held that the promise of the defendant to pay the additional $4.00 a thousand for fir logs was without any consideration, and as a result Hanscom and Blanchard only recovered on a basis of $20.00 per thousand for the fir logs furnished by this plaintiff, which sum so recovered was paid to him by Hanscom and Blanchard.

The defendant in his pleadings in the case at bar sets up the defense that this plaintiff is now bound by the judgment recovered in the former action brought by Hanscom and Blanchard.

It is a general and fundamental rule that judgments to be binding must be for the same cause of action and between the same parties or their privies. Under the term, parties, the law includes all persons who, though not nominally parties, but being directly interested in the subject matter, have a right to make a defense, or to control the proceedings, and to appeal from the judgment of the court, which right also includes the right to adduce testimony and cross-examine witnesses offered by the other side. Persons not having these rights are regarded as strangers to the cause and, of course, are not bound. Greenleaf on Ev., Vol. 1, Sec. 523; *Cecil* v. *Cecil*, 19 Md., 72, 80; *Lovejoy* v. *Murray*, 3 Wall, 1, 19. Privies with respect to judgments are those who have some mutual or successive relationship derived from one of the parties and accruing subsequent to the commencement of the action. 23 Cyc., 1253. 5, b; Bigelow on Estoppel, Page 142; *Seymour* v. *Wallace*, 121 Mich., 402; *Orthwein* v. *Thomas*, 127 Ill., 554. To give full effect to this rule, however, all persons represented by the parties, and who claim under them, are equally concluded.

While the record of the former judgment was not introduced in evidence, it is, of course, apparent that the plaintiff in this action was not nominally, at least, a party to the former proceedings. While it appears that he testified in the former action, it does not appear what the nature of his testimony was.

At some point in his testimony, the justice then presiding, halted the case, and in substance the following colloquy between court and counsel for Hanscom and Blanchard took place:

"THE COURT: You claim you have a legal claim against the North Anson Mfg. Co., in favor of this man (referring to Mr. Savage who was then on the stand) or this man has a legal claim?

"COUNSEL: We claim so, but I am not his (Mr. Savage's) attorney. He has gone on and stated his position, and if I was his attorney that would be one thing, but I am not, and I am not authorized to speak for him.

"THE COURT: The question here is between Hanscom and Blanchard and the North Anson Mfg. Co. If this man knows what the balance is due from the North Anson Mfg. Co., to Hanscom and Blanchard, he can testify, but as to what is due between him and Hanscom and Blanchard is not material, or between him and the North Anson Mfg. Co. This case is between Hanscom and Blanchard and the North Anson Mfg. Co.

"COUNSEL: We don't want them (referring to defendant Co.) to be in this position. When they get done with this case, they will say: Here is a charge by Hanscom and Blanchard, and therefore he (meaning Mr. Savage), can have nothing. If they should discount his bill, he is in a position to want to collect his claim against the North Anson Mfg. Co. We have put it in our claim, because we believed there was the place for it, but it appears from his contract that he has also got a bill against the North Anson Mfg. Co. Now we don't want to be held to him, and let counsel for the Company cut us out of getting our pay from the North Anson Mfg. Co. If they release us entirely from this and if Mr. Savage releases Hanscom and Blanchard from any further action in regard to the balance due of $10,000., we will strike it out of our writ, but if we are to be held, we want our money."

Without any other evidence as to the grounds on which Hanscom and Blanchard recovered for the fir logs in the former action, or the participation of this plaintiff therein, except that he accepted from Hanscom and Blanchard the sum recovered by them, but not, as he testified, in settlement of his claim, this court is asked to hold as a matter of law that this plaintiff is bound by that judgment.

Upon such evidence, it can hardly be said that, as a matter of law, this plaintiff had such control over the former proceedings, brought by

Hanscom and Blanchard primarily to enforce their own claim, 120 Maine, 220, as would permit him to appeal from the judgment, or except to the rulings of the court, to adduce testimony in his own behalf, or cross-examine witnesses. Nor does the fact that he had an interest in the suit and testified, by itself, render the judgment binding upon him. *Cockins* v. *Bank of Alma*, 84 Neb., 624, 628; *Lee* v. *School Dis.*, 149 Ia., 345, 353; *Central Baptist Church & Soc.* v. *Manchester*, 17 R. I., 492, 494.

The elements necessary to bind this plaintiff as a party or privy to the former action are, we think, clearly lacking. Can it then be said, that he was represented in the former action by Hanscom and Blanchard and so is bound? Surely, upon the evidence before this court, not as a matter of law.

There is not a scintilla of evidence that Savage ever requested Hanscom and Blanchard to include his claim in their action, or ever consented to it, except as it may be inferred from the fact that he was a witness, though the nature of his testimony does not appear, and accepted, but as he testified, not in settlement of his claim, the sum recovered by them. Statement of counsel above referred to, however, discloses the reason for the fir logs being included in their action. It was evidently done for the sole purpose of protecting Hanscom and Blanchard against some fancied claim that Savage might have against them, and not at the request or for the benefit of Savage.

Upon this point the statement of counsel is, we think, conclusive: "If Mr. Savage releases Hanscom and Blanchard from any further action, we will strike it out of our writ; but if we are held, we want our money." The basis on which it entered into the judgment is not disclosed by the evidence, but is left to conjecture.

The further statement of counsel for Hanscom and Blanchard in the former action, which is a part of the evidence in this case, that he did not represent Savage and could not prejudice his rights; that Savage had a claim against the defendant under his contract; and that they had put it in their writ because they did not want to be in any way held to him and not get their money out of the defendant, shows, almost beyond cavil, that Hanscom and Blanchard did not represent Savage in the former action; that he could not have controlled the procedings in their action, or excepted to the rulings of the court against him, and that he was in law a stranger to that cause.

And, as further bearing on this issue, where as in this case, extrinsic evidence is necessary to establish either identity of parties or cause of action and there is conflict of testimony, or a doubt as to its value, it is held to be no longer a question of law for the court but of fact for the jury. 23 Cyc., 1543, D-1. As the Massachusetts Court said in *Foye* v. *Patch*, 132 Mass., 111: "When extrinsic evidence is necessary to determine what issues are actually tried and determined, or to determine the identity of the parties, or of the subject matter, such evidence must be submitted to the jury under appropriate instructions."

Counsel also urges that the acceptance by the plaintiff of the sum recovered by Hanscom and Blanchard on a basis of $20.00 per thousand must be held under the circumstances to have been accepted in full accord and satisfaction of his claim against the defendant. While the plaintiff did testify it was in full settlement of his claim "on a basis of $20.00 per thousand," he at the same time stated he did not accept the sum in full settlement of his claim, and there is no evidence that it was tendered to him in full settlement of his entire claim, which at least raises a question of fact that should be submitted to a jury. *Bell* v. *Doyle*, 119 Maine, 383.

One other, and the main contention urged by the defendant at *nisi prius* and before this court, requires notice, viz.: That the agreement to pay the increased price for fir logs, though admitted to have been made by the defendant and acted upon by the plaintiff in good faith, was without consideration and, therefore, is not binding on the defendant, which might at first blush seem to involve a more difficult problem and one on which the courts, text-book writers and commentators are widely at variance.

The defendant relies upon the general principle that an agreement to perform what one party to an agreement is already in law bound to perform cannot form the sole consideration for a new promise by the party to be benefitted by the performance, which is universally admitted and is recognized by this court in *Wescott* v. *Mitchell* 95 Maine, 377.

But an examination of the plaintiff's declaration and an analysis of the defendant's original proposal as accepted by the plaintiff discloses that the upholding of the later agreement to increase the price for fir logs in no way violates the above rule. The plaintiff's declaration discloses that this action is to recover for certain fir logs

cut on the Stratton Mfg. Co. lot, the Potter lot, the Hammond farm and the Dudley lot. The defendant's original proposal, as quoted above, shows that it contained no offer to buy and, therefore, no obligation to cut and deliver any fir logs from the Stratton Manufacturing Company's land, but only the pine logs; that it contained no reference to any timber cut on the Dudley land, so called, on which two lots more than four fifths of all the fir logs involved in this action were cut. We are further of the opinion that, as accepted by the plaintiff, it imposed on him no absolute obligation to cut logs of any kind on either the Potter or Hammond lots, and as he had notified the defendant that he could not cut at the prices named in its offer, so far as fir logs are concerned, the plaintiff, when he entered into the new arrangement for increased compensation for fir logs, was under no obligation to cut any fir logs by reason of his acceptance of the defendant's original proposal.

The cutting, delivery and acceptance of logs which the plaintiff was in no way obligated to cut under the original agreement, would, of course, be a sufficient consideration to support the defendant's promise to pay the increased price, which promise was the sole inducement for the cutting and delivery of the logs involved in this action.

It is evident that the real effect of the plaintiff's acceptance of the defendant's original proposal was not called to the attention of the presiding Justice at the trial at *nisi prius* of the case at bar, or in the previous trial of the Hanscom and Blanchard action against the defendant, nor was it suggested to this court in argument.

The case, thus viewed, does not present a situation where one party to a contract refuses to perform, and to ensure the performance the other party, who would be benefitted by the performance, promises increased compensation, for which the party performing does nothing that he was not already bound to do, and as to the validity of such a promise the authorities are so much at variance; Williston on Contracts, Vol. I., Sec. 130; *Abbott* v. *Doane*, 163 Mass., 433; *Prox. Mfg. Co.* v. *Wolf*, 217 Mass., 196; *Goebel* v. *Linn*, 47 Mich., 489; *Linz* v. *Schuck*, 106 Md., 220; *Agel & Levin* v. *Patch Mfg. Co.*, 77 Vt., 13; *Courtenay* v. *Fuller*, 65 Maine, 156; *Awe* v. *Gadd*, 179 Iowa, 524; *Shriner* v. *Craft*, 166 Ala., 146; *Weed* v. *Spears*, 193 N. Y., 289; 13 Corp. Jur., 354, 11 L. R. A., (N. S.), 789, 794; 28 L. R. A., (N. S.), 450.

On the contrary, the question here presented, either, in the final analysis, resolves itself into an offer to buy at a stipulated price on the one side, and an acceptance by delivery on the other; or at most, if there was any obligation to furnish fir logs under the original agreement, into a proposition of having furnished in consideration of a promise of increased compensation a greater benefit than the plaintiff had previously been obligated to furnish under the prior agreement, which all the authorities agree may form a sufficient consideration for a modification by the parties of any contract. Williston on Contracts, Vol. III., Sec. 1828; *Storer* v. *Taber*, 83 Maine, 388; *Copeland* v. *Hewett*, 96 Maine, 525.

As the matter now stands before this court, having in mind that the burden is, in the first instance, on the defendant to establish its defense of *res judicata* by showing identity or privity of parties, 23 Cyc., 1536, C. 3., the issue is, whether upon the evidence in this case, considered in the most favorable light for the plaintiff, a verdict in his favor would not be allowed to stand. When the case is doubtful and when different conclusions as to essential facts might be fairly drawn from the evidence by different minds the case should be submitted to a jury. *Young* v. *Chandler*, 102 Maine, 251.

If the ruling of the court below was based on a failure of consideration for the alleged supplementary agreement, it was an inadvertence through failure of counsel to properly present the facts; if upon the contention that the issue was *res judicata*, or upon accord and satisfaction, we think there was evidence upon these points which should have been submitted to the jury, and the entry must be:

Exceptions sustained.

HAROLD O. UTTERSTROM, PRO AMI

vs.

MYRON D. KIDDER, INC.

Cumberland. Opinion June 6, 1924.

A minor who has disaffirmed his contract, except for necessaries, before attaining his majority, and restored all property received by him not destroyed, may recover such sum as he has paid, and is not liable by way of recoupment for depreciation caused by use or neglect, even if in form ex delicto; such depreciation or damage of the property while in his possession is within the protection afforded him by law against the improvidence and indiscretion of infancy.

A minor is bound by and cannot disaffirm his contract for necessaries, but the term necessaries does not include articles purchased for business purposes even though the minor earn his living by the use of them and has no other means of support. The contract of the plaintiff for the purchase of a truck was not a contract for necessaries.

A minor may disaffirm his voidable contract and recover payments made thereunder provided he return or account for such part of the property received as remains in his possession or under his control in original or substituted form. The plaintiff's duty to restore the consideration received by him was fully met when the defendant repossessed itself of the truck together with all its original equipment not destroyed.

A right to recover for the value of the use of the truck while in the minor's possession, including ordinary depreciation incidental to such use, rests upon contract express or implied, and a plea of infancy would bar a suit thereon unless the contract is duly ratified after the minor attains his majority.

The defendant's claim for the value of the use of the truck while in the plaintiff's possession could not be enforced by a direct suit and cannot be allowed by way of recoupment.

On report. An action of assumpsit by a minor to recover one hundred and fifty dollars paid by him under a conditional sale of an auto truck. On November 1, 1922, the plaintiff, a minor, purchased of defendant a second-hand Reo truck, the purchase price being $335.20, paying of the purchase price $150.00 down, and gave a conditional sale agreement in the form of a lease, securing the balance of the purchase price which was to be paid in monthly installments

of thirty dollars each. The plaintiff used the truck in his business. On December 14, 1922, the first monthly payment not having been paid, the defendant took possession of the truck under the conditional sale agreement for breach of condition and on December 18, served notice of foreclosure on plaintiff, who immediately notified defendant that he disaffirmed the contract, still being a minor, on the ground of his infancy. On August 1, 1923, this action was brought to recover the $150.00 paid down at the time of the execution of the contract. Defendant pleaded the general issue and under a brief statement contended that it should be allowed by way of recoupment for depreciation in value of the truck resulting from use, and for tools and equipment missing. At the conclusion of the evidence, by agreement of the parties, the cause was reported to the Law Court. Judgment for the plaintiff for $150.00 and interest from date of writ and costs.

The case is sufficiently stated in the opinion.

Jacob H. Berman, Benjamin L. Berman and Edward J. Berman, for plaintiff.

G. L. Brooks, for defendant.

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

STURGIS, J. This is an action of assumpsit brought by a minor, by his next friend, to recover moneys paid on account of the purchase of a truck. November 1, 1922, the plaintiff, a sheet metal worker, desiring a truck for use in his business and for miscellaneous home service, purchased a Reo truck from the defendant corporation, agreeing to pay therefor $335.20. He paid down $150.00, and at the same time signed a lease or contract of conditional sale, in which he agreed to pay $30.00 a month and interest until the entire purchase price of the truck was paid. He had used the truck a few times in his business when the deep snow prevented its further operation, and having no garage, he left it standing in his father's yard, unprotected and exposed to the weather. The storage battery which came with the car had given out, and upon being taken down and examined at a local garage, proved worthless and was abandoned. December 14, 1922, the plaintiff having failed to make his December payment under the contract, the defendant repossessed itself of the truck, and four days later served notice of its intention to foreclose

the lease. Immediately thereafter the plaintiff disaffirmed the contract for the purchase of the truck and demanded a return of his initial payment. This suit followed.

The defendant pleaded the general issue, and for brief statement of its defense alleged that the truck was purchased for the purpose of use in the plaintiff's business, and was so used, and urges in argument that the truck is to be regarded as included in the term "necessaries." The defendant further, in its brief statement, sets up a claim of recoupment for the value of the beneficial use of the truck enjoyed by the minor, together with a claim for the amount of the depreciation in its value, due to the minor's neglect to properly house and protect it from the ravages of the winter's storms. A claim for the value of a storage battery and tools originally in the car is also made by the defendant. These contentions constitute the issues to be considered in this case.

A minor is bound by and cannot disaffirm his contract for necessaries such as food, clothing, lodging, medical attendance, and instruction suitable and requisite for the proper training and development of his mind. *Kilgore* v. *Rich*, 83 Maine, 305; *Robinson* v. *Weeks*, 56 Maine, 102. While the term "necessaries" is not confined merely to such things as are required for bare subsistence, and is held to include those things useful, suitable and necessary for the minor's support, use and comfort, it is limited in its inclusion to articles of personal use necessary for the support of the body and improvement of the mind of the infant, and is not extended to articles purchased for business purposes, even though the minor earns his living by the use of them, and has no other means of support. *Ryan* v. *Smith*, 165 Mass., 303; *McCarthy* v. *Henderson*, 138 Mass., 310; *Lein* v. *Centaur Motor Co.*, 194 Ill. A. 509; *House* v. *Alexander*, 105 Ind., 109; 14 R. C. L. 252. The law does not contemplate that a minor shall become the proprietor of a business which involves the making of a variety of contracts. *Merriam* v. *Cunningham*, 11 Cushing, (Mass.), 40. The Reo truck purchased by the plaintiff for use in the business of a sheet metal worker falls within this well-recognized rule.

If a minor receives property during his infancy under a voidable contract, and spends, consumes or destroys it, he may recover back the money he has paid under the contract, though he be unable to place the other party in statu quo, *Boody* v. *McKenney*, 23 Maine, 517; *Neilson* v. *International Text Book Company*, 106 Maine, 106. If,

however, any part of the property received or its substitute remains in the infant's possession or under his control, he must return it or account for it as a condition precedent to his recovery of the amount paid on account of its purchase. *Whitman* v. *Allen*, 123 Maine, 1. Depreciation in the value of the Reo truck, due to the plaintiff's misuse or neglect, is the result of the very improvidence and indiscretion of infancy, which the law has always in mind, and which he who deals with infancy must anticipate. To require the minor to restore the value of such depreciation as a prerequisite to his disaffirmance of the contract and recovery of his payments would be to deprive him of the protection which it is the policy of the law to afford him, and would violate the rule adopted in this State that the minor is not obliged to place the other party in statu quo. This claim arises out of the original contract of conditional sale, and even if in form ex delicto, cannot be allowed by way of recoupment. *Caswell* v. *Parker*, 96 Maine, 40; *Knudson* v. *General Motorcycle Sales Co., Inc.*, 230 Mass., 54.

The defendant's claim to recoup the reasonable value of the beneficial use of the truck while in the minor's possession is untenable. The use itself, including ordinary depreciation incidental to such use, being intangible, cannot be restored. The right to recover the value of such use, if it exists, rests on contract, express or implied, and a plea of infancy would bar a suit thereon unless the contract were duly ratified after the infant attained his majority, as required by R. S., Chap. 114, Sec. 2. A claim cannot be sustained by way of recoupment which could not be enforced by a direct suit.

Our view that neither the value of depreciation nor the value of beneficial use can be recovered from the minor by way of recoupment is in accord with the weight of authority. *McCarthy* v. *Henderson*, 138 Mass., 310; *Gillis* v. *Goodwin*, 180 Mass., 140; *Knudson* v. *General Motorcycle Sales Co., Inc.*, supra; *Hauser* v. *Marmon Chicago Co.*, 208 Ill. App., 171; *Storey & C. Piano Co.* v. *Davey*, 68 Ind. App., 150; *Reynolds* v. *Garber-Buick Co.*, 183 Mich., 157; *Price* v. *Furman*, 27 Vt., 268.

The duty of the plaintiff to restore the consideration received by him was fully met when the defendant repossessed itself of the truck. The storage battery had been destroyed, and no part of the truck or its equipment, including the tools, remained in the minor's possession

or under his control in original or substituted form. We, therefore, think that the plaintiff should recover the amount of his payment under his contract of November 1, 1922.

Judgment for the plaintiff for $150.00 with interest from the date of the writ, with costs.

GEORGE R. PENNELL *vs.* CITY OF PORTLAND.

Cumberland. Opinion June 18, 1924.

The distinguishing features between "office" and "employment" are greater importance, dignity and independence; a more secure tenure; requirement of official oath or bond and liability to account as a public officer for misfeasance or non-feasance and further still to an office is delegated a portion of the sovereign power, which mere employment never embraces.

In the instant case the word "official" as used in Sub-section 2 of Section 1 of the Workmen's Compensation Act may be defined with greater precision. It may fairly be interpreted to mean the incumbent of an office created by statute or valid municipal ordinance.

In applying either test it must be held that the Superintendent of the City Home and Hospital is not an official of the city of Portland.

The Superintendent having received an accidental injury while trimming trees upon the Home grounds is not deprived of relief by reason of being an official. Such work, too, was reasonably incidental to the petitioner's duties, and the accident arose out of his employment.

On appeal. The petitioner, who at the time was Superintendent of the Portland City Home and Hospital, on October 27, 1922, following directions given to him by two members of the Board of Overseers of the Poor, while trimming certain trees on the Home grounds, fell from a ladder used in the work and broke his leg. Counsel for the city of Portland contended that the petitioner at the time of the injury was an official of the city of Portland and not an employee. A hearing was had upon the petition and the chairman of the commission granted compensation of $16.00 per week commencing January

13, 1923, and continuing to June 1st, 1923, for temporary total incapacity, and $15.67 per week commencing June 1, 1923, and continuing under Section 15 of the Act, for partial incapacity. From a decree by a justice of the Supreme Judicial Court affirming the findings of the chairman, counsel for the city of Portland entered an appeal. Appeal dismissed. Decree affirmed.

The case appears in the opinion.

Charles J. Nichols, for petitioner.

H. C. Wilbur, for city of Portland.

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

DEASY, J. In 1922, the petitioner was Superintendent of the Portland City Home and Hospital. To this position he had been elected by the Board of Overseers of the Poor and was subject to its jurisdiction and control. Its printed rules gave him charge of "all matters pertaining to the management of the City Home." Two members of the board directed him to trim certain trees on the Home grounds. Climbing a ladder for this purpose he fell and broke his leg.

The award of compensation to him is challenged by the defendant mainly upon the ground that he suffered his accidental injury while acting as an official of the city of Portland. Sub-section 2 of Section 1 of the Workmen's Compensation Act, defining the term "employee" excepts "officials" of cities and other municipalities.

So far as judicial authorities define the word "office" and distinguish it from "employment" the tests are,—greater importance, dignity and independence; a more secure tenure; requirement of official oath and bond and liability to account as a public officer for misfeasance or non-feasance in office.

State v. *Shannon,* (Mo.), 33 S. W., 1137; *Baltimore* v. *Lyman,* (Md.), 48 Atl., 145; *U. S.* v. *Schlierholz,* 137 Fed., 622; *Throop* v. *Langdon,* 40 Mich., 673.

Another test imposed by some courts including our own is that to an office but not to a mere employment is delegated "a portion of the sovereign power." Opinion of Justices, 3 Maine, 481. *Atty. Gen.* v. *Drohan,* 169 Mass., 534; *State* v. *Mackie,* (Conn.), 74 Atl., 759; *Coms.* v. *Goldsborough,* (Md.), 44 Atl., 1055; *Patton* v. *Board of Health,* (Cal.), 59 Pac. 704.

Applying either of these tests we are led to the same conclusion reached by the Commission. Perhaps it cannot be determined with precision whether the petitioner's position attains the "dignity" and "importance" of an office. But the Superintendent is not independent. He is subordinate to the Overseers. It does not appear that his tenure is certain, or that he is required to take an oath or give a bond. Incumbents of similar positions have been held not liable to prosecution for malfeasance in office. *State* v. *Spaulding*, (Iowa), 72 N. W., 288, 29 Cyc., 1367. In no true sense is any portion of the sovereign power delegated to the superintendent of a poor-house.

But resorting to what we believe to be the legislative intent the word "official" may be defined with greater precision.

True the word "official" and the cognate words "office" and "officer" are often used in a broad sense including officers of a lodge, society, school, &c. But as used in Section 1 of the Workmen's Compensation Act we think that it may fairly be interpreted to mean the incumbent of an office created by statute or valid municipal ordinance.

Tax Collectors, Harbor Masters and Street Commissioners have been held to be public officers. *State* v. *Walton*, 62 Maine, 111; *Goud* v. *Portland*, 96 Maine, 125; *Stephens* v. *Old Town*, 102 Maine, 21. These offices are created by statute. But the position held by the petitioner is not a statutory office. Nor so far as appears has such an office been established by municipal ordinance.

Counsel further contends that the accident did not arise "out of" the petitioner's employment. It is not necessary to determine whether he was bound to obey the orders given him by one or two overseers unconfirmed by the vote of the Board. The Commission did not err as a matter of law in holding that independently of any specific order the work which the petitioner was doing at the time of the accident was within the sphere of his employment. He appears to have had only two assistants, both inmates of the Home, one feeble-minded, and the other "kind of crazy."

Counsel for the city urges that the petitioner should have stood on the ground, confining himself strictly to the duty of superintending and sent one or both of his demented helpers up the ladder to do the work. This argument does not impress the court as being sound.

Trimming trees on the Home grounds was reasonably incidental to the petitioner's work.

The thirty-day notice was rendered unnecessary by knowledge clearly brought home to city officials. The claim of estoppel has no foundation.

Appeal dismissed.
Decree affirmed.

THE RUGGLES LIGHTNING ROD COMPANY *vs.* WILLIS B. AYER.

Penobscot. Opinion June 26, 1924.

A demand in set-off must be pleaded in substance as certain as in a declaration, and for a liquidated sum, or for one ascertainable by calculation. A claim by way of recoupment must be one resulting from a breach of the same contract or transaction as that on which the suit is founded, and not one arising from a new and independent agreement which in no way is a part of the consideration for the original contract.

In this case the alleged agreement is so far independent of the note that either contract could be enforced without a previous or contemporaneous performance of the other.

A defendant may recoup damages arising out of a breach of the same contract or transaction as that sued on, or arising out of one part of a contract consisting of mutual stipulations made at the same time, and relating to the same subject matter, where plaintiff sues on another part of the contract.

On exceptions. An action on a promissory note. Defendant pleaded the general issue and under a brief statement filed an account in set-off and also a claim in reduction of damages by way of recoupment. At the conclusion of the evidence on motion by counsel for the plaintiff the presiding Justice directed a verdict for plaintiff and defendant excepted, and also excepted to the exclusion of certain evidence. Exceptions overruled.

The case is fully stated in the opinion.

Ross St. Germain and Clinton C. Stevens, for plaintiff.

L. B. Waldron, for defendant.

SITTING: CORNISH, C. J., SPEAR, PHILBROOK, DUNN, STURGIS, BARNES, JJ.

BARNES, J. Suit is brought on a promissory note given in part payment, on June 17, 1923, of an account for merchandise sold and delivered in the course of transactions between the parties begun in March or April of the preceding year. Verdict for the plaintiff was directed by the court below and the matter comes to this court on exceptions; first, to the exclusion of testimony as to loss, claimed by way of set-off, and, second, to the direction of verdict.

Pleading in set-off must be in the manner prescribed by statute, R. S., Chap. 87, Sec. 74, "in substance as certain as in a declaration," and, when founded on a contract, for the price of personal estate sold, by the succeeding section, it must be "for a liquidated sum, or for one ascertainable by calculation."

Such evidence as the record discloses shows conversation regarding a contract of sale by the maker of the note in suit, subject a pair of colts, but the pleading in set-off is not for a liquidated sum, the damages not ascertainable, and the evidence offered was properly excluded. So the first exception fails.

By his pleadings, in brief statement, defendant admits giving the note sued on, and alleges that at the time of giving this note he entered into a contract with the plaintiff under which he claims recoupment in this action.

He testifies that when the plaintiff, by Mr. Ruggles, its treasurer, visited defendant's store, in October, 1922, defendant gave a note, a renewal of which is the note in suit, and that plaintiff then and there contracted with defendant to receive at some time in future, when defendant should have decided that he could sell no more of the goods, such goods as the defendant should then have in his possession. Counsel for defendant argues that such sums, if any, as would be due to the defendant from the plaintiff under the executory contract should be charged against the amount due on the note and reduction thereof be had by way of recoupment, and that the court below should have allowed recoupment, to avoid multiplicity of suits.

Such we think is not the law. Where plaintiff loaned money to the defendant, taking a note for the loan, and alleged an executory contract under which plaintiff was to supply merchandise to the

defendant, and where the defendant claimed that the plaintiff broke his agreement by charging prices for the merchandise which were above the market price and excessive, the court refused to allow the defendant to recoup damages for the breach of this executory contract. *Isenburger* v. *Hotel Reynolds Company et al.*, 177 Mass., 456.

In the case at bar the alleged agreement is so far independent of the note that either contract could be enforced without a previous or contemporaneous performance of the other.

The court cannot by way of recoupment allow a claim in reduction of damages which is founded upon an independent and distinct contract or transaction. *Home Savings Bank* v. *Boston*, 131 Mass., 277; *Brighton Five Cent Savings Bank* v. *Sawyer*, 132 Mass., 185.

A defendant may recoup damages arising out of breach of the same contract or transaction as that sued on, or arising out of one part of a contract consisting of mutual stipulations made at the same time, and relating to the same subject matter, where plaintiff sues on another part of the contract; but, taking the evidence of the defendant, as to the giving of the original note and the alleged agreement of the plaintiff to take back at the close of the business relations between the parties such merchandise as the defendant had left upon his hands, still the latter would be a new and independent agreement and in no way a part of the consideration for the original contract; and damages sustained by its breach would not be a proper matter of recoupment. *Gilchrist* v. *Partridge*, 73 Maine, 214; *Winthrop Savings Bank* v. *Jackson*, 67 Maine, 570.

Hence the direction of the verdict below was proper, and the judgment must be,

Exceptions overruled.

WILLIS O. MAHONEY ET AL. *vs.* FRANCIS J. AYOOB ET ALS.

Aroostook. Opinion June 27, 1924.

An official certificate must be signed by the officer himself in his own hand, or by making his mark, as it is the signature which authenticates it and gives it official character.

A capias or certificate issued by a disclosure commissioner under the provisions of R. S., Chap. 115, which requires that the same shall be issued under the hand and seal of the commissioner, is not the certificate or capias required by the statute if the commissioner impresses his name thereon with a facsimile rubber stamp.

It is true that under rules of construction, R. S., Chap. 1, Sec. 6, Par. XX., the words "in writing" and "written" include printing and other modes of making legible words, but the same rule requires that when the signature of a person is required he must write it or make his mark. This is not the general rule applicable to contracts or instruments between private persons except where a signature is required by statute. This rule is manifestly intended to reach the case of public officers required by the statute to sign official documents.

On exceptions. An action on a six months' bond, so-called, provided under R. S., Chap. 115, Sec. 49. The plaintiffs recovered judgment against one of the defendants, Francis J. Ayoob, the principal named in the bond, on which judgment execution issued and defendant was duly cited to disclose before a disclosure commissioner. The debtor was defaulted in the proceedings before the disclosure commissioner who indorsed on the execution the fact that the debtor had failed to obtain the benefit of the oath provided by statute, and also issued a capias and annexed it to the execution, which certificate and capias were signed not by the commissioner in his own hand, but with his facsimile signature by the use of a rubber stamp. A renewal or second execution was issued by the clerk of the court from which the original execution was issued, indorsed as provided by statute, on which renewal execution the debtor was arrested and gave the six months' bond in suit. The case was submitted to the presiding Justice on an agreed statement reserving exceptions, who ruled that the capias issued by the disclosure commissioner,

signed with his facsimile signature, impressed thereon with a rubber stamp, was not a capias issued under his hand and seal under Sec. 38, Chap. 115 of the R. S., to which ruling plaintiff excepted. Exceptions overruled.

The case is fully stated in the opinion.

A. B. Donworth, for plaintiff.

Powers & Mathews, for defendants.

SITTING: CORNISH, C. J., PHILBROOK, DUNN, STURGIS, BARNES, JJ.

PHILBROOK, J. This is a suit upon a bond. The plaintiffs, in a prior suit, having obtained judgment and execution thereon against the principal named in the bond, cited him before a disclosure commissioner under the provisions of R. S., Chap. 115.

Section 38 of said Chapter provides that if, upon disclosure, "the debtor fails to obtain the benefit of the oath provided for in Section fifty-five, the magistrate shall, under his hand and seal, indorse a certificate of that fact upon the execution in force at the time of said disclosure, and a copy of said certificate shall be indorsed on every subsequent execution issued on said judgment, or on any judgment founded thereon, and such subsequent execution shall run against the body of said debtor, where the original debt, exclusive of costs, exceeds ten dollars and not otherwise. The magistrate shall also issue a capias under his hand and seal, and annex the same to said execution in force at the time of said disclosure, and the debtor may be arrested and imprisoned on said capias and execution, the same as upon executions issued in actions of tort, where the original debt, exclusive of costs, exceeds ten dollars and not otherwise."

In the case at bar the principal named in the bond failed to obtain the benefit of the oath and the disclosure commissioner indorsed that fact upon the execution then in force and issued a capias which was annexed to the same execution. Instead of writing his name he used a rubber stamp facsimile of his signature upon both certificate and capias. A subsequent execution, indorsed as provided by statute, was issued by the clerk of the court from which the original execution was issued. Upon this latter execution arrest was made. Thereupon the debtor gave the so-called six months' bond provided for in R. S., Chap. 115, Sec. 49, and this bond became the subject of suit in the instant case.

In the court below the case was heard by the sitting Justice, without jury, upon agreed statement which contained a provision "that the plaintiff is to prevail in this case unless one of the two following defenses prevail. First; the defendant claims that the fact that the certificate on the first execution was signed by the disclosure commissioner with a rubber stamp signature defeats the suit on the bond. Second; the defendant claims that the fact that the bond was not filed until more than six months after it was given, defeats the suit. This case to be heard by the court with the right of exceptions."

The sitting Justice ruled "that the capias issued by the disclosure commissioner, signed with his facsimile signature, impressed thereon with a rubber stamp, is not a capias issued under his hand and seal under Sec. 38, Chap. 115, R. S., 1916."

To this ruling the plaintiff took exceptions and the case is thus before us. Under the terms of the agreed statement, the ruling of the justice in the court below, and the exception thereto, the only question here relates to the use of the rubber stamp. The date of the filing of the bond is not under consideration.

As already seen, the statute requires the disclosure commissioner to indorse the certificate and issue the capias "under his hand and seal." The phrase "under his hand" in legal parlance is often used to donate handwriting or written signature. *Salazar* v. *Taylor,* 18 Col., 538; 33 Pac., Rep. 369. *Bouvier Dict. Rawle's Revision,* Volume I., Page 930. It follows that in our statute the signature of the disclosure commissioner should be handwriting or written signature. An official certificate not signed by the officer himself in his own hand is not a certificate. It is the signature which authenticates it and gives it its official character. This is settled law. *Opinion of the Justices,* 116 Maine, Page 578, and cases there cited.

It is true that under Rules of Construction, R. S., Chap. 1, Sec. 6, Par. XX., the words "in writing," and "written" include printing and other modes of making legible words, but the same rule requires that when the signature of a person is required he must write it or make his mark. Commenting in *Chapman* v. *Limerick,* 56 Maine, 390, our court has said "this is not a general rule, applicable to contracts or instruments between private persons, except where a signature is required by statute. It was very manifestly intended to reach the cases of public officers required by the statute to sign official documents."

We see no error in the ruling of the sitting Justice and the mandate will accordingly be,

Exceptions overruled.

DOMINION FERTILIZER COMPANY *vs.* JAMES G. LYONS.

Aroostook. Opinion July 1, 1924.

The construction of a written contract is a question of law for the court.

In this case the presiding Justice correctly construed the written contract as one of agency.

The plaintiff's son as agent had no legal right to sell the property to pay his own old debts without the assent of the plaintiff.

The jury found that no such assent was given, and their finding is justified by the evidence.

The exclusion of certain alleged conversation between the father and son in the absence of any representative of the plaintiff was proper, as res inter alios acta.

On exceptions and motion. Assumpsit to recover the purchase price of forty and one half tons of fertilizer, liability for ten and one half tons of which was admitted. The contention was as to whether the plaintiff sold the fertilizer in question to the son of defendant, or consigned it to him as its agent, the defendant contending that his son sold to him the thirty tons of fertilizer to pay him an old debt he owed to him. Defendant excepted to the exclusion of certain evidence and filed a general motion for a new trial after a verdict for the plaintiff for the full amount was rendered by the jury. Motion and exceptions overruled.

The case is sufficiently stated in the opinion.

John B. Roberts and Powers & Mathews, for plaintiff.

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

SITTING: CORNISH, C. J., PHILBROOK, DUNN, WILSON, STURGIS, BARNES, JJ.

CORNISH, C. J. This is an action of assumpsit on an account annexed in which the plaintiff seeks to recover the purchase price of

forty and one half tons of fertilizer. The amended account contains three items. As to the first item, a charge for ten and one half tons of fertilizer, the liability of the defendant is admitted. The sole issue is that of the plaintiff's right to recover for the remaining two items in the amended account, aggregating thirty tons. The verdict was for the plaintiff in the sum of $3,049.62, the full amount claimed, and the case is before the Law Court on defendant's exceptions and general motion.

The plaintiff is a fertilizer company with its main office at St. Stephen, N. B., the defendant a farmer in Caribou, Maine.

On March 12, 1921, Mr. Kelley, the plaintiff's representative in Caribou, entered into a written contract with William M. Lyons, the son of the defendant, whereby William became the agent of the plaintiff to sell for it sixty-five tons of fertilizer under the terms and conditions specified in the contract, which was signed by both parties. There can be no question as to the nature of this written instrument. It was an agency contract pure and simple. For a valuable consideration the company agreed to ship on consignment to the agent the agreed quantity and the latter agreed to receive the consignment and to put forth every effort to sell the same, the agent personally guaranteeing the sales. The title to the fertilizer was to remain in the plaintiff until sold by the agent in accordance with the contract. The duties and obligations of the agent are set forth in great detail and at the bottom is this acceptance: "The undersigned accepts the appointment as agent under the foregoing contract and agrees to its terms and conditions. . . . ." This was signed by Wm. M. Lyons.

Of the quantity consigned thirty tons were delivered by order of Wm. Lyons to his father, the defendant, and were used by the latter on his farm in the season of 1921. To collect the price of this quantity, along with the other ten and one half tons concerning which there is no controversy, this suit was brought.

The defendant admitted the receipt and use of these thirty tons, but claimed that while the written contract purported to be one of agency consignment, it was in reality an absolute and unqualified sale to the son, and the latter as the purchaser had title thereto and therefore had the right to transfer and did transfer it to the defendant in part payment of an old debt which the son owed to his father for fertilizer furnished and paid for by the father in the previous

year, 1920, and for which the son had never repaid the father; in other words that the son was taking care of an old debt to the father by delivering to him the thirty tons of phosphate just received by him from the plaintiff in 1921. This was done, as the defendant further claimed, under an oral understanding and agreement with the company's representative, Mr. Kelley, who fully assented to the transaction. These contentions raised an issue of fact.

The issue of law involved the legal construction of the written contract. That was a matter for the presiding Justice and he ruled squarely that it was a contract of agency, a proposition which admits of no legal doubt. One of defendant's exceptions relates to this ruling, but there is no merit in the exception. The fact that all the contracts entered into by the company were in substantially the same form does not affect or modify their nature. Even the contract for the ten and one half tons sold directly to the defendant was of the same tenor. The reason undoubtedly is a protective one on the part of the company, because the agent is made personally liable in case of bona fide sales as he guarantees the sales, and further the fertilizer in each case remains the property of the company until sold in accordance with the terms of the contract.

In argument the counsel for defendant seeks to inject an element of fraud in the execution of the contract, but no such claim was evidently made at the trial, because the presiding Justice in his charge stated the situation as it then appeared as follows: "Now there is a written contract. It does not appear that there was any fraud in connection with it. It is claimed it was not understood, but it does not appear that there was any fraud, and I instruct you that that written contract is binding upon the plaintiff and upon William M. Lyons, and that by virtue of that contract he became not the purchaser but agent for the sale." If there was any claim of fraud this statement by the court should then and there have been challenged. But obviously there was none, no correction was suggested, and it is too late to raise it now even if there were facts to justify the allegation as there are not. If the written contract was not understood by the agent it was his own fault. He says he did not take the pains to read it. It is perfectly plain and unambiguous and it does not lie in his mouth now to complain of its contents.

Such being the situation the court further instructed the jury that William M. Lyons being an agent had no right to sell the fertilizer

to pay his own old debts. No exception was urged against this as a proposition of law. It is conceded to be correct. But the defendant says there was a distinct oral agreement between the representative of the company and the son, and the latter was authorized to dispose of the thirty tons to his father, not for cash but in part payment of his own fertilizer debt of the previous year. This alleged collateral agreement was a question of fact for the jury, it was specifically submitted to them, and they decided against the existence of any such agreement and in favor of the plaintiff's contention. This finding is attacked by the defendant's motion, but the attack is feeble. The only evidence in its support is the testimony of the son, while the representative of the company unqualifiedly denies it. The circumstances corroborate the plaintiff. When the contract was executed the son made and signed a property statement, in which he stated: "My fertilizer for 1920 is all paid," and again under the heading: "I owe on open accounts" is the answer "Nothing on open accounts." These statements are hardly consistent with the making of a collateral agreement based upon the unpaid fertilizer bill of 1920, which must still have been an open account, whether owed to his father or to the company. Moreover, the idea that the plaintiff's representative would have been willing to deliver thirty tons of fertilizer of the value of $2,170 to the agent to be turned over to the father towards the son's old debt, draws heavily upon credulity. It would be in the nature of a gift to a stranger.

The only other exception that is pressed is based upon the exclusion of a certain conversation alleged to have taken place between the son and father wherein the son promised to secure thirty tons on his own credit and deliver it to the defendant to repay him an old debt. This was a matter between themselves. Mr. Kelley was not present, nor was any other representative of the company. It was clearly res inter alios acta and properly excluded.

In conclusion the court is of opinion that there was no error on the part of either the presiding Justice or of the jury, and that substantial justice is represented in the verdict.

Motion and exceptions overruled.

EVERETT D. CALL *vs.* MYRA L. GARLAND.

Somerset. Opinion July 3, 1924.

The credit of an estate of a deceased person may be pledged for all reasonable expenses incurred in providing a decent burial; not so for a monument or gravestone, though a judge of probate may authorize an expenditure for such purposes to be allowed from the estate, or decree an allowance from the estate to reimburse for such expenditures made without authority from the probate court.

In the instant case the defendant ordered the monument in question over her personal signature and not as administratrix.

Had she in her capacity as administratrix ordered the monument she would in the first instance be liable personally, though the probate court might allow reimbursement from the estate.

In this case there was a clear and complete contract between the parties and there was no subsequent change or modification thereof by them made.

On exceptions. An action of assumpsit to recover the purchase price of a monument. The defendant, who at the time was the administratrix of the estate of her husband, on December 5, 1922, ordered in writing the monument in question from the plaintiff and it was delivered and set at the grave of her husband. The contention of the plaintiff was that the defendant personally ordered the monument and thus became personally liable for it, while the defendant's position was that she ordered it in her capacity as administratrix, that she was not liable personally, and that the plaintiff must recover from the estate if at all. At the conclusion of the evidence the presiding Justice directed a verdict for the plaintiff and defendant excepted.

Exceptions overruled.

Harry R. Coolidge, for plaintiff.

Harvey D. Eaton, for defendant.

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

DUNN, J. When this defendant was administering her husband's estate, she ordered the monument that marks his grave, the agreement between herself and the plaintiff being signed by the defendant as "Mrs. George H. Garland."

On the day of the signing, and before the plaintiff had left the defendant's house, the defendant said to the plaintiff, bill my husband's estate for the burial vault and other things you have already furnished and for the monument you are to furnish, for I want the bill that way. The bill for the vault, rendered several weeks before, was handed to the plaintiff who added the charge for the monument, and passed the bill back to the defendant.

The monument was made and set. But the defendant did not pay for it, insisting that there was no promise enforceable against her personally.

Defendant has exception to the directing of the verdict for the plaintiff.

A charge for a monument or gravestone is not one for which the law pledges the credit of the estate that a decedent owned. Allowances may be made by probate judges to administrators therefor. R. S., Chap. 68, Sec. 61. But the purport of the statute is the granting of judicial leave so to spend money, or the finding, when the administrator files his account, that an expenditure, previously undecreed, is reimbursable. Massachusetts, whose statute is similar to ours, has determined those points. *Sweeney* v. *Muldoon*, 139 Mass., 304; *Durkin* v. *Langley*, 167 Mass., 577; *Mayo* v. *Skinner*, 149 Mass., 375; *Dudley* v. *Sanborn*, 159 Mass., 185.

That one who is a fiduciary may contract personally is manifest. An administrator, by attempting to make the estate he represents a party to an executory contract, upon a new and independent consideration, though the contract be in the interest and for the benefit of the estate, would create personal liability. *Davis* v. *French*, 20 Maine, 21; *Baker* v. *Fuller*, 69 Maine, 152; *Carter* v. *Bank*, 71 Maine, 448; *Wilton* v. *Eaton*, 127 Mass., 174; *Rosenthal* v. *Schwartz*, 214 Mass., 371; *Elisberg* v. *Simpson*, 173 N. Y. S., 128. Even where the subject-matter is gravestones, or legal services, the rule remains the same. *Ferrin* v. *Myrick*, 41 N. Y., 315; *Eaton* v. *Walker*, 244 Mass., 23.

It is competent for an administrator to stipulate, by words of exemption, against personal liability. Williston on Contracts, Section 311; *Grafton Bank* v. *Wing*, 172 Mass., 513. In such event no contract would arise for lack of a contracting party. And, to instance further, in Prof. Williston's words, "though no contract with the estate, as such, is possible, it is possible that the executor shall agree

to perform only to the extent that the assets of the testator's estate permit, and that the person with whom the executor contracts shall accept such a limited promise in return for his own promise or performance." Williston, supra.

Only what was done is valuable to know.

First, with the preliminary entries chasing each other in order and coherence down the filled-out printed form, the defendant engaged to pay personally, and stated that fact just as clearly as meaning could be conveyed in this earnest world by human speech.

Then, as the defendant would have it, by the request for and the billing of the monument, consequence or value was taken from her promise, or at least that promise was made to drift in the underworld of indeterminates, where, in scouting for meaning, sidelights thrown upon the loose ends of expressed thoughts might reveal signification differently to the differing minds of different men.

Without being understood, all words are vain. But the defendant's words have this merit, they can be understood in the sense that the trial judge supposed them to mean, and not in congruence in more than that one sense.

There is no pretense now, in difference from the trial, that the estate was substituted for the defendant as a party to the contract. Never was it asserted that the agreement was to perform only to the extent of the assets. And there was utter want of evidence tending to show, that the minds that met and made the contract, met again and made that contract as nugatory as if it never had been, by removing the defendant as one of the but two contractors.

The evidence and the deducible inferences showed this: For the burial vault and the sexton's services the estate had not paid the submitted bill. The charge for the monument, the administratrix would undertake to justify. All those matters were for attention in the probate court. And the defendant, wishing for evidence that might lie close before the eye of that court like a level and open road, said bill the charges together against the estate. The plaintiff did. And prompt compliance followed spoken words without affecting the agreement to pay for the memorial to the dead.

There was abundant warrant for directing the verdict.

Exceptions overruled.

LEVONIA B. BARNES, In Equity

vs.

FRED W. HECHLER et al.

Aroostook. Opinion July 3, 1924.

A sheriff's sale on an execution issued on a judgment recovered against debtors jointly, on a levy, of different interests of such debtors in and to different parcels of real estate, owned by them in severalty, is null and void.

The right of a judgment debtor to redeem from such a sale as to his interest in one of the parcels sold, independent of the interest in another parcel of another debtor jointly liable on the execution, such interests being held in severalty, would be wrested from him.

Such debtor desiring to redeem the parcel sold in which he had an interest in severalty should be permitted to be able to ascertain from the deed of the sheriff or from his return of the sale, the amount of money he must pay to effect a redemption and regain his interest sold.

On appeal. A bill in equity seeking to remove an alleged cloud upon the title of complainant in certain real estate. The complainant owned an equity of redemption in certain real estate and her husband, Austin A. Barnes, had an attachable interest, under a bond for a deed, in certain real estate adjoining that of his wife, the complainant. Defendant, Fred W. Hechler, obtained a judgment against the complainant and her husband jointly, and levied on an execution issued on said judgment on the interest of the complainant, the right of redemption in the first parcel, and on the interest of her husband under a bond for a deed in the second parcel, the interest of each being several and not joint, and sold at a sheriff's sale the interests of both in the two parcels together at one sale and not separately. Complainant contended that such sale was not a valid sale for the reason that the interest of each was owned in severalty and under the right of redemption each should be able to know how much must be paid in either case to redeem from the sale and regain the title.

After a hearing on the bill, answer, replication and evidence, the sitting Justice found for the complainant and sustained the bill and

defendants appealed. Appeal dismissed, with an additional single bill of costs. Decree below affirmed.

The case is sufficiently stated in the opinion.

Powers & Mathews, for complainant.

A. S. Crawford, Jr. and P. E. Higgins, for respondents.

SITTING: CORNISH, C. J., PHILBROOK, DUNN, SPEAR, STURGIS, BARNES, JJ.

DUNN, J. An appeal from the decree sustaining the bill to remove what was alleged and found to cloud the plaintiff's title to real estate.

The precise question in this case is, whether, upon execution against joint debtors, their several interests in separate but contiguous and unitedly occupied lands, may be levied and sold for one price, validly.

The point does not appear to have been investigated in the cases heretofore reported by this court nor to have been decided in any other jurisdiction where the statutory provision is like ours. R. S., Chap. 81, Sec. 32. It has been held that distinct mortgage equities belonging to one debtor ought to have been sold, not together for a single sum, but apart. *Smith* v. *Dow,* 51 Maine, 21; *Fletcher* v. *Stone,* 3 Pick., 250. The cited cases settle that a debtor may effect redemption by piecemeal, that he may buy back one equity aside from any other. Accepting the reasonings as good and sufficient, the resemblance between the situations is close.

This defendant, Hechler, held an execution issued on a judgment he had recovered against the present plaintiff and her husband. The soundness of that judgment is unchallenged. For the purpose of satisfying the execution, the equity of this plaintiff to redeem real estate from mortgage was levied, and there was levy, also, on the enforceable right which the other debtor had, in virtue of a bond, for the conveyance of a lot adjoining that of the mortgage, the two parcels comprising one farm.

The sheriff offered the equity for sale, but no one bid. Nor was there any bidder when he put the other property up. Then the sheriff presented the interests in or to the mortgaged land and the bonded lot as one physical thing, and thus sold and deeded them for an entire or gross sum to the judgment creditor, who conveyed to the other defendant.

That first sale was void, and the plaintiff's equitable ownership was unaffected and unimpaired thereby.

The debtors owed jointly but they owned in severalty. What they owned was taken and applied on the execution, but to no purpose. A sold-out debtor may make redemption. R. S., Chap. 81, Sec. 41. And hence it was but compatible with her right, that this plaintiff should have been left in position to have ascertained, from the return of the sale or from the deed, what money it would cost to regain that which was sold from her on compulsory process, and that primarily involved selling her property independent of the other.

The appeal is dismissed with an additional single bill of costs and the decree below is affirmed.

FRANK L. FERREN *vs.* S. D. WARREN COMPANY.

Cumberland. Opinion July 12, 1924.

The obligation on the part of an employer to pay for medical aid implied from his becoming an assenting employer is enforceable by petition to the Industrial Accident Commission in behalf of the employee, and not by common law action. But the employer may bind himself by express contract to pay medical bills. Such contract is enforceable through the common law courts. No commission decree is necessary to give binding force to it. Unless the contract expressly so provides, such decree cannot limit the extent of the obligation.

In the instant case the decree of the commission was properly excluded. That decree was the result of a proceeding between the employee and the employer. The plaintiff in this case was not a party to it. As between the employee and the defendant it determines the extent of liability for medical aid. It does not effect any obligation which arises from the express contract between the plaintiff and the defendant.

Except under peculiar circumstances not shown to exist in the pending case, the statute of frauds is interposed too late when set up for the first time in a motion for directed verdict.

On motion and exceptions by defendant. An action by the plaintiff, a physician, to recover for medical services rendered under an express contract. One William Raymond, while in the employment of defendant, was injured through an accident arising out of said

employment. In this case the plaintiff contended that the defendant was not only liable for such medical aid rendered as determinable by the Industrial Accident Commission, under an implied contract as an assenting employer, but was liable for medical services rendered by plaintiff to the employee under an express contract or promise to pay the plaintiff for such services.

The case was tried to a jury and at the close of the evidence counsel for the defendant moved for a directed verdict for defendant, which was denied by the presiding Justice and exceptions taken, and a verdict for plaintiff for $411.76 was rendered, and defendant filed a general motion for a new trial. Motion overruled. Exceptions overruled.

The case is fully stated in the opinion.

Thaxter & Holt, for plaintiff.

Bradley, Linnell & Jones, for defendant.

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

DEASY, J. In 1921, one William Raymond, while employed by the defendant was injured through an industrial accident arising out of said employment.

Under Section 10 of the Workmen's Compensation Law the defendant, without contract except as implied from its status as an assenting employer, was bound to furnish, or pay for, medical aid to an extent determinable by the Industrial Accident Commission. This implied obligation of the employer is enforceable exclusively through petition to and decree of the Commission.

But the employer may bind himself by express contract to pay medical bills. Such contract is enforceable through the common law courts. No Commission decree is necessary to give binding force to such a contract. Unless the contract expressly so provides such decree cannot limit the extent of the obligation.

In this case the jury has found that the defendant employed the plaintiff, a physician, to attend its disabled employee, and expressly and unqualifiedly undertook to pay for such services. No question is raised as to the rendition of services or the charge therefor. Evidence was adduced tending to support the jury's findings. The evidence is not manifestly erroneous.

Nor is there any merit in the exceptions; the defendant through its exceptions relies on the doctrine of election of remedies. But the only remedy that the plaintiff has elected is the present suit. The petition to the Commission was filed by Raymond. That remedy was not open to the plaintiff. He did not attempt to invoke it.

The decree of the Commission was properly excluded. That decree was the result of a proceeding between the employee and the employer. The plaintiff in this case was not a party to it. As between Raymond and the defendant it determines the extent of liability for medical aid. It does not affect any obligation which arises from the express contract between the plaintiff and the defendant. "The Workmen's Compensation Act deals exclusively with matters growing out of the relation of employer and employee. The provisions of the act are binding upon employers and employees electing to be bound by them and upon none others. All except employers and employees are strangers to the act, and their usual lawful rights and remedies are unaffected by it. . . . . The physician rendering such services is no more deprived of his right to resort to the courts for the establishment and collection of his claim than though the services had been rendered to the employer personally." *Noer* v. *Lumber Company*, 170 Wis., 419, 175 N. W., 784. See also to same effect, *Casualty Co.* v. *Industrial Commission*, 87 Okla., 92; *Collins* v. *Joyce*, 146 Minn., 233; *Augustus* v. *Lewin*, 224 Ill. App., 376; *Feldstein* v. *Motor Co.*, 187 N. Y. S., 417.

Defendant's counsel in his motion for a directed verdict, though not by his pleadings, sets up the statute of frauds. But the claim of the plaintiff is that the defendant's promise to pay for the plaintiff's services was an original and not a collateral promise. There is evidence tending to support this claim. The statute of frauds applies only to collateral promises, 27 C. J., 132.

Moreover, the statute of frauds was not pleaded. Except under circumstances not shown to exist in the pending case the statute is interposed too late when set up for the first time in a motion for directed verdict. *Lawrence* v. *Chase*, 54 Maine, 199.

Motion overruled.
Exceptions overruled.

STATE OF MAINE *vs.* DAN SOBEL.

Knox. Opinion July 12, 1924.

In a mere statement of venue contained in a complaint one place may be alleged and another proved provided both are within the jurisdiction of the court.

In a search and seizure proceeding the complaint must contain a special designation of the place to be searched. In this case the place is clearly designated. The fact that the venue is laid in one town and the place to be searched is described as in another, both being in the same County, is immaterial.

On exceptions. A search and seizure process. The respondent was tried to a jury and found guilty and his counsel filed a motion in arrest of judgment alleging that the complaint was fatally defective in that the premises to be searched were stated therein to be in Camden, while the venue was laid therein in Rockland, which motion was overruled and respondent excepted. Exceptions overruled.

The case is stated in the opinion.

Z. M. Dwinal, County Attorney, for the State.

Oscar H. Emery, for the respondent.

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

DEASY, J. Search and seizure process. In the complaint the premises to be searched are stated to be in Camden. The venue is laid in Rockland. The respondent contends that this creates a fatal defect. Not so. As required by the Constitution (Article I., Section 5) and by the Statutes of the State (R. S., Chap. 127, Sec. 29) the complaint contains a "special designation of the place to be searched." The description is so clear as to leave no doubt as to the place intended. The laying of venue is no part of such designation. The fact that it names another place in the same County is immaterial. It is well settled that in a mere statement of venue one place may be

alleged and another proved, provided that both are within the jurisdiction of the court. *State* v. *Mahoney*, 115 Maine, 256, 14 R. C. L., 181; *Commonwealth* v. *Tolliver*, 8 Gray, 386; *Commonwealth* v. *Lavery*, 101 Mass., 208; *Commwealth* v. *Snell*, 189 Mass., 17; *Ledbetter* v. *United States*, 170 U. S., 606.

Exceptions overruled.
Judgment for the State.

RANSFORD W. SHAW, ATTORNEY GENERAL
on relation of Joseph Amedee Arsenault by next friend, Petitioner for Writ of Mandamus

vs.

ALFRED B. SMALL ET ALS.

Cumberland. Opinion July 22, 1924.

The word guardian when used in statutes ordinarily signifies guardian appointed by the Probate Court, but the word does not necessarily mean Probate Guardian. It may be used in its broader sense as "a person who legally has the care of the person or property or both of another, incompetent to act for himself."

This case involves the meaning of the word "guardian" as used in R. S., Chap. 16, Sec. 30, providing that "Every child . . . shall have the right to attend the public schools in the town in which his parent or guardian has a legal residence." Joseph A. Arsenault, the boy involved in this case, is about thirteen years of age and a ward of the State. By due court proceedings he was placed in custody of the State Board of Children's Guardians. In performance of its duty the board placed the boy in the care of Susan Walsh Whalen, a legal resident of Yarmouth, with whom in that town he has since lived. Because the boy's parents do not reside in Yarmouth and because he has no probate guardian, the school officials of that town denied him the privilege of the free public schools of the town.

The care and the custody of the boy was given to Mrs. Whalen by the State. She has the right to his custody as against the boy's parents and against all comers except the State itself. She stands toward the boy in loco parentis. In the sense in which the word is used in R. S., Chap. 16, Sec. 30, she is the child's guardian.

It is also claimed that the boy was legally expelled under R. S., Chap. 16, Sec. 38. To expel a pupil under that section requires a proper investigation. The case fails to disclose any such investigation.

On exceptions. A petition for mandamus brought by the Attorney General of the State, on relation of Joseph A. Arsenault, by his next friend, Susan Walsh Whalen against the Superintending School Committee of the town of Yarmouth, and Herbert L. Young, Principal of the grammar grades of the public schools of said Yarmouth, praying that a writ of mandamus issue commanding them to restore and reinstate the said Joseph A. Arsenault, a minor thirteen years of age, to the grammar grade of the public schools of said Yarmouth, from which he had been excluded by said board. The school officials contended that because the boy's parents did not reside in Yarmouth and further because he had no probate guardian, the privilege of the free public schools of the town should be denied him.

After a hearing on the petition the alternative writ was ordered and issued, and the respondents filed their return to which the petitioner demurred and the presiding Justice sustained the demurrer and adjudged the respondents' return and answer insufficient and ordered peremptory writ to issue, and respondents excepted. Exceptions overruled. Peremptory writ to issue.

The case is sufficiently stated in the opinion.

Frank H. Haskell, for petitioner.

Bradley, Linnell & Jones and William B. Nulty, for respondents.

SITTING: CORNISH, C. J., PHILBROOK, DUNN, DEASY, STURGIS, BARNES, JJ.

DEASY, J. Joseph Arsenault, the relator, a boy about thirteen years old, was excluded from the public schools of Yarmouth by the respondents, school officials of said town. Upon petition therefor an alternative writ of mandamus was issued directing the respondents to reinstate the relator, or show cause for failure to do so. Their return undertaking to show cause was on demurrer held insufficient. The case comes to this court on exceptions.

Joseph Arsenault is a ward of the State. By due court proceedings he was committed to the custody of the State Board of Children's Guardians. In performance of its duty the board placed the boy in

the care of Susan Walsh Whalen, a legal resident of the town of Yarmouth and since February 3, 1922, he has made his home with her in that town. He was admitted to the primary school of the town, promoted to the grammar grade and continued as a pupil until January 18, 1924, when he was excluded from the schools. The relator subsequently, through Mrs. Whalen, his custodian, applied for reinstatement. This request was summarily refused.

R. S., Chap. 16, Sec. 30 reads in part: "Every child between said ages (five and twenty-one years) shall have the right to attend the public schools in the town in which his parent or guardian has a legal residence." School officials may in their discretion admit others, but only under the section above quoted is the admission of pupils made obligatory.

The parents of the relator have no legal residence in Yarmouth and had none at time of the exclusion. He had and has no probate guardian. If the word "guardian" must, as is contended, be strictly construed to mean a guardian appointed as such by a court, the respondents would prevail. But the word is not to be thus interpreted.

The word "guardian" as used in statutes usually signifies probate guardian. The context ordinarily shows this and no other to be the meaning. Sometimes it is not so used as for example in the statute creating the State Board of Children's Guardians. The word is employed in different senses. At common law the father was denominated the infant's "guardian by nature" or as more commonly expressed "natural guardian." 12 R. C. L., 1105. Our statute in effect makes the mother joint natural guardian with the father. R. S., Chap. 64, Sec. 44. To the natural guardians the law commits the child's care and custody, even if he has a guardian appointed by the Probate Court. The probate guardian as such (and other than in exceptional cases) has to do only with the ward's property. R. S., Chap. 72, Sec. 3.

The Legislature doubtless intends that each child in the State shall have the legal right to attend some free public school. In some States the residence of the child is made the determining factor. Here it depends upon the residence of parent or guardian. The duty of this court is to determine the meaning of the word "guardian" when used in this connection and for this purpose.

Article 8 of the Maine Constitution reads: "A general diffusion of the advantages of education being essential to the preservation of the rights and liberties of the people; to promote this important object, the Legislature are authorized, and it shall be their duty to require, the several towns to make suitable provision, at their own expense, for the support and maintenance of public schools."

It is to give effect to this mandate of our fundamental law that elementary education is made universal and compulsory. As a necessary corollary the Legislature intended that free public school privileges should be somewhere open to all children living in any town in the State. The respondents contend that when the Legislature undertook to determine what public school each pupil could attend as a matter of right, it intentionally omitted orphan children without probate guardians. They argue that the law must be so construed as to exclude from free school privileges every abused and neglected child who has been by the State, the super-guardian of all children, removed from the demoralizing influences surrounding him. This would be to deny the discipline and training of schools to those having the greatest need of it. It is no answer to say that children may be put in homes in the same town with the parents. In most cases this would be impracticable and would defeat the very purposes of the Act.

But the defendants must prevail notwithstanding the incongruities involved if the word guardian must be held to mean a guardian appointed as such by a court. This, however, is not the necessary meaning. No authority that has been called to our attention so holds.

Every dictionary defines "guardian" either precisely or in substance thus: "A person who legally has the care of the person or property or both of another, incompetent to act for himself." This definition applies to Mrs. Whalen. The care of the relator was given her by authority of the State. As against his parents, as against all the world, except the State, she is entitled to his custody. By decree of court the rights of the natural guardians have been extinguished. To their rights of care, custody and protection, Mrs. Whalen has succeeded and for the time being possesses and exercises. She stands toward the relator in loco parentis.

The relator's name was included in the list certified by the town officials to the State Superintendent of Public Schools.

The share of the State school fund received by Yarmouth was in part based on this list. The officials did right in including the relator's name in their enumeration. The statute requires the "leaving out" of certain persons of school age who are within the town. But children circumstanced as was the relator are not required to be left out. His name was properly included in the certified list. No estoppel was created as argued by counsel upon authority of cases construing other and differing state statutes. But does the Legislature intend to distribute the state school fund among towns in respect to children not entitled to share in its benefits? We think not.

Mrs. Whalen having control of the relator is made by the literal language of the statute subject to a fine or imprisonment if she does not cause him to attend school. R. S., Chap. 16, Sec. 66.

It is not possible that the law means to lock the schoolhouse door against her, and punish her for not entering. If the boy is not entitled to attend the school, cases like this must be impliedly excepted from the above cited penal statute. We believe that there is no such implied exception. No authority that we are aware of is opposed to the conclusion which we have reached.

Eminent courts hold that statutes relating to public schools should receive a liberal construction in aid of their dominant purpose which is universal elementary education. *McNish* v. *State* (Neb.), 104 N. W., 186. *State* v. *Thayer*, (Wis.), 41 N. W., 1014. *Yale* v. *School Dist.*, (Conn.), 22 Atl., 295. The Nebraska Statute is in all essentials like that of Maine. The domicile of the "parent or guardian" determines the town or district wherein the pupil has a legal right to free school privileges. A child, having no legally-appointed guardian, by consent of its father lived with a relative of its deceased mother in a town distant from the father's home. The school board refused the child school privileges save upon payment of tuition. By peremptory writ of mandamus the Supreme Court of Nebraska ordered that the child be accorded school privileges without payment. *McNish* v. *State*, (Neb.), 104 N. W., 186. This case is directly in point.

The following authorities while arising under statutes different from that of Maine tend to support the conclusion here reached. *People* v. *Hendrickson*, 104 N. Y. S., 122. *Yale* v. *School District*, (Conn.), 22 Atl., 295. *School Dist.* v. *Powell*, (Ky.), 140 S. W., 67.

The respondents offer a further reason why as they contend, the exceptions should be sustained. They invoke R. S., Chap. 16, Sec. 38 which authorizes the committee to "expel any obstinately, disobedient and disorderly scholar after a proper investigation of his behavior." The respondents cannot justify under this section.

There was no finding that the relator was "obstinately disobedient and disorderly." No proper investigation was made. The relator was not "expelled" for obstinate disobedience and disorder but was "excluded" for other reasons, mainly, it appears, because he, as the committee believed, had no legal right to attend the school.

The committee have large powers. They may exclude pupils for sanitary reasons, or because mentally defective. In the present case the respondents do not rely on this ground. They exercise quasi judicial powers. *Donahoe* v. *Richards*, 38 Maine, 379. If they act in good faith they are not liable in damages even if clearly wrong. *Donahoe* v. *Richards*, supra. After proper investigation they may expel a pupil. No appeal is provided for. If they act in good faith after proper investigation their decision is final. But before expelling a pupil they must make such investigation. This duty cannot be wholly delegated to others. Moreover, in exercising this power the committee acts as a public board. It in no sense represents the town. Its members are chosen by voters of the town, but after election they are public officers deriving their authority from the law and responsible to the State for the good faith and rectitude of their acts.

In the instant case the respondents received from certain teachers a written complaint about the conduct of the relator and other pupils. Upon this the respondents evidently relied in excluding the relator and refusing reinstatement. A complaint by teachers is a sufficient reason for an investigation, but it is not an investigation, or at all events not such a proper investigation as the statute contemplates.

It incidentally appears that some twenty-three other wards of the State live in Yarmouth and attend its schools. The respondents think that this a hardship, an unequal burden that the town should not be obliged to bear. There is some merit in this contention, but it in no way affects the legal rights of the parties. The State Board of Children's Guardians have it in their power to distribute wards more nearly equally among towns and cities. The Legislature may upon application grant relief.

But pending such measures and unless and until the relator shall be legally expelled, he has if his present status continues, a right to enter the public schools of Yarmouth and there remain and be taught subject to all reasonable and uniform regulations.

This right must be accorded him.

Exceptions overruled.
Peremptory writ to issue.

CHARLES E. TOLMAN

vs.

UNION MUTUAL LIFE INSURANCE COMPANY.

Cumberland. Opinion September 6, 1924.

An amendment setting up a new cause of action or enlarging the cause of action originally set forth in the declaration cannot under the Rules of this Court be allowed.

In this case the contention of the plaintiff that two causes of action were set forth in the original declaration, though imperfectly stated, and the proposed amendment was but a fuller statement of them, cannot be sustained.

The proposed amendment clearly sets up two causes of action, and even if both causes of action were included in the declaration but imperfectly stated, the proposed amendment enlarges the causes of action as set forth in the declaration.

On exceptions. An action on a contract between plaintiff and defendant to recover commissions alleged to be due plaintiff for soliciting life insurance as defendant's agent. The defendant pleaded the general issue, and the case was committed to an auditor and several times recommitted. After the auditor filed his reports, the plaintiff filed various motions to amend the declaration. At the October Term, 1922, the motion to amend, now in question, was filed, and after a hearing the amendment was allowed, and defendant entered exceptions. Exceptions sustained.

The case is fully stated in the opinion.

Frank A. Morey, for plaintiff.

Woodman, Whitehouse & Littlefield, for defendant.

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

WILSON, J. An action brought on a contract of agency entered into November 1st, 1906, between the plaintiff and the defendant company, under which the plaintiff originally sought to recover commissions alleged to be due on premiums on insurance policies solicited by him and issued by the defendant. The writ is dated September 3d, 1913.

After repeated references to an auditor it was finally determined that there had been a termination of the contract by the defendant on November 15th, 1907, for alleged non-compliance with its terms by the plaintiff and whether for well-founded cause or not, that the plaintiff could not recover commissions on renewal premiums falling due after the termination of the contract, but only for damages in case it was terminated by the defendant without cause.

The plaintiff then sought to amend his declaration by adding a count for unliquidated damages by reason of an alleged breach of the contract by the defendant in November, 1907, which amendment was not allowed on the ground that it set up a new cause of action.

At a later term, however, the plaintiff offered another amendment which was allowed by the court, and to the allowance of which the defendant excepted. The case is before this court on the defendant's exceptions.

The proposed amendment now sets forth two separate causes of action—and so in terms describes them—one for unliquidated damages by reason of the alleged breach in November, 1907; the other, for commissions alleged to be due him, but only for those due prior to November, 1907.

Plaintiff now seeks to avoid the objection—insuperable under the Rules of this Court—that his proposed amendment sets up a new cause of action, and contends that there was in the original declaration at least an imperfect statement of a right to damages in case the contract was terminated without his fault, and otherwise than by a thirty days' notice in writing. His contention being, that the proposed amendment merely correctly states, and with more fullness, an "imperfectly stated right" to receive commissions on renewal premiums either as due under the contract, or as damages in case of breach without fault of plaintiff.

If there were in the original declaration an imperfect attempt to set forth a claim for damages in any form by reason of an actual breach of the contract in November, 1907, it was so imperfectly done that it is not recognizable. The language of the declaration is, that "unlawfully and illegally the defendant Company in November, 1907, attempted to cancel the agreement of the plaintiff herein, and thereafter deprived him of a large amount of commissions which became due after and had become due to him before the attempted cancellation."

Clearly no actual breach of the agreement and consequent damages is here alleged. The only inference from such language, which must be construed against the pleader, is, that the alleged "attempted cancellation" was not effective, and that the commissions he sought to recover as thereafter due became due under a contract still existing. In fact, he so alleges at the close of his declaration and says: "that said amount is due him for commissions and services from said defendant Company under and by virtue of the agreement with him."

The proposed amendment, however, goes even farther than the recovery of damages for commissions which would have become due on renewal premiums but for the defendant's alleged unwarranted breach, and seeks recovery of commissions which he might have earned, or in the language of the amendment; of, "sundry great gains and profits that would have been earned and become due and payable but for such breach by the defendant," which even upon the plaintiff's theory of an "imperfectly stated right," is at least an enlargement of his original cause of action as stated in his writ, and under the decisions of this court renders the amendment equally as objectionable as though it stated an entirely new and independent cause of action. *Brown* v. *Starbird*, 98 Maine, 292.

It can hardly be necessary to cite authorities in support of the rule that a count for commissions alleged to have become due under an existing contract and a count for the recovery of the amount of such commissions in the form of damages on the ground of an unwarranted termination of the contract by the defendant, or a count to recover unliquidated damages in any form after breach, state two different causes of action, or that any amendment which enlarges the plaintiff's right of recovery cannot be allowed under the well-established law of this State. *Harrington* v. *Separator Co.*, 120 Maine, 388;

Brown v. *Starbird,* supra; *Anderson* v. *Wetter,* 103 Maine, 257; also see *Derosia* v. *Ferland,* 83 Vermont, 372; *Mullaly* v. *Austin,* 97 Mass., 30; *Dalton* v. *American Ammonia Co.,* 236 Mass., 105.

The law of this jurisdiction is liberal in the allowance of amendments when justice can be done. It may be unfortunate that the plaintiff misconceived the basis on which his right to recover for commissions which would have become due him in the future, or which he might have earned but for the alleged breach of his contract by the defendant, inasmuch as a new action therefor is now barred; but this court cannot disregard the well-settled law of pleading, or wink at plain violations of its Rules long established.

Exceptions sustained.

STATE *vs.* JOHN CHEMIESKY.

Knox. Opinion September 6, 1924.

A motion in arrest of judgment after verdict on the ground of duplicity comes too late.

On exceptions. The respondent was tried before a jury upon a complaint for illegal possession of mash fit for distillation and a still for the purpose of manufacturing intoxicating liquors, and a verdict of guilty rendered. After the verdict had been returned, and before judgment, the respondent filed a motion in arrest of judgment alleging that the complaint was bad for duplicity in that it alleged two distinct offenses. The motion was overruled by the presiding Justice and exceptions entered by the respondent. Exceptions overruled. Judgment for the State.

The case is stated in the opinion.

Z. M. Dwinal, County Attorney, for the State.

O. H. Emery, for respondent.

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

WILSON, J. A complaint under Sec. 17, Chap. 127, R. S., as amended by Chap. 62, Public Laws, 1921. The indictment alleges that the respondent had in his possession two half barrels containing mash fit for distillation and one still for the purpose of manufacturing intoxicating liquors. Respondent after conviction and before judgment filed a motion in arrest of judgment on the ground that the complaint was bad for duplicity in that it alleges two distinct offenses, viz.: the having in possession mash fit for distillation, also a still for the purpose of manufacturing intoxicating liquors. The case is before this court on respondent's exceptions to the court's ruling denying the motion.

The objection to the complaint on the ground of duplicity is not well taken. In principle this complaint is governed by *State* v. *Burgess*, 40 Maine, 592 and *State* v. *Haskell*, 76 Maine, 399; but if the complaint was bad on the grounds urged, the motion of the respondent after verdict comes too late. *State* v. *Derry*, 118 Maine, 431.

Exceptions overruled.
Judgment for State.

JOSHUA CLARK'S CASE.

York. Opinion September 11, 1924.

Under the Workmen's Compensation Acts of various jurisdictions an "independent contractor" for an injury sustained in the performance of his contract for services, is not, as a rule, compensable. The line of demarkation between an "employee" and an "independent contractor" is sometimes faint and obscure. If the employer has the right to direct what shall be done and how it shall be done, the other party is an employee, and the manner of payment is not decisive, but may be indicative.

In the instant case from the writing no other reasonable conclusion is to be drawn than that Mr. Clark was an independent contractor and not an employee; "his contract was not to serve as a master, but to serve an object;" he was working for himself and received his injury in connection with that work. The evidence that the names of Mr. Clark and his men were on the pay-roll of the company as carpenters was consistent with the contemplation of the contract that the wages and time of those who worked might be kept.

The compensation awarded in this case was unwarranted on the record under the express language of the Workmen's Compensation Act. Where the facts are not in dispute and but one sensible conclusion is inferable, whether it is reached by natural reasoning or the application of fixed rules of law, the question of the relationship between the parties is one of law.

On appeal. Joshua Clark, deceased husband of claimant, Olive P. Clark, entered into a written agreement with the York Utilities Company to take down a frame structure in Kennebunkport, called a coal pocket, salvaging the sound lumber, the daily wages to be paid to Mr. Clark and to the men who were to assist him being fixed in the agreement, but the total expense was not to exceed fifteen hundred dollars.

On the second day after beginning work, Mr. Clark fell from the roof of the building, and received injuries which resulted in his death within a few hours. Claimant petitioned as dependent widow for compensation under the Workmen's Compensation Act. The questions at issue were as to whether Mr. Clark was an employee or independent contractor, and if an employee as to whether his employment was casual. Compensation was awarded and respondents appealed. Appeal sustained. Decree reversed.

The case is fully stated in the opinion.
Willard & Ford, for claimant.
Robert Payson, for respondents.

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

DUNN, J. Joshua Clark died by accident. His widow claimed and was awarded compensation under the Workmen's Act. Two questions of law are presented on the record. First, Was Mr. Clark, at the time of the accident, an employee or an independent contractor? Second, If he was an employee, was his employment merely casual in nature? The conclusion that he was an independent contractor obviates considering the second point.

In substance the facts are these: The York Utilities Company owned a frame structure in Kennebunkport. The demolition of that structure and the using of the lumber that would be salvaged to erect a building in another place was its purpose. Negotiations with Mr. Clark, whose business was that of a contractor, merged in a written agreement dated August 8, 1923. On Mr. Clark's part the undertaking was to tear down the building in good and workmanlike manner, sort and grade the lumber, and then pile the lumber in places where the company should say. No time was set for the work to be begun or finished. And what was to be done and how is not more definite in the agreement than in effect it is stated here. The company promised payment at "the regular daily wage charged by him (Clark) as a contractor for himself and said men" (his employees) "for the amount of time put in by said Joshua Clark and his said employees," payable in instalments as the work progressed and the balance on completion, but not to exceed fifteen hundred dollars in all. Other stipulations of the contract are not now material.

Clark and three men whom he had hired began work on the day that the agreement was made, doing the work in their own way and according to their own ideas, or at least according to Clark's ideas, no representative of the company assuming to exercise any control or direction as to its accomplishment. The accident was on the next day; Mr. Clark fell to the ground from the roof of the building on which he was at work, and was so injured that he died soon afterward.

The Workmen's Act furnishes its own definition of the term "employee." This is the defining:

"Employee shall include every person in the service of another under any contract of hire, express or implied, oral or written." 1919 Laws, Chap. 238, Sec. 1, Cl. 11.

An "independent contractor," in the expression of Judge Walton, is:

"One who carries on an independent business, and, in the line of his business, is employed to do a job of work, and in doing it, does not act under the direction and control of his employer, but determines for himself in what manner the work shall be done." *McCarthy* v. *Second Parish*, 71 Maine, 318. See, too, *Keyes* v. *Second Baptist*, 99 Maine, 308.

One who is not an employee, but an independent contractor for the work, it is held pretty generally if not universally, is not within the scope of compensation acts. *Mitchell's Case*, 121 Maine, 455; *Vamplew* v. *Parkgate Iron Company*, 1903, 1 K. B., 851; *Western Indemnity* v. *Pillsbury*, (Cal.), 159 Pac., 721; *Stephens* v. *Industrial Commission*, (Cal.), 215 Pac., 1025; *Flickenger* v. *Industrial Commission*, (Cal.), 184 Pac., 851, 19 A. L. R., 1150; *Perham* v. *American Roofing Company*, (Mich.), 159 N. W., 140; *Zoltowski* v. *Ternes Company*, (Mich.), 183 N. W., 11; *Thompson* v. *Twiss*, 90 Conn., 444, 97 Atl., 328; *State* v. *District Court*, (Minn.), 150 N. W., 211; *Hungerford* v. *Bonn*, 171 N. Y. S., 280; *Fancher* v. *Boston Excelsior Co.*, 196 N. Y. S., 793; *Litts* v. *Risley Lumber Company*, 224 N. Y., 321; *In re Rheinwald*, 223 N. Y., 572; *Village of Weyauwega* v. *Kramer*, (Wis.), 192 N. W., 452; *Simonton* v. *Morton*, 275 Pa. St., 562, 119 Atl., 732; *Landberg* v. *State Industrial Com.*, (Ore.), 215 Pac., 594; *Petrow* v. *Shewan*, (Neb.), 187 N. W., 940; *Robichaud's Case*, 234 Mass., 60; *Centrello's Case*, 232 Mass., 456; *Winslow's Case*, 232 Mass., 458; *Eckert's Case*, 233 Mass., 577.

The shade of distinction between an "employee" and an "independent contractor" is not always easy to catch as it flits past. In Texas, where the statutory meaning of employee is the same as in Maine, the Commission of Appeals has said this present year, that "the term 'employee' as used in (the) act may be said to have a broader and more liberal meaning than the word 'servant,' as that term has been generally understood, in this, that it was intended to include all those in the service of another whether engaged in the performance of manual labor, or in positions of management and trust, and whether being paid wages or a salary, so long as they remained under the ultimate control of the employer. However,

whatever the position occupied by the person employed, he must, to come within the provision of the law, be 'in the service of another.' " *Shannon* v. *Western Indemnity Company*, 257 S. W., 522.

As a usual thing, the principal consideration in determining whether a person is an employee, as distinguished from an independent contractor, is the authoritative right of the employer to control, not simply the result of the work, but the means and methods and manner by which the result is to be attained. If the employer has authority to direct what shall be done, and when and how it shall be done, and to discharge him disobeying such authority and direction, and if the employer would be liable to third persons for misconduct of the worker, the other party to the relationship is an employee. *Mitchell's Case*, supra; *Fidelity & Casualty Company* v. *Industrial Com.*, (Cal.), 216 Pac., 578; *Amalgamated Company* v. *Traveler's Company*, (Ill.), 133 N. E., 259.

Whether payment is to be by the piece or the job or the hour or the day is indicative but not decisive. *Morgan* v. *Smith*, 159 Mass., 570; *Chisholm's Case*, 238 Mass., 412; *Harrison* v. *Collins*, 86 Pa. St., 153; *Thompson* v. *Twiss*, supra; *Freeman* v. *Life & Health Assn.*, (Ala.), 98 So., 461; *Chicago, etc. Co.* v. *Bennett*, (Okla.), 128 Pac., 705, 20 A. L. R., 678 and annotation.

What is controlling is whether the employer retained authority to direct and control the work, or had given it to the claimant. *Mitchell's Case*, supra; *Forsyth* v. *Hooper*, 11 Allen, 419; *Generous* v. *Hosmer*, 216 Mass., 26; *Chisholm's Case*, supra; *Singer Mfg. Co.* v. *Rahn*, 132 U. S., 518. The test might be said to be simple enough, yet it is not infallible, and the attempt to demarcate the line of distinction "has involved . . . much perplexity and some inconsistency." *Kelley's Dependents* v. *Hoosac Company*, 95 Vt., 50, 113 Atl., 818.

Of course, determination must be in the light that the evidence affords. Where the facts are not in dispute and but one sensible conclusion is inferable, whether it is reached by natural reasoning or the application of fixed rules of law, the question of the relationship is one of law. But where the evidential facts are in dispute, or where ordinary minds might ordinarily conclude oppositely from the same elemental premises, then the question is for the trier of facts.

An indispensable finding, precedently to awarding compensation, was that the relation of employer and employee existed between the

York Utilities Company and Mr. Clark when the latter got hurt. If, in truth and in fact, there was evidence of legal weight from which that was found, although the evidence was conflicting, review of the record can go no further, for such is the inhibition of the Legislature. 1919 Laws, Chap. 238, Sec. 34.

What was before the Industrial Chairman to prove that Mr. Clark was an employee? The written agreement itself, testimony by the company's manager concerning what led to the making of the agreement, and that Clark and his men were regarded by the manager as being under his supervision, though he never oversaw or superintended them. And there was evidence that the names of Mr. Clark and the men of his crew were carried on the wage-roll of the company as carpenters.

The writing is unambiguous and embodies the entire contract. That which the parties specifically and finally agreed to do, rather than what brought them to agreeing, is the significant thing. Testimony by the manager of the authority he imagined he had, but never exercised, and of which Clark did not even know, did not strike efficacy from the document and leave it limp and scarcely more than waste paper, for it could not. The case was not that of an interpretation mutually by the parties, often resorted to where verbal meaning is not clear, or where the original agreement was modified by express assent or practice under it. But it was the conception of an employee of one of the parties, identified with the writing only as an attesting witness, as he passed the matter through the crucible of his mind, when sympathy may have warped his judgment and his reasoning processes may not have been cold. The objection interposed to the reception of the testimony ought to have been sustained.

And the evidence that the names were on the wage-roll was consistent with the contemplation of the contract that tab would be kept on who worked and when and his wages.

Probative force was contained in the writing. And from that no other reasonable conclusion is to be drawn than that Mr. Clark was an independent contractor and not an employee; "his contract was not to serve a master, but to serve an object;" he was working for himself and received his injury in connection with that work. Where only one consistent inference can be drawn from existing facts, finding otherwise is error of law. *Morey* v. *Milliken*, 86 Maine, 464; *Mailman's Case*, 118 Maine, 172; *Gauthier's Case*, 120 Maine, 73; *Ferris' Case*, 123 Maine, 193.

Other jurisdictions lend support to the proposition that Mr. Clark was a contractor.

B contracted to do the masonry and slating for cottages that A had undertaken to erect, the latter provided the materials and paid B by the day for his work. B worked as he wished, subject to getting the work done in six months, and was concurrently at work for other people. He was fatally injured, after the masonry and slating job was done, while putting right some of his defective work. It was held that he was not under a contract of service. *Byrne* v. *Baltinglass Council*, 5 B. W. C. C., 566.

A man carted stones. He did the work when it suited him. He was not controlled at the work, except that he was told where to cart the stones. And he was paid by the day for the work that he did. The finding was that he was not a workman. *Ryan* v. *Tipperary Council*, 5 B. W. C. C., 578.

One, who being engaged in the truck business, was employed to assist in moving a quantity of hay, and who loaded his truck when it suited his own convenience, with no one to control his actions or the times of his coming or going, and was to be paid a specified price per day for his services, was an independent contractor not within the terms of the California Workmen's Act. *Flickenger* v. *Industrial Commission*, supra.

Where a bridge contractor arranged with the owner of horses and wagons to haul sand from a designated place to the bridge, to be paid for on the basis of the cubic yard for the amount hauled, and the employer gave no directions other than to show the place from which the sand was to be taken and where delivered, and exercised no supervision over the wagon owner's movements, such owner was an independent contractor. *Stephens* v. *Industrial Commission*, supra.

A painter and decorator undertaking to do work by the hour for a hotel company and employing others on such job was an independent contractor, and not within the terms of the Michigan Act. *Holbrook* v. *Olympia Hotel Co.*, 166 N. W., 876.

A lumber company's teamster having Saturday afternoons free took the job of unloading a car of lumber for the company for a specified price, subject to no control of the company; his capacity was that of an independent contractor. *Zoltowski* v. *Ternes, etc. Co.*, (Mich.), 183 N. W., 11.

A painter working by the job and by the hour, as to certain work connected with painting the residence of his employer, and who hired his own assistants, was an independent contractor, in New York. *Hungerford* v. *Bonn*, supra.

So, in New York, a man who contracted to paint smokestacks for a lump sum and furnish his own implements, with discretion as to the time of beginning the work and method of doing it, was held to be without the Workmen's Act, although the employer furnished him with ropes and tackle and paint and paid a helper and during the progress of the work gave directions which were essential to the performance of the agreement. *Litts* v. *Risley Lumber Co.*, supra.

A Wisconsin painter agreed with a village in that State to clean and paint a bridge for a specified price. The village furnished the paint and he the brushes. He was at liberty to do the work in his own way at his own convenience. Held, an independent contractor. *Village of Weyauwega* v. *Kramer*, supra.

Where the proprietor of three two-horse teams let them with the drivers to a corporation to haul dirt, at an hourly rate for each team and driver, driving one of the teams himself and hiring and paying drivers for the others, and where the corporation exercised no control over the drivers except in directing them where to get the dirt and where to dump it, the master teamster thus driving one of his own teams was not an employee of the corporation. *Centrello's Case*, (Mass.), supra.

The business of a claimant was that of teaming and jobbing. He let a cart, a pair of horses and himself as driver to work for the town on the roads for a daily wage. He was held to be an independent contractor. *Winslow's Case*, (Mass.), supra.

At the time of the injury a compensation claimant was hauling ashes for a town. By his contract he was to furnish the team and to feed, take care of and drive the horses for a fixed daily remuneration. The only orders given to him were where to go for and where to dump the ashes. He was an independent contractor. *Eckert's Case*, (Mass.), supra.

One employed for a dollar an hour to repair a well, a work which took him some two hours, and in which he was injured, was held to be an independent contractor, and not an employee. *Otmer* v. *Perry*, 94 New Jersey Law, 73, 108 Atl., 369.

Expression of similar views from other cases would be but cumulative.

The appeal must be sustained and the decree below reversed.

Appeal sustained.
Decree reversed.

EVA M. HEALEY'S CASE.

Androscoggin. Opinion September 12, 1924.

Under the Workmen's Compensation Act an agreement for compensation duly approved by the Labor Commissioner is as effective as a judicial judgment.

In the instant case the question whether claimant was originally compensable was not open. The decision may have been at variance with the law, as later decisions of this court have declared that law to be, but the point was and is not reexaminable upon the merits.

The right to compensation was once established between these same parties in this same case. And, whether established correctly on general principles, or not, so long as the facts on which the awarding of compensation was predicated continued to be the facts in the case, so long did that which was established continue to be law of the case.

On appeal. Eva M. Healey was injured September 9, 1918, while in the employ of Dingley-Foss Shoe Company, by having the chair in which she was sitting at her work suddenly pulled from under her without any warning, the injury resulting from contact with the floor. Under an "open-end" agreement approved by the Commissioner January 16, 1919, she was paid compensation at the rate of $9.15 per week for temporary total disability for a period of twenty weeks when the payments were terminated by the insurance carrier on the ground that her disability at that time was not due to her injury, but to tuberculosis from which she was found to be suffering. On March 14, 1923, was filed the petition in this proceeding with the Commission by the Dingley-Foss Shoe Company to determine present incapacity. Before the decree Eva M. Healey died and her mother, Bessie A. Healey was appointed administratrix of her estate. On May 22, 1924,

a decree was made confirming the findings of the Commission in awarding compensation at the rate of $9.15 per week from February 13, 1919 to December 31, 1919, inclusive; $7.95 per week from January 1, 1920 to December 31, 1922; $7.71 per week from January 1, 1923 to September 28, 1923, and $9.15 from that date to April 7, 1924, and respondents appealed. Appeal dismissed with costs. Decree affirmed.

The case is fully stated in the opinion.

Frank A. Morey, for claimant.

Harry Manser, for respondents.

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

DUNN, J. On the ninth day of September in 1918, Eva M. Healey, an employee of the Dingley-Foss Shoe Company, sustained personal injuries while working in her employment, the cause being that a fellow employee snatched the chair in which she was seated, whereby she dropped to and forcibly upon the floor.

An "open-end" agreement, that is, an agreement between Miss Healey and her employer, concerning the paying of compensation from a given time for an indefinite period, was approved by the Labor Commissioner, and in consequence became of the same effect as the judgment of a court. R. S., Chap. 50, Sec. 35. Miss Healey was paid thereunder, for "temporary total disability," twenty weeks at $9.15 a week, until February 19, 1919.

Then the employer's insurance carrier, asserting that full recovery from the injuries had been made, informed Miss Healey by letter that it would not make any further payment to her. And it has not. The Industrial Accident Commission, when notified by the insurance carrier of its position, wrote Miss Healey asking if she was content with that which had been paid, or if hearing was desired. She did not reply.

Thus matters stood, the agreement unchanged by any modification and unaffected by release or on review, the claimant silent, compensation withheld, for somewhat more than three years.

Miss Healey now requested that execution issue for the compensation in arrears. Section 35, cited before. But the request was never pressed, seemingly by amicable arrangement, pending determination of whether the claimant's incapacity to work had ended, which was

to be made on the petition that the former employer, still subsequently but yet seasonably, was to and did file. *Milton's Case*, 122 Maine, 437; *Wallace's Case*, 123 Maine, 517. Upon hearing on that petition, the Industrial Accident Commission, the associate legal member presiding, ordered the paying of compensation at varying rates, as incapacity varied from total to partial and back again, from the time that payments were stopped on the original agreement to the day of the date of the death of Miss Healey, she having died following the hearing and preceding the order, and her administrator being in and defending. Appeal was made from an affirming decree.

Whether the claimant was compensable originally was not open. That question was finally decided when, on being officially approved, the compensation agreement became as effective as a judicial judgment. Perhaps, as argued, the decision was at variance with the law of the land, as later decisions of this court, touching the subject of horseplay or frolic, have declared that law to be. But the point was and is not reexaminable upon the merits. The right to compensation was once established between these same parties in this same case. And, whether established correctly on general principles or not, so long as the facts on which the awarding of compensation was predicated continued to be the facts in the case, so long did that which was established continue to be the law of the case. *Gee* v. *Williamson*, (Ala.), 27 Am. Dec., 628 and note; 15 R. C. L., 959.

No one would venture seriously to dispute that Miss Healey's failure to reply to the mere inquiry of the Industrial Accident Commission was equivalent to the voluntary relinquishment by her of her judgment-evidenced property. She owed no duty to reply. She might have sought review, but she did not. Instead, with the time for so doing far from expired, she prayed for execution. And she stayed her prayer, to the end that her former employer might be afforded opportunity to present, whether her incapacity, so far as it was caused by the accident had ended, and her right to compensation as awarded had ceased. R. S., Chap. 50, Sec. 36, *Milton's Case*, supra; *Wallace's Case*, supra.

The petitioner had the burden of proof. *Orff's Case*, 122 Maine, 114. Miss Healey, in the accident, was bruised at the base of her spine and in the lumbar region and her abdominal muscles were strained. She already was afflicted with pulmonic tuberculosis, a fact not appreciated when the compensation agreement was entered

into, but she was entitled to compensation, nevertheless, if the preexisting condition was aggravated or accelerated by the injuries received. *Orff's Case*, supra; *Patrick* v. *Ham*, 119 Maine, 519.

The Commission found adversely on the petition of the employer. In effect the finding was, that the aggravating or accelerating of disability and the incapacity thereby produced, continued in varying compensable degrees, as the immediate or proximate cause of the accident, from and after the time of the withholding of compensation until the claimant died. It was the employee herself who showed that for some of the time her resulting incapacity had been but partial. And of that, on the commissioner's finding and conclusion, the employer had the benefit.

What would have been Miss Healey's condition had she never been injured, and whether but for the accident she would not still be alive, the commissioner said were questions to which the record did not indicate satisfactory answers. He might have added that he was called on only to decide whether the petitioner had successfully proved what it undertook to show. And the decision was that it had not. That decision must be upheld.

Appeal dismissed with costs.
Decree affirmed.

THEODORE R. SWEETLAND, Petitioner.

Knox. Opinion September 17, 1924.

An application for writ of Habeas Corpus is addressed to the sound discretion of the court and will not be granted unless the real and substantial justice of the case demands it.

On exceptions. Petition for Habeas Corpus. Petitioner was convicted in a lower court of illegal possession of intoxicating liquor and sentenced to fine and imprisonment and he appealed to the Supreme Judicial Court. Not at the first term of said appellate court but at the second term thereof the sentence was affirmed and a mittimus issued. The presiding Justice denied the application and petitioner entered exceptions. Exceptions overruled. Writ denied.

The case appears in the opinion.

Frank A. Tirrell and Phillip Howard, for petitioner.

Z. M. Dwinal, County Attorney, for the State.

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

DEASY, J. Petition for writ of Habeas Corpus.

The petitioner having been in the Rockland Municipal Court convicted of illegal possession of intoxicating liquor and sentenced to fine and imprisonment appealed to the April Term, 1923, of the Supreme Judicial Court for Knox County.

Not at said April Term but at the following September Term of said court the sentence of the Municipal Court was affirmed and later a mittimus was issued. The respondent complains that his detention upon this mittimus is unlawful. He argues that the sentence can be lawfully affirmed only at the term to which the appeal is taken and at which it is entered.

This contention finds no support in the statutes. Neither R. S., Chap. 134, Sec. 18, establishing general rules governing criminal procedure, nor R. S., Chap. 127, Sec. 43, relating to liquor law violations, contain any such limitation upon the power of the court.

It is true that Sec. 42 of Chap. 127, R. S., provided that sentences should be imposed at the term of conviction, but this section has been held directory and not mandatory, (St. Hilaire Petnr., 101 Maine, 522) and (still more important) has been wholly repealed. Acts of 1917, Chap. 156.

"An application for writ (of habeas corpus) is addressed to the sound discretion of the court and the writ will not be granted unless the real and substantial justice of the case demands it."

O'Malia v. *Wentworth,* 65 Maine, 129.

It is clear that the real and substantial justice of the present case does not demand the issuance of the writ.

Exceptions overruled.
Writ denied.

WILLARD DURAND'S CASE.

Aroostook. Opinion September 23, 1924.

Where the written acceptance of the employer specifies and describes his business as "Lumber and those incidental," at "Portage Maine and vicinity," and the employee is injured while hauling logs for the sawmill of employer, though thirty miles distant therefrom, the injury is compensable.

In this case the cutting and hauling of the logs by the employer to be manufactured into lumber at his sawmill, though cut at a place thirty miles distant from the mill, was incidental to his lumber business.

The word "Vicinity" has an elastic meaning and as applied to territory is indefinite.

On appeal. Petitioner while in the employ of the Portage Lake Mill Company hauling logs for its sawmill, had his left hand crushed by being caught between a log on the load and a standing tree, which resulted in an amputation. The accident occurred at Fish River Lake thirty miles distant from Portage Lake where the sawmill was located.

The question involved was as to whether the acceptance of the employer embraced the work performed by claimant. After a hearing compensation was awarded and respondents appealed. Appeal dismissed with costs and the decree below affirmed.

The case is sufficiently stated in the opinion.

Claimant was without counsel.

Robert Payson, for respondents.

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

DUNN, J. An accident cost Willard Durand his left arm. The limb was crushed between a log and a standing tree. Mr. Durand at the time was an employee of the Portage Lake Mill Company. He was then hauling logs for that company. in the woods about thirty miles away from its sawmill.

Formal answer to the petition for compensation raised the issue, whether the employer's assent to the Workmen's Compensation Act was inclusive of the employee Durand. The Industrial Accident Chairman found that it was. And whether or not the finding had any evidential support is the question of law on appeal.

The Act carries the provision that if the employer has more than one kind of business, he shall specify that which he desires to bring within the statute. 1919 Laws, Chap. 238, Sec. 3. An employer, who had a sawmill in one town and a box mill in the next town and logged in the timber woods far beyond, limited his assent to the manufacturing industry in the two towns. It was held that his employee, injured while at work in the woods, was not compensable. *Fournier's Case,* 120 Maine, 191. Again, a wood-pulp and paper-making concern, supplying raw material to itself, explicitly manifested non-inclusion of the woods-end by saying that its business was that of pulp and paper making, "excluding cutting, hauling, rafting and driving logs." *Oxford Paper Company* v. *Thayer,* 122 Maine, 201.

In assenting, Durand's employer recited that the "kinds of business included" were "Lumber and those incidental," at "Portage Maine and vicinity." No employees were expressly excluded. The insurance policy filed with the assent, in stating the locations of workplaces, mentions Portage, but is silent on the subject of vicinity. The policy took in employees in sawmills, lumber yards, work-cooks

furnishing board for employees in connection with lumbering risks, drivers and drivers' helpers, and others. The employer, on the authority of the policy, had no other business operations "at this or any other place."

It was essential to the business of the employer that logs be provided to be sawed into lumber. A sawmill without logs to saw would be almost as useless as "a painted ship upon a painted ocean." The mill was in the northern part of Aroostook county. Many square miles of forest-land were thereabouts. Operating a mill in a town and cutting logs in a forest may be substantive, independent businesses. And the cutting may be incident to the operating of the mill. A man may cut logs to sell them to another man, he may cut for hire for another, and he may cut to operate his own mill. In the latter case the cutting would be an incident of his mill business, as the keeping of an hotel is a business incidental to that of operating a railroad. *Navigation Co.* v. *Hooper*, 160 U. S., 514, 40 L. Ed., 515. This employer, incidental to its business of manufacturing lumber, had a logging operation, and Durand was its workman, hurt while working.

But was Durand in the vicinity of Portage Lake? He was in the woods about Fish Lake. The very logs the team he drove was drawing were destined to come out of Fish Lake into Fish River and float down that stream to the mill.

"Vicinity" is from the Latin, "vicinitas," and signifies propinquity, or nearness in place, but not that more immediate closeness or connection which the Anglo-Saxon word, "neighborhood" imports. Usage has broadened the root-form meaning of "vicinity." In the secondary sense surrounding country or region is of its definition. But the word never expresses any definite idea of distance. Reasonable nearness as contrasted with remoteness is the thought that illuminates the mind of the hearer or reader. "Vicinity," to quote from New Hampshire, "admits of a more indefinite and wider latitude in place than proximity or contiguity, and, as applied to territory, may embrace a more extended space than that lying contiguous to the place in question, and as applied to towns and other territorial divisions, may embrace those not adjacent." *Langley* v. *Barnstead*, 63 N. H., 246. "Used in some connections," says the Wisconsin Court, "it may mean a very trifling space; used in others, it may mean thousands of miles." *Burton* v. *Douglass*, 123 N. W., 631. One man's "neighborhood," to instance from the more

restricted word, may be a small hamlet, while the "neighborhood" of another may be a county or a state. *Peters* v. *Bourneau*, 22 Ill. App., 179. Vicinity has not a precise meaning. *Com.* v. *Parker*, 2 Pick., 549. The idea conveyed shifts and varies to correspond with the respective position of other objects. In re Hancock Street, 18 Pa. St., 26. Communipaw is a village in the vicinity of the city of New York. Irving, Knickerbocker, Page 100. "The vicinity of the sun." Bentley, Sermon VII. In a decree enjoining a physician from practising his profession in a city and vicinity the term was held inclusive of the territory on all sides of the city for a distance of ten miles from its corporate boundaries. *Timmerman* v. *Dever*, (Mich.), 17 N. W., 230. A place two miles distant, in reference to the drilling of other oil wells, was not included by the term. *Sparks* v. *Pittsburgh Co.*, 159 Pa. St., 295. The term is relative; its rhetorical estimate depends upon no arbitrary standard of distance or topography.

Considered with reference to its application in the present case, it would be doing violence to the record to say there was no evidence to sustain the finding of the Commissioner, that the logging was incidental to the business of sawing lumber, that the Fish Lake Woods were within the vicinity of the mill at Portage for which the logs were cut, and that Durand was compensable.

The appeal is dismissed with costs and the decree below affirmed.

So ordered.

MARGARET ROBERTS ET AL. *vs.* PORTLAND WATER DISTRICT.

Cumberland. Opinion September 23, 1924.

In condemnation proceedings, by right of eminent domain, by a water district under authority of a Private or Special Act, the owner of the property so taken may have the question of the necessity of the appropriation for public use judicially determined, and such part of the land so taken as the court shall determine as being necessary, or the whole of the land so taken if found to be necessary, shall be appropriated, and damages awarded accordingly. If any of the land is judicially determined as necessary the moving party in the condemnation proceedings is considered as prevailing and entitled to costs.

In cases of this kind if the property taken is not necessary for public good and uses the owner is entitled to judgment and costs.

If any part of the land taken is necessary for public uses such part may be appropriated upon payment of damages, the costs being taxable against the petitioner, the other party being the prevailing party.

On exceptions. The Portland Water District under authority of Chapter 433 of the Private and Special Laws of 1907, under condemnation proceedings, took certain land owned by the plaintiffs for the purpose of constructing a new conduit and for other water-works improvements. Commissioners were appointed to determine the question of necessity under Secs. 23 to 26 of Chap. 61, R. S., the owners of the land claiming that the taking was not necessary. After a hearing the commissioners found that it was necessary to take a part of the land but not the whole of it, and the plaintiffs contended that the commissioners could not make such a finding of fact, but must find that the whole or none of the land was necessary, but the presiding Justice ruled against the plaintiffs who entered exceptions, and the presiding Justice also ruled that the respondent was the prevailing party and entitled to costs under R. S., Chap. 61, Sec. 25, and plaintiffs excepted. Exceptions overruled.

The case is fully stated in the opinion.

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

David E. Moulton, for respondent.

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

DUNN, J. These petitioners owned certain land in Standish. By invoking the power of eminent domain, delegated to it in 1907, Chapter 433, Private and Special Laws, the Portland Water District took and preliminarily occupied that land, on the 19th day of March in 1923, for the laying out and construction of pipes and other water-works improvements. No question that the nature of the use was public arises. On a later day, the owners of the land seasonably filed the petition which is the background of the two questions presented for decision. One question concerns whether, without beginning over, part only of the land originally taken may be held by the district. The other question goes to taxable costs.

The petition is under the general statute enacted in 1911 and included in the latest revision of the statutes as Sections 23 to 27 inclusively of Chapter 61, to which statute this donee of the right of eminent domain is subject. R. S., Chap. 51, Sec. 2. The general statute, as consequential here, runs:

SEC. 23. The owner of property which is the subject of appropriation for public purposes by any water district may, upon hearing, have the necessity of the particular appropriation determined.

SEC. 24. The owner of such property may, within thirty days after the beginning of condemnation proceedings, file in the office of the clerk of courts of county where the property is situated, a petition to the supreme judicial court, for a decision as to the necessity of the appropriation. . . . . Any justice of the supreme judicial court, in term time or vacation, upon such petition, may appoint three disinterested commissioners, residents of the county in which the property is situated, one of whom shall be learned in sanitary matters, to determine the necessity of the particular appropriation.

SEC. 25. The commissioners shall fix a time for hearing, and give written notice thereof to the owner and to the district seeking to acquire said property. At the hearing all parties in interest shall be heard . . . .; the burden of proof to show the necessity of the particular taking shall rest upon the party seeking to acquire the property. . . . . The prevailing party shall recover costs as in actions at law. . . . .

The land owners petitioned that commissioners pass on the necessity for taking their land, asserting the taking to be unnecessary.

Commissioners were appointed. They fixed the time for hearing and gave notice and heard the parties. Their conclusion was that the exigency necessitated the taking of the greater part, but not all, of the land for proper public uses. They reported accordingly. The report was confirmed. Besides, though the matter was not formally up, the court by mutual request ruled on costs, the ruling being favorable to the respondent. The petitioners reserved exceptions on the confirmation and the ruling, and the exceptions were allowed.

Plainly the situation is one involving statutory interpretation and construction. By interpretation the true sense of any form of words is ascertained. Construction draws warrantable conclusions not always included in the direct expression. In interpreting and construing a statute one must, so to speak, walk round the legislation, view it from every side and in every light, and read its letter and deduce its spirit conformably to well-established rules, till from it he has unfolded the single controlling thought around which everything in the whole enactment shall center, and to which in the final determination all shall at last return.

Every word of the statute is simple. None is barrier or hindrance to perspicuity. And fitting enough expression secures clearness when the several sections are brought together.

Let us take up the first section. The word "particular" seems to fit the movement of the petitioner's contention that it is the unitary taking which must be sustained or no while the word has in itself a meaning that matches with the words preceding and curbs the immediately following word "appropriation." But pass on to the next section. Consonance with the foregoing section is perfect though "particular" is omitted from the principal clause and "appropriation" is apt to place and context without the qualifier. Nor does the repetition of "particular" in the subordinate clause add force. What this section provides is, that the owner of the property taken may petition that whether there was necessity for the appropriation of his land be decided by judicatory authority.

Of course "particular" was used with purpose. Particular is a word of sundry meanings. In Hamlet each particular hair was made to stand on end. And Addison in the Vision of Justice writes: "It was the particular property of this looking-glass to banish all false appearances, and show people what they were."

The law knows the earlier of two successive estates, on the termination of which a devise over is to take effect, as the particular estate in contradistinction to total ultimate ownership. There are particular liens, carrying the right of retaining property, as distinguished from general liens. And particular average, in marine insurance, in case of partial loss by perils of the sea. Causes are particular and so are customs and methods and opinions and propositions. A science or art has its particular utility. Synonymes of particular are special, specific, personal, private, individual, precise, and detailed. No useful purpose would be sufficed by extending the list. The construction of the word in the statute as meaning the same as "detailed" is perhaps as fair as any. The water district, in exercising the right of eminent domain, must file plans in designated public places, which show the location of the land to be taken and appropriately describe it, and the owner's name where known and other particulars are to be given. 1907 P. & S. L., supra. The district must publicly and particularly specify or detail the land it takes. When it does that, the owner of the particular property so taken and detailed, has standing to have the necessity of the appropriation reviewed in court. And where the sovereign state, through a regularly constituted authority, appropriates private property for public use without the owner's consent, the maxim that the greater includes the less applies, and the public end to be subserved circumscribes the taking. In the sight of the law useless labor is foolish.

Under the division of governmental dominion into three coordinate branches, the executive, legislative and judicial, the right of the exercise of eminent domain, ordinarily is exclusively legislative. *Riche* v. *Water Company*, 75 Maine, 91; *Hamor* v. *Water Company*, 78 Maine, 127; *Mosely* v. *Water Company*, 94 Maine, 83; *Brown* v. *Gerald*, 100 Maine, 351; *Hayford* v. *Bangor*, 102 Maine, 340; *Brown* v. *Water District*, 108 Maine, 227; *Bowden* v. *Water Company*, 114 Maine, 150. Similarly, when the power is delegated to municipal or quasi municipal or other bodies, with discretion as to when and how far it is to be called into use, the propriety of a taking is not for a court, provided that the power is not exceeded or perverted. *Brown* v. *Water District*, supra. But the grant of the right of eminent domain is fraught with the possibility of the disregard of another's rights. "Its exercise," in the terse sentence of Judge Deasy, "should be sedulously guarded." *Sidelinker* v. *Water Company*, 117 Maine, 528. The Legislature can

make the question of the existence of a genuine necessity for the appropriation determinable by a court. Some of these authorities recognize that principle and others support it; *Brown* v. *Water District*, supra; *Lynch* v. *Forbes*, 161 Mass., 302; *Minnesota Canal, etc. Co.* v. *Koochiching Company*, (Minn.), 107 N. W., 405, 5 L. R. A., (N. S.), 638; *Carnegie Natural Gas Company* v. *Swiger*, (W. Va.), 79 S. E., 3, 46 L. R. A., (N. S.), 1073; *Seattle, etc. Co.* v. *State*, (Wash.), 34 Pac., 551, 22 L. R. A., 217; Lewis on Eminent Domain, 3d Ed., Sec. 597. Our Legislature has done this very thing in the instance of the taking by a water district. R. S., supra. In the absence of the statute, in the case in hand, the trustees of the district would have judged finally of the necessity and expediency for taking the petitioner's land; under the statute, the judicative jurisdiction of the trustees, on the point of the necessity for the taking, was primary only.

Review in cases of this kind works out thusly: If, in the public exigency, it is unnecessary to appropriate the property, there is an end of the thing, except that the owner is entitled to judgment for taxable costs. Where necessary to take, it is for the condemnor to compensate the landowner justly, according to his interest and the quality of his estate, for that which was taken from him, reasonable opportunity to be heard on damages to be afforded. And where, as here, it is necessary to take part only of the land, then, with like chance for hearing, the condemnor must make just amends for the part taken, the award of compensation to be on the basis of the extent of the damage to the whole lot by reason of the taking of part.

The one issue on taxable costs is, who, in this case, within the meaning of the statute, is the prevailing party. The respondent is. When the district took the land, the situation stood that compensation therefor must be by agreement or proceedings to ascertain the amount, and so is it at the present time. In the interim, however, the landowners put in action that the appropriation of their land was not essential for the purposes stated in the notices of taking. Upon the trial of the issue the district sustained the burden of proof imposed upon it by the statute. The district prevailed, though it was given less of the land than it had taken. "If the jury award any damages . . ., he prevails." *Burrill* v. *Martin*, 12 Maine, 345. He is the prevailing party, on the authority of the *Bangor & Piscataquis Case*, 60 Maine, 285, who, at the end of the suit, or other proceeding, has successfully maintained the claim he made against the other.

In line with that is *Goodwin* v. *Boston & M. R. Co.*, 63 Maine, 363. The prevailing party is the party in whose favor the judgment is entered, although, in the course of the proceedings, he made certain claims upon which he was held not entitled, and as to which, though not otherwise, the other party prevailed. *Smith* v. *Wenz*, 187 Mass., 421. Judgment was against these petitioners; they did not prevail.

Both exceptions are without merit.

Exceptions overruled.

JAMES P. HARRIS' CASE.

FRANK B. VANDEWARD'S CASE.

Cumberland. Opinion September 25, 1924.

The provision of the Workmen's Compensation Law that "the Governor and Council shall order such compensation as shall be assessed (compensation awarded to an employee of the State or department thereof) paid from the State Contingent Fund" is not impliedly repealed or modified by Special Law of 1923, Chapter 118. The section of statute hereinabove quoted is in full force.

While it is well settled that a later act may, by implication, repeal an earlier statute, without mentioning such statute, yet in order to effect such a repeal by implication the later statute must be so broad in its scope and so clear and explicit in its terms as to show that it was intended to cover the whole subject matter and to displace the prior statute, or the two must be so plainly repugnant and inconsistent that they cannot stand together. The court will if possible give effect to both statutes, and will not presume that the Legislature intended a repeal.

On appeal. In these two cases arising under the Workmen's Compensation Act compensation was awarded and payment was ordered from the State Contingent Fund. An appeal was taken on the sole ground as to whether the payment should be taken from the contingent fund alleging that the provision of the Act authorizing such payment to be made from the contingent fund had been repealed by Chapter 118 of the Special Law of 1923. Appeal dismissed with costs. Decree affirmed.

The case is fully stated in the opinion.

Petitioners appeared without counsel.

Ransford W. Shaw, Attorney General and Clement F. Robinson, Deputy Attorney General, for the State of Maine.

Ralph O. Brewster and Carl W. Smith, for the Directors of the Port of Portland.

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

DEASY, J. Workmen's compensation cases. The petitioners were accidentally injured while working on the State Pier at Portland. From a decree in favor of the petitioners in each case the State appeals. Nothing in the awards is claimed to be erroneous except the part reading: "payment to be made from the State contingent fund in accordance with the provisions of the Workmen's Compensation Act."

The Act after making subject to its provisions all employees of the State, or acting under the direction of any department of the State, proceeds: "The Governor and Council shall order such compensation as shall be assessed paid from the State Contingent Fund." Public Acts of 1919, Chap. 238, Sec. 1, Par. 2, Sub Par. (g).

The petitioners when injured were acting under the direction of a State department. It is not questioned that if the statute above quoted is in force and unrepealed the decree should be affirmed.

But counsel for the State maintain that when the accidents occurred the above quoted statute was no longer in force so far as concerns employees of the Directors of the Port of Portland. Admittedly it has not been in express terms repealed. It is, however, contended that by implication Private and Special Law of 1923, Chap. 118, operates as an amendment to the Workmen's Compensation Act and in effect repeals that part of it which directs payment from the contingent fund of compensation awards in favor of State employees.

The Portland Pier Act (so called for brevity) was passed in 1919. Private and Special Acts of 1919, Chaps. 84 and 123. These acts created a Board of Directors of the Port of Portland and gave to this board charge of the construction and administration of the State Pier at Portland and provided that all revenues should be covered into the State Treasury. This law was amended in 1923. By the amendment a treasurer of the board was provided for with authority to "collect and deposit . . . . . the income and revenue accruing from the properties within the charge of the directors, and make

disbursements therefrom for carrying out the purposes of this Act." Private and Special Acts of 1923, Chapter 118.

The State argues that payment of compensation awards is "carrying out the purposes of the Act" and is one of the purposes for which the Port Treasurer is required to make disbursements. This it is urged is inconsistent with the general law providing that awards shall be paid from the contingent fund, and operates as a repeal of the earlier general statute.

It is, of course, well settled that a later act, albeit that it makes no mention of an earlier statute may by implication effect its repeal.

But "in order to effect a repeal by implication the later statute must be so broad in its scope and so clear and explicit in its terms as to show that it was intended to cover the whole subject matter and to displace the prior statute, or the two must be so plainly repugnant and inconsistent that they cannot stand together. The court will if possible give effect to both statutes, and will not presume that the Legislature intended a repeal." *Eden* v. *Southwest Harbor*, 108 Maine, 489. Opinion of Justices, 120 Maine, 569. 25 R. C. L., 918.

Applying these principles, it is apparent that the amendment of the special act relating to the Port of Portland was not intended to "displace" any part of the Workmen's Compensation statute. Neither are the acts "so plainly repugnant that they cannot stand together." The intent may conceivably have been that, in respect to compensation awards, the Port Treasurer reimburse the contingent fund. This theory would reconcile the two statutes even if it were provided that all port liabilities be paid by the Port Treasurer.

It is the court's opinion, however, that no such reimbursement was contemplated. The Directors were not constituted a quasi municipal corporation. They act in behalf of the State. The pier is State property. Its administration is State business. Its revenues are State funds. Any surplus will eventually accrue to the State. Any deficiency will presumably be met from its treasury.

The statute does not expressly command that all liabilities be paid from the port treasury. In the absence of either general or special legislative direction it is not reasonable to presume an intent that compensation awards be so paid. The provision of statute first above quoted remains in full force. Compensation awards are by mandate of statute to be paid from the State contingent fund.

Appeal dismissed with costs.
Decree affirmed.

IN RE CLARENCE E. CROWELL'S ESTATE.

Cumberland. Opinion October 1, 1924.

R. S., Sec. 3, Chap. 80, does not go beyond descent and embraces only rights of inheritance of intestate estates of and for illegitimates. It does not attempt to change the status of an illegitimate to a legitimate. The time and place, whether in this State, another state or country, the provision of the statute "adopts him into his family" takes place are immaterial. The law of the domicil of the decedent in force at the time of his death governs in the succession to and distribution of personal property.

The statute is of descent pure and simple. Humaneness prompted it, that the severity of the common law, by which an illegitimate had not parents, kin, name, or heirs, except his own lineal descendants, and could not himself inherit, might in some degree be mitigated and the blot of parental sin partially removed from one innocent of responsibility for the unlawful state of his own birth.

On exceptions. This is an appeal from a decree of the Judge of Probate ordering distribution in the estate of Clarence E. Crowell, late of Portland, deceased intestate. Decedent left as survivors a brother, Hiram B. Crowell; a brother, George M. Crowell; a sister, Evelyn C. MacDonough; a half brother, Oscar Crowell; and three children of a deceased half sister, Ambrosine Crowell Vanier. Oscar Crowell and Ambrosine Crowell Vanier were born out of wedlock, having the same parents who after the births of these two illegitimate children which took place prior to March 24, 1864, intermarried and the father adopted the two illegitimate children into his family where he was domiciled in Nova Scotia. The question involved is as to whether the half brother, Oscar Crowell, and the children of the deceased half sister, Ambrosine Crowell Vanier, should inherit personal property from the estate. The presiding Justice in the Supreme Court of Probate dismissed the appeal and sustained the decree of the Probate Court which was in favor of the illegitimate half brother and the children of the illegitimate half sister, deceased,

and exceptions were entered to the ruling. Exceptions overruled, the decree of the Supreme Court of Probate affirmed, and additional costs allowed.

The case is fully stated in the opinion.

Edward S. Anthoine, for appellant.

Edmund P. Mahoney, for appellees.

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

DUNN, J. Two children, born out of wedlock in Nova Scotia, were adopted into the family of their father, while he still resided in that land. Whether such adoption conferred the privilege, under R. S. of Maine, Chap. 80, Sec. 3, to share by inheritance in the estate of a child by marriage of the same father, dying intestate domiciled and leaving personalty in this State, is in a rough and general way the question pivotal here.

It is among the provisions of the statute, that if the father of an illegitimate child "adopts him into his family," the child thereby becomes the heir of his father, so it or its issue shall inherit from the father and his lineal kindred "the same as if legitimate."

Archanes Crowell and Isabelle McCollum were British subjects. Illicit cohabitation was begun by them. The fruit of their unlawful intercourse was the two children. Subsequently to the births of the children, about the year 1855, when the parents and children were yet in Nova Scotia, the parents intermarried. The children were adopted into the family and there reared, until the death of their mother in or later than 1860. On the fact of the adoption, which was of no legal significance in Nova Scotia, decision of this case is staked.

Marriage ended widowerhood. The father of the children and his new wife removed to the State of Maine; they had children; the name of one was Clarence.

Clarence was he who died without making a will. His domicil at the time of his death was in Cumberland county. Courts therein, both probate and appellate, decreed favorably to the adopted child then living, and to the surviving children of the child dead, on the distribution of the estate. Appeal in the first instance and exceptions in the next, by a child of the second marriage, brought the cause up. It must go back decided the same as before.

The statute, as is rightly urged, had no extraterritorial force. It did not purport to have. Nor did it attempt to transmute from bastardy to artificial legitimation. Bestowing the status of legitimacy on an illegitimate child is one thing and endowing him with heritable blood is another and distinctly different thing.

Usually a status created in one country is recognized in every other. *Irvin* v. *Ford*, 183 Mass., 448. On the authority of the New York Court, speaking among other things of inheriting, a person who is legitimate according to the law of the domicil of his parents is legitimate everywhere. *Olmstead* v. *Olmstead*, 190 N. Y., 458. Perhaps the statement is a bit broad. The authorities seem to indicate the principle as general rather than universal. But however that may be the rule obtains in this jurisdiction.

The converse of what is determinative when legitimacy is the fact, runs the argument designed to uphold the exceptions, governs where illegitimacy is the case, and a child who for that reason is without inheritable capacity by the foreign-domicillary law of his parent, must bear the vicarious stigma and its disqualifying accompaniment in Maine. But the argument is faulty. *Hunt* v. *Hunt*, 37 Maine, 333, a decision somewhat extreme in its conclusion, which is confidently but erroneously advanced as sustaining the exceptions, was not based on the present statute. The Hunt Case is sharply distinguished in *Brewer* v. *Hamor*, 83 Maine, 251.

The succession to and distribution of personal property is regulated, not by the law of the domicil of a decedent's ancestor, but by the law of the domicil of the decedent, in force at the time of his death. *Crofton* v. *Ilsley*, 4 Maine, 134; *Holton* v. *Bangor*, 23 Maine, 264; *Hughes* v. *Decker*, 38 Maine, 153; *Gilman* v. *Gilman*, 52 Maine, 165; *Smith* v. *Howard*, 86 Maine, 203; *Messer* v. *Jones*, 88 Maine, 349; *Philadelphia Trust, etc. Co.* v. *Allison*, 108 Maine, 326; *Holmes* v. *Adams*, 110 Maine, 167. The legitimate child inherits by the grace of the law of his decedent's domicil. Legitimation is not a prerequisite to inheriting and inheriting does not legitimize. An illegitimate child, albeit the right to inherit is his, remains an illegitimate. Only one objective is in the statute—heirship of intestate estates to and from illegitimates. *Lyon* v. *Lyon*, 88 Maine, 395. The adopting contemplated by our statute, like that purposed by similar statutes, is not as a prospective heir even, but as an illegitimate child. *Brewer* v. *Hamor*, supra; In re *Rohrer*, (Wash.), 60 Pac., 122, 50 L. R. A. 350;

In re *Pederson's Estate,* (Minn.), 106 N. W., 958; *Brown* v. *Legion of Honor,* (Iowa), 78 N. W., 73; *Alston* v. *Alston,* (Iowa), 86 N. W., 55; *Townsend* v. *Meneley,* (Ind. App.), 74 N. E., 274, 76 N. E., 321; In re *Garr's Estate,* (Utah), 86 Pac., 757. Humaneness prompted permitting an illegitimate to inherit, that the severity of the common law, by which he had not parents, kin, name, or heirs, except his own lineal descendants, and could not himself inherit, might in some degree be mitigated and the blot of parental sin partially removed from one innocent of responsibility for the unlawful state of his own birth.

The proper contention of these appellees is, that, in the country of their intestate's domicil, they meet the measure of the law controlling the transmission of his estate, not on the ground of status but sufficiently otherwise, and therefore, in virtue of that country's statutory declaration are entitled to inherit.

The statute is of descent pure and simple. *Lyon* v. *Lyon,* supra; *Brisbin* v. *Huntington,* (Iowa), 103 N. W., 144; *Blythe* v. *Ayers,* (Cal.), 31 Pac., 915, 19 L. R. A., 40. That the adoption antedated the enactment of the law is inconsequential. (*Messer* v. *Jones,* supra; *Lawton* v. *Lane,* 92 Maine, 170; *Alston* v. *Alston,* supra; *Daggy* v. *Wells,* Ind. App., 76 N. E., 524; *Townsend* v. *Meneley,* supra; *Moen* v. *Moen,* S. D., 92 N. W., 13); that the adoption was performed abroad is unimportant, (*Morgan* v. *Strand,* Iowa, 110 N. W., 596; *Brisbin* v. *Huntington,* supra; *Caldwell* v. *Miller,* Kan., 23 Pac., 946; *Moen* v. *Moen,* supra; *Blythe* v. *Ayers,* supra), and the laws of Nova Scotia are unrelated to the situation. *Hall* v. *Gabbert,* (Ill.), 72 N. E., 806; *Van Horn* v. *Van Horn,* (Iowa), 77 N. W., 846, 45 L. R. A., 93; Story on Conflict of Laws, Sections 93, 93s.

The exceptions are overruled. The decree of the Supreme Court of Probate is affirmed, additional costs are allowed, and the cause is remanded.

So ordered.

FELIX CHOUINARD *vs.* HENRY BERUBE.

Androscoggin. Opinion October 7, 1924.

Ordinary care only is required of a bailee in a gratuitous bailment.

In a gratuitous bailment the burden is upon the bailor to prove delivery to the bailee and, in the first instance, to prove refusal to redeliver on demand, making a prima facie case.

Then the burden would be upon the bailee to explain the cause of his refusal, such as loss of the property by theft or burglary, or destruction by fire or otherwise.

Then the burden would shift to the bailor to show that the loss or destruction was due to the failure of the bailee to exercise the degree of care of the property required by law of a gratuitous bailee.

On report. An action to recover damages for the loss of an automobile which plaintiff alleged that he left with the defendant, a deputy sheriff, over night, who put it into a stable, and during the night the stable was destroyed by fire and the automobile destroyed. The question involved was that of a gratuitous bailment.

Judgment for the defendant.

The case appears in the opinion.

Frank A. Morey, for plaintiff.

B. L. Berman and E. S. Titcomb, for defendant.

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

PHILBROOK, J. This case comes to the court on report. The issue involves the liability of a gratuitous bailee when the property claimed to be the subject of bailment is destroyed by a fire while in the possession of the alleged bailee. The defendant denies that any contract of bailment ever existed but we are not obliged to pass upon that contention because, even if the contract did exist, the plaintiff cannot recover in this action.

In a suit to recover damages against a gratuitous bailee the burden is upon the bailor to prove delivery of the goods to the bailee and, in

the first instance, to prove refusal to redeliver on demand. This would make a prima facie case. It would then be incumbent upon the bailee to explain the cause of his refusal, such as by showing the loss of the property by theft or burglary, or its destruction by fire or otherwise. Then it would be incumbent upon the bailor to show that the loss or destruction occurred by reason of the bailee's failure to exercise such a degree of care of the property as the law requires of a gratuitous bailee. *Dinsmore* v. *Abbott*, 89 Maine, 373. The bailee, in a gratuitous bailment, is held only to the measure of ordinary care. *Dinsmore* v. *Abbott*, supra. The record is wholly devoid of any proof of defendant's failure to exercise ordinary care over the property alleged to be bailed.

Judgment for defendant.

STATE OF MAINE

vs.

EASTERN STEAMSHIP LINES INC.

Cumberland. Opinion October 7, 1924.

An owner of a vessel or building used as a nuisance, though he be in possession does not keep and maintain the nuisance and is not criminally liable unless he himself uses the property for the illegal keeping or sale of intoxicants, or unless he knowingly permits such use of his property to be made.

In the instant case if the respondent's responsible agents knowing that the ship was being used in violation of law, had acquiesced in such use; if they had obstructed the enforcement officers or failed to render them assistance when requested, or if knowing the guilty parties, had continued to employ them, in either such cases permission might well be implied. But in this case no conduct of this kind appears. No express or implied permission is shown.

The fact that the oilers were employees of the respondent does not change the situation. They were employed to handle oil, not alcohol. In their surreptitious bootlegging operations the respondent was not their principal.

On report. The respondent was indicted for maintaining a liquor nuisance on one of its steamships, the Ransom B. Fuller, of the fleet of the respondent operating on the line between Boston and Portland.

It was alleged that certain employees of the respondent on said steamship, viz., three of the oilers, sold intoxicating liquor in violation of law on the steamship while it was tied up at the pier in Portland, the liquor having been surreptitiously concealed in various places on the ship and thus brought to this port. By agreement of the parties the case was reported to the Law Court for the determination of the guilt or innocence of the respondent upon such evidence as was legally admissible. Judgment for the respondent.

The case is stated in the opinion.

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

Nathan W. Thompson and Jacob H. Berman, for the respondent.

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

DEASY, J. The respondent corporation owns and operates a line of ocean-going steamships plying between Portland and Boston, including the ship Ransom B. Fuller.

Among the men employed on this ship in 1923 were three oilers having polysyllabic Greek names, but who were known as Gus, John and Mike. On several occasions while the ship was lying at the State pier in Portland these oilers sold intoxicating liquor to various persons. At the time of the sales the liquor was taken from the bilges and other hiding places on the vessel. A search afterwards made disclosed other alcoholic liquor similarly concealed on the ship. Gus, John and Mike were arrested and convicted of being common sellers. By the same evidence the State now seeks to convict the owner of the ship under the nuisance statute.

Omitting irrelevant parts, the statute defining nuisance reads: "All places used . . . . for the illegal sale or keeping of intoxicating liquor . . . . are common nuisances." R. S., Chap. 23, Sec. 1. Amended 1917, Chap. 155.

Obviously the ship was used by Gus, John and Mike for the illegal keeping and sale of intoxicating liquor. She thus became a statutory nuisance. But ownership and possession of a vessel, building or other place, so used as to be a nuisance, does not necessarily prove liability to criminal prosecution. It is "Whoever keeps and maintains such a nuisance" that is so liable—1917 Chapter 155.

An owner even though he be in possession does not keep and maintain the nuisance and is not criminally liable unless he uses the property for the illegal keeping or sale of intoxicants, or unless he knowingly permits such use of his property to be made. *State* v. *Stafford*, 67 Maine, 125. *State* v. *Frazier*, 79 Maine, 95.

In this case it appears that the respondent warned employees not to handle intoxicants, distributed circulars containing extracts from the Federal Prohibition Act; admonished its officials and servants to obey the law; stationed a watchman to prevent unauthorized persons from boarding the vessel; upon learning that some unknown member or members of its crew were bootlegging, it urged the State officers to identify and prosecute the guilty men, offered its aid in such measures and suggested the method which, adopted by the sheriff's office, resulted in the arrest and conviction of the bootleggers.

But notwithstanding the adoption in apparent good faith of all these precautions the counsel for the State argues that the respondent corporation must be held to have knowingly permitted bootlegging upon its ship because it instituted no active measures on its own part to discover and to discharge the guilty men. The State accuses the respondent of a sin of omission.

If the respondent's responsible agents knowing that the ship was being used in violation of law had acquiesced in such use; if they had obstructed the enforcement officers, or failed to render them assistance when requested, or if knowing the guilty parties, they continued to employ them, in either of such cases permission might well be implied. But no conduct of this kind appears. There is no evidence from which the respondent's consent to illicit acts can be fairly implied.

We have not regarded it as necessary to consider whether the ship is a "place of resort" as is for example a social club.

A place of resort is a nuisance, even if liquor is not there sold, if it is given away, drank or otherwise illegally dispensed. *State* v. *Cumberland Club*, 112 Maine, 196.

But on the Ransom B. Fuller intoxicants were sold. The ship was thus shown to be a nuisance whether she were a place of resort or not. But in undertaking to prove that the acts creating the nuisance were knowingly permitted by the respondent the State has failed.

The fact that Gus and the others were employees of the respondent does not change the situation. They were employed to handle oil not alcohol. In their surreptitious bootlegging operations the respondent

was not their principal. In the absence of express or implied permission no civil responsibility and, with greater reason, no criminal liability attached to their employer.

Judgment for the respondent.

EMPIRE CREAM SEPARATOR COMPANY

vs.

GEORGE H. CURTIS.

Androscoggin. Opinion October 7, 1924.

Verdict sustained.

In this case the plaintiff corporation contends that certain farm machinery shipped to the defendant was sold to him unconditionally. There was evidence, however, tending to show a conditional sale and other evidence tending to prove a consignment of the machinery to be sold by the defendant on commission.

The jury were justified in finding either theory to be the true one, the order given being consistent with either.

The jury found for the plaintiff for the price of machinery actually sold and not for that unsold.

On motion. An action of assumpsit to recover for farm machinery which plaintiff contends it sold to defendant unconditionally. A part of the machinery had been sold by defendant and a part of it unsold, defendant claiming that he was to sell it on commission. A verdict for the plaintiff for $293.97 was rendered, that being the price of so much of the machinery as defendant had sold, not including that unsold. The plaintiff filed a general motion for a new trial. Motion overruled. Verdict sustained.

The case is sufficiently stated in the opinion.

William H. Newell, for the plaintiff.

Frank A. Morey, for the defendant.

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

DEASY, J. In 1920 the plaintiff upon the defendant's order shipped to him certain farm machines. These were intended to be sold at retail by the defendant. Some of the machines were returned, or otherwise disposed of and are not now involved in the case. Two were sold by the defendant. The rest are still in his possession. His offer to return them has been refused. Suit was brought to recover for all. The jury by its verdict for $293.97, found that the plaintiff was entitled to recover for those only which the defendant had sold. The case comes to this court on the plaintiff's motion. It contends that the verdict is against law and evidence and that the damages are inadequate.

In the transaction the plaintiff was represented by its agent, Harrington. The following year, one Sheldon, another agent of the plaintiff came to the defendant's place of business and as is alleged, made certain promises with reference to the return of the machines. This feature of the case has been previously passed upon by this court. Sheldon's promises were apparently unauthorized and plainly without consideration. *Separator Co.* v. *Curtis*, 123 Maine, 247.

But the defendant relies upon the conditions of the original transaction. Evidence that the jury were entitled to believe, and which is for the most part uncontradicted, shows that the machines were ordered and shipped pursuant to the terms of a written contract between the parties made in the Spring of 1920. In concluding this contract the plaintiff was represented by Harrington and the defendant by his son, George Curtis, Jr.

After the contract was drafted and signed it was delivered to Harrington. No duplicate copy was made.

Harrington testifies that having received the contract he forwarded it by mail postage prepaid to the Empire Cream Separator Co., directed to one of its main offices and that it was not returned, although a return direction was printed on the envelope.

The only copy of the contract was thus traced into the hands of the plaintiff. The plaintiff did not produce it, nor explain its absence, nor deny its receipt. Mr. Haeusler, the plaintiff's secretary and treasurer, testifies that he does not know whether he received it or

not. Thereupon, the foundation having been laid, the presiding Justice admitted secondary evidence of the contents of the written contract.

Two witnesses, (the same persons who made the contract) testified to its contents. Harrington said "The substance of it was that he (the defendant) was to act as agent" and "to receive a per cent on all the goods he sold." According to Harrington's recollection there was also a provision that the plaintiff should provide assistance in selling. As is usual when witnesses honestly and without collusion attempt to recall the contents of a written document the witnesses do not remember the terms of the contract precisely alike. George Curtis, Jr. testifies that the contract was to cover "the distributing of milking machines and appliances" in certain territory; that there was an agreement relative to having assistance in disposing of them and that "it was guaranteed that all machines would be sold. If not they were to be transferred elsewhere."

The jury evidently believed and held and were justified in believing and holding that shortly before the machines were ordered and shipped a contract as described was entered into by the defendant and the plaintiff's selling agent, that this contract was sent to the plaintiff, received by and assented to by it and that all machines were ordered and shipped in pursuance of such contract and subject to its terms. So believing and holding, the jury was justified in deciding by its verdict that the defendant does not owe the plaintiff for unsold machines.

To otherwise determine we should have to hold that the jury was bound to disbelieve and disregard the testimony of Harrington and Curtis.

The fact is stressed that each of the defendant's orders for machines contains the words "all agreements relative to this order are indicated hereon." The orders, like the contract, are upon printed blanks supplied by the plaintiff corporation. Printed diagonally across each order are the words above quoted. Otherwise with the exception hereinafter noted, the orders are in the ordinary stereotyped form. They contain nothing about payment. Nothing else appearing a promise of payment is implied. But if, as Harrington testified and as the jury found, Curtis had been made the plaintiff's agent to sell its product upon commission the form of order used was equally appropriate and gave rise to no implication of a promise to pay for

machines unsold. Moreover the agreement or contract which the parties had entered into and signed was "indicated hereon." Each order contains the printed words "Term as per contract." The defendant was abundantly justified in understanding that the "contract" referred to was that which he had signed and which the plaintiff had received and kept; that his orders were given and filled pursuant to the terms of such contract and subject to its conditions.

This case has been previously before the Law Court. *Separator Co.* v. *Curtis*, supra.

In the former opinion it is held and is herein reiterated that the promises made by Sheldon are utterly without legal significance. We do not now question, but on the other hand reaffirm what is said in that opinion relative to failure to furnish assistance. These were the only points decided by the earlier opinion.

The written contract between the parties pursuant to which, in the judgment of the jury, the orders were given and machines shipped was not considered.

Motion overruled.

BEAULIEU'S CASE.

Aroostook. Opinion October 8, 1924.

That Section 36 of the Workmen's Compensation Act does not apply to agreements in which the period of compensation is not definitely limited, that is "an open end agreement," again affirmed with emphasis. Whether the claimant has unreasonably refused to submit to proper surgical treatment is a question of fact, and the finding thereon by the Chairman, if supported by rational and natural inferences from facts and circumstances proved, is final.

In this case the Chairman found "as a matter of fact" that claimant had not unreasonably refused to submit to proper surgical treatment, and the record justifies the finding.

On appeal. Compensation was paid to claimant under an agreement between the parties, duly approved by the Labor Commissioner, which was to continue during disability, the expiration not being fixed. On September 7, 1923, the respondent filed a petition asking that the compensation be stopped on the ground that claimant refused to submit to proper surgical treatment offered him by the respondent. The petition was denied and an appeal taken from a decree affirming the finding of the Chairman. Appeal dismissed with costs for claimant. Decree affirmed.

The case is sufficiently stated in the opinion.

Jasper H. Hone, for claimant.

Robert Payson, for respondents.

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

PHILBROOK, J. This is an appeal from a decree of a sitting Justice affirming a decision of the Chairman of the Industrial Accident Commission, denying the petition of the insurance carrier to end compensation, and further ordering compensation continued according to the terms of the agreement between the parties which was duly approved by the Commissioner of Labor, and further ordering pay-

ments to commence from the date of the last payment of compensation, the same to continue according to the provisions of the Workmen's Compensation Act.

The agreement above referred to, provided that compensation was to be paid during disability, beginning May 26, 1922. The date of expiration was not fixed, except, of course, as it would be so done by statutory limitation. The agreement is like that referred to in *Milton's Case*, 122 Maine, 437, as one "where the period of compensation is not determined" or in *Wallace's Case*, 123 Maine, 517, as "an open end agreement." We deem it proper, therefore, to again affirm, and with emphasis, that the provisions of Section 36 of the Compensation Act, prescribing a petition for review of decrees and agreements, do not apply to agreements in which the period of compensation is not definitely limited. *Milton's Case*, supra; *Wallace's Case*, supra.

Passing over the confusion which might arise merely from the title of the present proceeding, "petition for review of agreement or decree," and like expression in the title used by the Chairman of the Industrial Accident Commsision in his finding, we learn that the gravamen of the insurance carrier's petition is "that since said agreement was made the injury for which the employee was compensated ended, inasmuch as claimant has persistently refused, and still refuses, to submit to proper surgical attention offered him by said respondents." (The insurance carrier).

As stated in its brief, the insurance carrier takes the position that compensation claimants, to preserve their rights thereto, must submit to any reasonable and proper treatment offered them, and surely so if said treatment does not entail undue danger to life or extraordinary suffering. There is no direct provision in our compensation act which sustains this position. The insurance carrier, however, depends upon decisions of courts of last resort in other jurisdictions to support its position. Without doubt, the overwhelming weight of authority holds that a man cannot continue to receive compensation and at the same time refuse to submit to proper medical or surgical treatment such as an ordinarily reasonable man would submit to in like circumstances. *Schiller* v. *B. & O. R. Co.*,112 Atl., 272, and cases there cited.

But in proceedings under the English Compensation Act it has been held that whether or not a workman is unreasonable in refusing to have an operation performed is a question of fact with which an

appellate court will not interfere where the doctors are not wholly agreed as to the advisability of the operation. *Ruabon Coal Co.* v. *Thomas,* 3 B. W., Comp. Cas., 32.

In the case at bar the Chairman of the Commission found "as a matter of fact" that Beaulieu had not unreasonably refused to submit to proper surgical treatment. Careful examination of the record fully justifies the finding. The doctors and surgeons who testified are at variance as to the exact nature of the treatment which should be tried, and all practically admit that any operation would be followed by great pain and inconvenience and that the results of any treatment would be uncertain as to permanently successful results.

Appeal dismissed with costs for Beaulieu. Decree affirmed.

TANCREDE G. CROTEAU ET AL.

vs.

LUNN & SWEET EMPLOYEES ASSOCIATION.

Androscoggin. Opinion October 14, 1924.

Where a by-law of a benefit association provides three classes of benefits arising from sickness, temporary injury and death, the word "injury" as used in the by-law includes both an injury resulting in temporary disability, and an injury resulting in death.

Where the by-law provides no benefits shall be paid where the sickness or injury is the result of intemperance or immoral act, each of such causes is distinct from and exclusive of the other. The phrase "immoral act" does not include intemperance or the after effects of it.

In this case there is no evidence showing causal connection between the death of the late member of the defendant association and the intoxication of the occupants of the car.

On report. An action by the parents to recover a death benefit for the death of Emile Croteau who died May 20, 1923, as a

result of an automobile accident in going over an embankment, plaintiffs alleging that the driver of the automobile and others in the car including the deceased were intoxicated. By agreement of the parties the cause was reported to the Law Court on an agreed statement of facts. Judgment for the plaintiffs for $200.

The case is sufficiently stated in the opinion.

Clifford & Clifford, for plaintiffs.

George C. Webber, for defendants.

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

MORRILL, J. Action by the parents and legal heirs of one Emile Croteau to recover a death benefit payable upon the death of their son. Emile Croteau died May 20, 1923; it is conceded that he was a member in good standing of the defendant association until the day of his death; that he died unmarried, without designating a beneficiary, and that the plaintiffs are his legal heirs, and have given all notices required prior to bringing this action.

The defense relies solely upon the following provision constituting Section 14 of Article VII. of the By-laws, entitled "Mutual Aid Department":

"No benefits shall be paid for sickness or injury caused by intemperance or immoral act on the part of the claimant, or for injuries caused by deliberate self-infliction, or the after effects of any of these causes."

The facts, as agreed upon, are as follows:

"On the nineteenth day of May, 1923, young Croteau, in company with several other young men, started in an automobile for what might be termed a 'joy ride.' They started drinking at five thirty of the clock in the afternoon in Lewiston; they drove to Lisbon Falls, and remained there for four or five hours at a wedding party where more or less intoxicating liquor was consumed by all of them. It is admitted that while under the influence of intoxicating liquor, they drove to Augusta, Maine, starting from Lewiston about twelve o'clock at night on May 19th, and on their return from Augusta early in the morning of May 20th, at some place in Kennebec County, the automobile in which they were riding went over an embankment and as a result of this accident Croteau was killed and other members

of the party were more or less injured. It is admitted that Croteau was not driving the automobile, but that one of the party, while under the influence of intoxicating liquor, was driving the automobile at the time of the accident."

Thus have the parties stated the facts, — presumably all the facts known to them — relating to the manner of Croteau's death. Two questions are presented.

FIRST. Does Section 14 above quoted apply to death benefits? Upon consideration of the whole article it is apparent that we must so hold, notwithstanding the phrase "caused by intemperance or immoral act *on the part of the claimant.*" Three classes of benefits are provided for, arising from sickness, temporary injury, and death. Death may occur either from injury or sickness. A fair construction of the word "injury" as used in the section in question includes both an injury resulting in temporary disability, and an injury resulting in death. It certainly could not have been the intention to bar benefits for injuries caused by intemperance or immoral act resulting in temporary disability, and yet to pay benefits for injuries so caused resulting in death. The word "claimant" is not apt and cannot be regarded as controlling; it must be construed as meaning "member" or "deceased," when death benefits are to be considered. Section 9 of the same article makes this construction clear; it reads:

"No benefits for sickness, accident or death will be paid by this Association unless the *claimant* has been a member of the Association for at least one month."

SECOND. Do the facts show that young Croteau's death was caused by intemperance or immoral act on his part, or the after effects of any of these causes?

Conceding that the case does not show that the death of Croteau was caused by his own intemperance, counsel for defendant argues that the word "immoral" is not used in the narrow sense of "licentious," but in its broader meaning as defined by lexicographers; thus in Webster's New International Dictionary, "Inconsistent with rectitude, purity or good morals; contrary to conscience or the moral law; wicked; unjust; vicious;" and in the New Standard Dictionary, "Inconsistent with moral rectitude; violating the moral or divine law; morally wrong; hostile to the welfare of the general public;" and that the participation of Croteau in the drunken spree was an immoral act.

The answer to this line of arugment is two-fold. Careful consideration of Section 14 leads to the conclusion that the section speaks of two causes occasioning sickness and injury,—intemperance and immoral act, each distinct from and exclusive of the other. Therefore, whatever construction may be put on the latter phrase, it does not include intemperance, or the after effects of it; the language used is not, "or *other* immoral act."

Further, the case does not show that the accident to the car was due to the intoxication of the occupants; the road may have been wet and slippery; the car may have been crowded off the road by a passing car; the driver, although under the influence of intoxicating liquor, may have exercised due care beyond criticism. No causal connection whatever is shown between the death of Croteau and the intoxication of the occupants of the car.

Judgment for the plaintiffs for $200.00.

CHARLES F. DAGGETT ET ALS., Trustees

vs.

MARGARET G. TAYLOR.

Aroostook. Opinion October 14, 1924.

A devise in a will in the following language, "One half in common and undivided interest of and in" several parcels or lots of real estate, to some of which testator had the entire title and to others a fractional part of the title, construed as creating new estates, titles in new undivided interests, both in the lots where he owned the entire interest and in those in which he owned a fractional interest.

On report. A bill in equity seeking instructions in interpretating certain parts of the will of Albert J. Taylor who died March 19, 1922. The cause was reported to the Law Court. Bill sustained. Decree in accordance with opinion.

The case is fully stated in the opinion.

Cook, Hutchinson & Pierce, for complainants.

Edgar J. Rich, for respondent.

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

MORRILL, J. Albert J. Taylor, a native of this State, and a resident here for forty-seven years, died in Orlando, Florida, where he had resided for the last nine years of his life, on March 19, 1922; he left a will dated February 25, 1922, which has been duly proved and allowed both in Florida and in this State; by the seventh item of said will he devised to the plaintiffs as Trustees, certain real estate described in said will as follows:

"One-half in common and undivided interest of and in the following real estate situated in the North-half of Town of Wade, Aroostook County, Maine: Lots Fifty-three to Fifty-five, both inclusive. Lot Fifty-seven, Lots Fifty-nine to Sixty-two, both inclusive, Lots one Hundred and five and One hundred and eight and Lots One hundred and forty-four to One hundred and Sixty-nine, both inclusive. Also in said Town of Wade one-half in common and undivided of Lots Seventy-five, Seventy-eight and Eighty-one.

"Also one-half in common and undivided interest of and in the following real estate in the plantation or town of Caswell, Aroostook County, Maine: Lots one hundred and eighteen, one hundred and forty four, and the west half of Lot one hundred and forty five.

"Also one-half in common and undivided interest of and in the following described real estate situated in the town of Perham, Aroostook County, Maine: Lots Twenty, Twenty one, twenty-one and one-half, Twenty-two and West half of Sixty-eight.

"If any above lands are under permit to cut lumber at time of my death then one-half the stumpage due and unpaid at that time shall go to this trust and the other half to my general estate."

He bequeathed and devised the residue and remainder of his estate to his wife, Margaret G. Taylor, the defendant, "absolutely and in fee simple."

At the date of the will and at the time of the testator's death, he owned two ninths in common and undivided of the lots above described as situated in the north half of the town of Wade, and the whole of lots seventy-five, seventy-eight and eighty-one in said Wade. He owned the whole of lots one hundred and eighteen and one hundred and forty-four, and the whole of the west half of lot one hundred and forty-five, in Caswell. He owned one half in common and undivided

of lots twenty, twenty-one, twenty-one and one half, and twenty-two and three fourths in common and undivided of the West half of lot sixty-eight, in Perham. These lots are wild land.

The issue presented for our decision is between the trustees and the residuary devisee. The trustees contend that they take all the testator's title where he owned one half or less of the several parcels mentioned; that in the parcel where he owned a three fourths interest in common and undivided, they take a half and the residuary legatee a quarter of said parcel; and that where he owned the entire interest in the several parcels, the trustees take one half and the residuary devisee one half of said parcels. The residuary devisee contends that the testator's holdings in these lands are devised in equal shares to the trustees and the residuary devisee.

It thus appears that in applying the language of the will to the subject matter of the devise a latent ambiguity is disclosed, which it becomes the duty of the court to solve by determining the intention of the testator. The rule by which the court must be guided is well recognized. The intention of the testator is to be sought in the language of the will, taking into consideration all parts of the instrument and interpreting it in the light of facts and conditions existing at the time the will was made, which may be supposed to have been in the mind of the testator; *Palmer* v. *Estate of Palmer*, 106 Maine, 25, 28. *Tibbetts* v. *Curtis*, 116 Maine, 336, 339; and courts will change or mould the language of the will in order to give to it its intended effect, (*Hopkins* v. *Keazer*, 89 Maine, 347, 355), with the avowed object of dispelling the effect of some inaccurate, or inappropriate use of language on the part of the testator or his scrivener, and making the will interpret what he obviously meant, just as though his ideas had been clearly and correctly expressed in the instrument; (1 Schouler on Wills. Fifth Ed., Sec. 477, Page 597) but the court will not permit "conjectural interpretation to usurp the place of judicial exposition." 1 Jarman on Wills, Randolph & Talcott's, Fifth Am. Ed. 736.

At the outset, it is apparent that if the testator had intended to devise to the trustees, as claimed by their counsel, his entire interest in the lots in the North half of the town of Wade, of which he owned two ninths in common and undivided, the phrase, "one half in common and undivided interest in and to," has no application; so, with reference to the four lots in the town of Perham, of which he

owned one half in common and undivided, the phrase, while not inappropriate, is unnecessary; in both instances the mode of expression most naturally occurring to the mind of a scrivener, if the contention of the trustees is correct, would omit the phrase altogether and substitute: "All my interest in the following real estate situated in the North half of the Town of Wade." . . . . "All my interest in the following described real estate situated in the Town of Perham."

The testator knew the extent of his holdings; he was familiar with the ownership in common of wild lands in Maine, with methods of managing such interests, and with cutting under stumpage permits. Throughout the entire seventh item the testator uses the words, "one half in common and undivided interest in and to," at the beginning of each sentence describing the lots in the different townships, both where he owned the entire interest and where he owned an interest in common. This studied, recurring use of the same words should not be attributed to the mistake of the scrivener or testator, unless all other conclusions fail. They should, if possible, be given effect.

We are of the opinion that by the use of this language the testator intended to create new estates, titles in new undivided interests, both in the lots where he owned the entire interest and in those in which he owned a fractional interest, and that he intended to divide equally all his holdings of the wild lands in question between the trustees of the trust created for the benefit of his brother and his brother's daughter, and his widow. He used the same phraseology throughout the devise to accomplish the same purpose relative to his different holdings. *Blaine* v. *Dow*, 111 Maine 480, 484.

The will discloses that the testator had in his mind that a substantial sum of money would probably be due at his death from stumpage contracts on these lands; realizing this, he divided the amount equally between the trust and the residuary estate. This provision supports our interpretation of the will. It is very improbable that a testator having in his mind so fully the character and condition of his property as this testator had, would divide his wild lands in one proportion, and the stumpage payments arising therefrom in another proportion, between the same parties.

The language of the will as to lots seventy-five, seventy-eight and eighty-one, in Wade, and as to the lots in Caswell, owned wholly by

the testator, is clear and without ambiguity. As applied to the lots in the North half of Wade, of which he owned two-ninths, and to the lots in Perham, of which he owned one half, and to the half lot in Perham, of which he owned three fourths, it is elliptical, and we have but to supply the omitted words, "of my" before the word "interest" to harmonize the language of the entire devise. Courts interpreting wills have frequently supplied words so as to bring out the testator's obvious meaning, 1 Schouler on Wills, Fifth Ed., Sec. 477, Page 596; and have the right where the estate or quantity of interest disposed of by a testator is in dispute, to look out of the will and be guided in the construction of it by the effect, if any, which the circumstances of the case may have upon it. Wigram on Wills, Proposition V., star Page 72. 1 Schouler on Wills, Fifth Ed., Sec. 589.

It is accordingly the opinion of the court that it was the intention of the testator to devise to the plaintiffs in trust one half in common and undivided of his interest in the wild lands in question, and the other half to the residuary devisee.

The bill is sustained. The trustees having acted for the protection of the trust, are entitled to charge their taxable costs, and their counsel fees allowed at $250, against the trust estate.

Bill sustained.
Decree in accordance with opinion.

ARTHUR L. PERRY, ADM'R *vs.* CLARA LESLIE ET ALS.

Cumberland. Opinion October 14, 1924.

Legacies, where the testatrix bequeath to A "twenty shares of the capital stock" of a certain corporation, to B "ten shares of the capital stock" of the same corporation, and to C "twenty shares of the capital stock" of the same corporation, are general, not specific, and may be satisfied by the delivery of the specified number of shares of the capital stock of the corporation within twenty months after final allowance of the will without any dividends, either in cash or stock, declared by the company and received by the administrator or executor before such delivery.

In this case in the distribution of the residue of the estate, the defendants, daughters of John Pease, will take one fourth thereof to be equally divided between them; the defendants, daughters of Laura Livers, who died in the lifetime of the testatrix, will take one fourth to be equally divided between them, and the defendants, Clara Leslie and Anna Perry, will take each one fourth thereof.

On report. A bill in equity seeking the construction and interpretation of the will of Ellen J. Whitmore, deceased, late of Brunswick in Cumberland County. At the conclusion of the evidence, by agreement of the parties, the cause was reported to the Law Court upon the amended bills and answers thereto, replication and proof, for the determination of facts and rights of the parties upon the pleadings and so much of the testimony as is legally admissible. Bill sustained. Decree in accordance with opinion.

The case is fully stated in the opinion.

Andrews, Nelson & Gardiner, for complainants.

McLean, Fogg & Southard, Clement F. Robinson, Charles M. Davenport, Philip G. Clifford, Joseph E. F. Connolly, Charles H. Blatchford, Clinton C. Palmer and Ralph E. Jenny, for respondents.

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

MORRILL, J. Ellen J. Whitmore of Brunswick died on the eleventh day of October, 1922, leaving a will written by herself, dated

June 30, 1909. The plaintiff as administrator with the will annexed of her estate brings this bill for instructions in the performance of his duties. Two questions are presented.

FIRST. The testatrix owned at the time of her death one hundred seventy-one shares of the capital stock of the Sagamore Manufacturing Company, a Massachusetts corporation; her will contains inter alia the following provisions:

"I give and bequeath as follows:

"To American Board Commissioners for Foreign Missions, incorporated in Massachusetts, Three thousand dollars and twenty shares in the capital stock of the Sagamore Manufacturing Company of Fall River, Massachusetts.

"To the Congregational Union for Church Building Ten shares of the capital stock of said Sagamore Manufacturing Company and Five Hundred in money.

"To Chadbourne Whitmore of Superior Wisconsin, son of Samuel Warren Whitmore in trust for the said Samuel W. Whitmore his father twenty shares in capital stock of Sagamore Manufacturing Company."

After the death of the testatrix the Sagamore Manufacturing Company declared a stock dividend of sixty-six and two thirds per cent., or two additional shares for every three shares outstanding, and from time to time certain cash dividends, which plaintiff has received and now holds. As to the disposition of both classes of dividends he asks the instructions of the court.

The legatees, American Board of Commissioners for Foreign Missions, the Congregational Church Building Society and Chadbourne Whitmore claim to be entitled to their proportionate shares of both classes of dividends.

It is to be noticed that the holdings of the testatrix exceeded the total number of shares thus disposed of, including forty shares bequeathed to the Medical School of Maine, which has since been dissolved; and there is no language directly identifying the shares bequeathed. The legacies must, therefore, be regard as general, not specific, under the ruling in *Palmer* v. *Estate of Palmer*, 106 Maine, 25.

The essential nature of stock dividends has recently been considered by this court in cases arising between life tenants and remainder men (*Thatcher* v. *Thatcher*, 117 Maine, 331, *Harris* v. *Moses*, 117 Maine, 391), and by the Supreme Court of the United

States in cases involving the taxation of such dividends as income (*Towne* v. *Eisner*, 245 U. S., 418, *Eisner* v. *Macomber*, 252 U. S., 189), with the result that in the first class of cases such dividends have been declared not to be income to which a life tenant will be entitled as against a remainder man, and in the latter class, not be taxable income. It is urged that the reasoning upon which the results in those cases are based applies equally here.

Counsel, therefore, submit, with forcible argument, that the legacies to the American Board of Commissioners for Foreign Missions, the Congregational Union for Church Building, and Chadbourne Whitmore, Trustee, are the shares in the corporate property of Sagamore Manufacturing Company which on October 11, 1922 were represented by twenty, ten, and twenty shares respectively of its capital stock, and are now represented by thirty-three and one third, sixteen and two thirds, and thirty-three and one third shares respectively.

In ascertaining the rights of legatees the intention of the testatrix as collected from the whole will and all the papers which make up the testamentary act, (*Tibbetts* v. *Curtis*, 116 Maine, 336, 339) examined in the light of the attendant facts which may be supposed to have been in the mind of the testatrix, (*Palmer* v. *Estate of Palmer*, supra,) must govern. If the intention of the testatrix cannot be so ascertained, the court must be governed by such rules of law as have been established to meet the circumstances of the case. *Thatcher* v. *Thatcher*, supra.

The will affords no indication of the intention of the testatrix as to either class of dividends; it was made more than thirteen years before her death; nothing appears from which we may infer that she knew anything about stock dividends, or that the possibility of such distribution ever occurred to her: unless the possibility of such dividends was present in her mind she cannot be said to have had any intention in regard thereto. We must, therefore, look to the rules of law governing the case, and ascertain what will satisfy the calls of the will as to these legacies; and here the distinction between specific and general legacies becomes important and, we think, controlling.

Specific legacies are considered as separated from the general estate, and appropriated at the time of the testator's death, and carry with them all accessions by way of dividends or interest accruing

after the death unless the will otherwise directs; although the executor for his own protection may withhold payment or delivery of the legacy to provide against debts. But general legacies are payable out of the general assets of the estate and in case of a gift of stock may be satisfied by the delivery to the legatee of any stock answering the description. *Palmer* v. *Estate of Palmer*, supra. 2 Woerner on Administration, 2d Ed. Sections 444, 458. *Tifft* v. *Porter*, 8 N. Y., 516. *Sponsler's Appeal*, 107 Pa. St., 95, 100. So where a testator bequeathed to one daughter "four thousand dollars in United States government bonds, to be delivered to her, if alive, at my death; if not, to her children," and to another daughter "one thousand dollars in United States Government bonds," and left at his death United States bonds to the amount of five thousand dollars, the legatees contended that they were entitled to receive the respective amounts of bonds due them under the will from those left by the testator. The court held, however, that the requirements of the will would be satisfied by the delivery to the legatees of any bonds of the United States in the amounts specified. *Evans* v. *Hunter*, 86 Iowa, 413.

These authorities are decisive of this case. We hold that the legacies under consideration will be satisfied by the delivery of the specified number of shares of the capital stock of Sagamore Manufacturing Company within twenty months after final allowance of the will (Public Laws, 1919, Chapter 40) without the dividends, either in cash or stock, declared by the company and received by the administrator before such delivery.

If the plaintiff transfers and delivers the certificates of stock before said twenty months expire, the legatees will be entitled to the dividends, stock and cash, payable after such transfer; and in any event they will be entitled to the dividends payable after said twenty months.

SECOND. The residuary clause of said will is as follows: "I give, bequeath and devise all the rest, residue and remainder of my estate to Clara Leslie Anna Perry—Laura Livers and daughters of John Pease."

Clara Leslie and Anna Perry are sisters of each other, and daughters of an uncle by blood of the testatrix; Laura Livers and Susan Pease were sisters of each other, and daughters of an aunt by blood of the testatrix; Laura Livers died May 3, 1920 and it is conceded that

her two daughters, Caroline Van Huysen and Susan Eastman, succeed to her interest in the residuary estate; Susan Pease was the wife of John Pease mentioned in the residuary clause; they had children, Charles, Fannie, Minnie, Sarah and Bessie, who are legatees under an earlier clause of the will, as follows: "To Charles, Fannie, Minnie, Sarah and Bessie children of John Pease and his late wife Susan C. Pease Thirty-five hundred dollars to be equally divided between them."

Clara Leslie, Anna Perry and the two daughters of Laura Livers contend that the residuary personal estate shall be distributed in four equal parts, of which the daughters of Mrs. Livers will have one, and the daughters of John and Susan Pease another; the four daughters of John and Susan Pease, viz.: Fannie M. Pease, Minnie P. Pease, Sarah P. Pease and Bessie M. (Pease) Bowers, claim that said estate shall be divided into seven equal parts of which they shall each receive one seventh, Clara Leslie and Anna Perry each one seventh, and the daughters of Laura Livers, a seventh to be divided between them. It is conceded that the share of Clara Leslie, whatever it may be, has been assigned to one Marion G. L. Harmon, who is made a party to the bill, and that the real estate constituting a part of the residuary estate will be held in common and undivided in the same proportions in which the residuary personal estate shall be distributed.

The executor asks for the instructions of the court as to the distribution of the residuary estate.

Here, again, we are to seek the intention of the testatrix as expressed in the will.

Counsel for Fannie M. Pease, Minnie P. Pease, Sarah P. Pease, and Bessie M. (Pease) Bowers contends that when a devise or bequest is made to a person and the children of another person, or to a person described as standing in a certain relation to the testator and the children of another person standing in the same relation, the beneficiaries take per capita, not per stirpes, as stated in 2 Jarman on Wills, 5th Am. Ed., star Page 194, (Randolph & Talcott's, 5th Am. Ed., Page 756). That such a canon of interpretation exists is conceded by counsel for the other beneficiaries under the residuary clause. It seems to have been based upon the judgment of Lord Chancellor King in *Blackler* v. *Webb*, 2 P. Wms., 383 (*Roome* v. *Counter*, 6 N. J. L., 111. *Dollander* v. *Dhaemers*, 297 Ill., 274, 130

N. E., 705), and in some jurisdictions has now become an established canon of interpretation; but like all other rules of construction it yields to the intention of the testator as determined from the language of the will; and it requires but slight evidence, "a very faint glimpse," of a different intention on the part of the testator to lead to a distribution per stirpes. *Balcom* v. *Haynes et al.*, 14 Allen, 204. If we have strict regard to the language of the will before us and to the facts admitted, the rule referred to is not applicable because (1) the word "children" as distinguished from "heirs," is not used, and (2) the gift is not to the children of John Pease, of whom there were five by his wife, Sarah, but the daughters, four in number, are selected as the recipients of the bounty of the testatrix. The diligence of counsel has not found for us any case in which the language of the will and the facts relating to the beneficiaries are the same as here, nor have we found such a case. In the case of *Kimbro* v. *Johnston et al.*, 15 Lea (Tenn.), 78, the language of the will,—"Mary's daughters,"—"James' daughters"—is very similar to the language of the will before us, and both "Mary" and "James" had sons as well as daughters; but the testatrix directed that the notes bequeathed should be "equally divided." This phrase, wanting in the present will, is very generally regarded as a determining factor as to the manner of distribution. See *Doherty* v. *Grady*, 105 Maine, 36, 44. *Balcom* v. *Haynes*, supra. *Allen* v. *Boardman*, 193 Mass., 286. The Tennessee Court felt obliged to follow the English rule "in the absence of anything to show a different intent," in accordance with their decisions.

In cases involving the interpretation of wills, citations of adjudicated cases cannot afford much aid; while they can afford helpful analogies, they are uncertain guides. No two wills are ever precisely alike. No two testators are situated precisely the same, and it is both unsafe and unjust to interpret the will of one man by the dubious light of the construction given by a court of justice to the will of another. This court has often so remarked; *Fogler* v. *Titcomb*, 92 Maine, 184, 188; *Crosby* v. *Cornforth*, 112 Maine, 109, 112; *Tibbetts* v. *Curtis*, 116 Maine, 336, 340; and the remark is peculiarly applicable, here, to the consideration of a will involving the distribution of an estate per stirpes or per capita, upon which subject the cases are a multitude, confusing when an attempt is made to classify them, and in many cases contradictory.

Nor can this bequest to the "daughters of John Pease" in a strict legal sense be said to be a gift to a class, which is a body of persons which may fluctuate in number. 1 Redfield on Wills, 2d Ed., 340, star Pages 385, 386. "A number of persons are popularly said to form a class when they can be designated by some general name as 'children,' 'grandchildren,' 'nephews'; but in legal language the question whether a gift is one to a class depends not upon these considerations, but upon the mode of gift itself, namely, that it is a gift of an aggregate sum to a body of persons uncertain in number at the time of the gift, to be ascertained at a future time, and who are all to take in equal or in some other definite proportions, the share of each being dependent for its amount upon the ultimate number of persons." 1 Jarman on Wills. Randolph & Talcott's, 5th Amer., Ed., 534, star Page 269. Here there is no uncertainty as to the number of the designated legatees; their names are stated in the will; their relationship to the testatrix was through their mother, Susan C. Pease, who died in 1884; there is no reason for supposing that the testatrix had in mind other persons than the daughters of John and Susan C. Pease; it does not appear that she knew of the second marriage of John Pease, or had any personal acquaintance with him. We are of the opinion that it could not have been the intention of the testatrix that only the daughters of John Pease living at her death should take, and that in the event of the death of one or more in the lifetime of the testatrix, their representatives would take nothing. See *Fairbank's Appeal*, 104 Maine, 337. *McClench* v. *Waldron*, 204 Mass., 554, 557.

It is well, however, to bear in mind the popular conception of the term "class" in interpreting this will drawn by the testatrix herself; the word is not infrequently used by the authorities in the same sense, or in the sense that the persons indicated collectively represent their parent. See *Doherty* v. *Grady*, 105 Maine, 36, 45. *Palmer* v. *Jones*, 299 Ill., 263; 132 N. E., 567. *Fissel's Appeal*, 27 Pa. St., 55, 57. *Ferrer et al.* v. *Pyne*, 81 N. Y., 281, 284.

Whether in the absence of any attendant facts and conditions, thus confined to the language of the devise itself, we should follow the English rule or adopt a construction which conforms to the statute of distribution, as if the word "heirs" was used (*Doherty* v. *Grady*, supra), we need not decide; the authorities appear to be at variance.

Upon the record as presented we think that it is not difficult to determine the development of her will in the mind of the testatrix, and thus to ascertain her intentions.

In addition to the facts in the bill before stated, admitted by the answers, we have before us three documents; the first is a former will of the testatrix, not in her handwriting, dated February 8, 1901, found in her residence before her death; the second is an office copy of the first, not very material here, found among the papers of the late Weston Thompson, Esq., who was in his lifetime the attorney of the testatrix; the third document is in the handwriting of the testatrix, signed by her, and dated June 29, 1909. These documents do not contain any declarations by the testatrix as to her intentions in relation to the present issue; such declarations are conceded to be inadmissible; but they are evidence of conditions which were before, and present in the mind of, the testatrix when she wrote the last will, and as such are admissible as legitimately tending to show the probabilities of her intentions. *Tapley* v. *Douglass*, 113 Maine, 392, 394.

A comparison of the will of 1901 with the document dated June 29, 1909 and with the will before us dated June 30, 1909 shows beyond question that when Miss Whitmore undertook to write her will she had before her the will of 1901. The document dated June 29, 1909 was evidently begun as a will; she carefully copied the will of 1901 to and including the legacy to the First Parish Church in Brunswick, changing only the reference to the pastor in accordance with the fact; from that point the writing becomes a memorandum of the provisions of the contemplated will, noted down as she went through the earlier will, leaving some legacies unchanged, changing others, and omitting some. The will of 1901 contained inter alia these provisions:

"To Fannie, Minnie, Sarah, and Bessie, children of John Pease and his late wife, Susan C. Pease, two thousand four hundred dollars to be divided among them in equal shares: also all my funds and deposits in Portland Savings Bank in Portland, Maine to be divided among them as aforesaid.

"To Charles Pease, son of said John and Susan, four hundred dollars."

The residuary estate she bequeathed and devised "to Clara E. Leslie, Anna J. Perry and Laura S. Livers to have and to hold in fee."

In the writing of June 29, 1909 she did not dispose of the residue, and omitted all legacies to the Pease children and to some other legatees, including the Congregational Union for Church Building. When she later had decided upon the final terms of her will, she gave to the five Pease children thirty-five hundred dollars to be shared equally, and made additional provision for the daughters by including them as beneficiaries in the residue.

Giving consideration to the relationship which these parties and the other residuary legatees bore to the testatrix as disclosed by the record, we cannot doubt that the testatrix had in mind that Susan C. Pease was related to her in the same degree as the other residuary legatees, and that by including her daughters collectively, as her representatives, the residue would be divided among three persons and the daughters of a fourth, of the same degree of kindred to her, and likewise divided between two collateral branches of her family, and that no distinction should be made between those branches. Miss Whitmore probably knew nothing about the technical distinction between distribution per stirpes and per capita, or as to taking by "a class"; but the natural thought in her mind was that the daughters collectively should represent their mother, that the mother was of the same degree of kindred to her as the other residuary legatees, and that there should be no discrimination between them; she thus in her own mind classified the daughters of John Pease. *Fissel's Appeal,* supra. *Ferrer et al.* v. *Pyne,* supra. We know of no rule of law which will prevent us from giving effect to this thought and intention of the testatrix. We, therefore, hold that in the distribution of the residue of the estate the defendants, Fannie M. Pease, Minnie P. Pease, Sarah P. Pease, and Bessie M. (Pease) Bowers, will take one fourth thereof to be equally divided between them, that the defendants, Caroline Van Huysen and Susan Eastman, will take one fourth thereof to be equally divided between them, and that the defendants, Clara Leslie and Anna Perry will each take one fourth thereof; the share of said Clara Leslie in the personal estate will be paid to the defendant, Marion G. L. Harmon. The following cases, upon various aspects of the case, are in harmony with this conclusion, although in none is the language of the will, and the facts, precisely the same as in the instant case. *McClench* v. *Waldron,* 204 Mass., 554. *Dollander* v. *Dhaemers,* 297 Ill., 274, 130 N. E., 705. *Ferrer et al.* v. *Pyne et al.,* 81 N. Y., 281. *Fissel's Appeal,* 27 Pa. St.,

55. *White* v. *Holland,* 92 Ga., 216. *Geery et als.* v. *Skelding et als.,* 62 Conn., 499. *Lyon et als.* v. *Acker,* 33 Conn., 222. *Fraser* v. *Dillon,* 78 Ga., 474.

It is conceded that the defendant, Congregational Church Building Society, is the organization referred to in said will as the "Congregational Union for Church Building," and is entitled to the legacy thus bequeathed.

The plaintiff may charge his taxable costs, and counsel fees allowed at one hundred dollars against the estate in his hands.

Bill sustained.
Decree in accordance with opinion.

MRS. R. L. BEAN *vs.* CAMDEN LUMBER AND FUEL COMPANY.

Knox. Opinion October 16, 1924.

The practice of pleading double by joining an appropriate common or money count with a special count on a promissory note is so well established and of such long standing, it cannot now be questioned.

In the instant case the specifications are no part of the count. The count itself is in proper form and states a good cause of action.

On exceptions. An action of assumpsit, declaring on a promissory note in the usual form in one count, and for money lent in another, with specifications that the loan declared on in the second count is the same consideration for the note declared on. Defendant filed a general demurrer to the second count at the return term, which was overruled and exceptions taken. Exceptions overruled.

The case is stated in the opinion.

Oscar H. Emery, for plaintiff.

J. H. Montgomery, for defendant.

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

WILSON, J. An action of assumpsit. The plaintiff's declaration contains two counts, one in the usual form on a promissory note, the other a common count for money lent followed by a specification that the loan declared on in the second count is the same consideration for which the note described in the first count was given.

At the return term the defendant filed a general demurrer to the second count, which was overruled. The case comes up on defendant's exception to this ruling.

Defendant's counsel in substance contends in support of his exception that the plaintiff is confined by his specifications under his second count to proving that the note was given in payment of the loan, and therefore no recovery can be had upon any general promise to repay the loan, but only upon the special promise contained in the note.

Such a contention is specious on its face and clearly without merit. A note at best is only presumptive evidence of payment, which may be rebutted. *Bunker* v. *Barron*, 79 Maine, 66. The specifications simply give notice to the defendant that the second count is for the same cause of action as the first,—to recover a certain sum loaned to the defendant, of which a promissory note may be evidence. *Fairbanks* v. *Stanley*, 18 Maine, 296. The practice of joining an appropriate common or money count with a special count on a promissory note is so well established and of such long standing that it is difficult to conceive that counsel is serious in urging such objection. Chitty on Pl., Vol. 1, *350; Ency. Pl. & Pr., Vol. 14, Page 568; *Cushing* v. *Gore et al.*, 15 Mass., 69; *Ellis* v. *Wheeler*, 3 Pick., 18; *Tebbetts* v. *Pickering*, 5 Cush., 83; *Dean* v. *Mann*, 28 Conn., 352; *Villa* v. *Weston*, 33 Conn., 42; *Wilkins et als.* v. *Reed et als.*, 6 Maine, 220; *Atkins* v. *Brown*, 59 Maine, 90; *Blackstone Nat. Bank* v. *Lane, Trustee*, 80 Maine, 165; 8 Cyc., 146.

Plaintiff may amend, in case a special count on a promissory note fails for any reason, by adding an appropriate common or money count. *Burnham* v. *Spooner*, 10 N. H., 165; *Willis* v. *Crooker*, 1 Pick., 204. A promissory note may even be introduced in evidence in support of a money count though not specially declared on. *Fairbanks* v. *Stanley*, supra; *Payson* v. *Whitcomb*, 15 Pick., 212; *Webster* v. *Randall*, 19 Pick., 13, 16; 8 Cyc., 147.

As was said by this court in *Cape Elizabeth* v. *Lombard*, 70 Maine, 396, 400: "The very object of double counts is that one may succeed, if others fail in a correct description of the cause of action."

For instance, in the case at bar, if it should appear that the plaintiff was not able to show that the note declared on was duly executed by someone authorized to sign in behalf of the corporation, the appropriate common count would permit recovery of any sum justly due and thus end litigation. *Wilkins et als.* v. *Reed et als.*, supra.

For another reason the demurrer was properly overruled. The specifications, added no doubt in view of Rule XI. of this court, or to comply with Sec. 60, Chap. 86, R. S., are no part of the count. *Dexter Savings Bank* v. *Copeland*, 72 Maine, 220. The count itself is in proper form and states a good cause of action.

Exceptions overruled.

HERMON E. HENRY'S CASE.

Hancock. Opinion October 17, 1924.

"Dependency" under the Workmen's Compensation Act is determined by the question whether claimant is dependent on the earnings of the employee for support at time of injury. Contributions, if not necessary for the support of claimant and not by him relied upon for his support, do not constitute dependency.

In the instant case the finding of the Commission on the question of dependency, being a question of fact, is final under the evidence. Dependency is a condition precedent to award of compensation.

On appeal. A minor son of claimant, nineteen years of age, was fatally injured while in the employ of the Bar Harbor & Union River Power Company at Ellsworth. The son worked out at odd jobs when not in school, living at home, and from his earnings gave to his father from time to time a part of them. The question involved was as to whether claimant was dependent on the earnings of the minor son for his support. After a hearing the Commission found that

claimant was not dependent on the earnings of the minor son and denied compensation. From a decree of the sitting Justice affirming the findings of the Commission an appeal was taken. Appeal dismissed. Decree affirmed.

The case is stated in the opinion.

D. E. Hurley, for claimant.

Gillin & Gillin and Robert Payson, for respondents.

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

CORNISH, C. J. Appeal by claimant, alleged partial dependent father, from a decree of the sitting Justice affirming a decision of the associate legal member of the Industrial Accident Commission, hereinafter termed the Commission, dismissing the petition for compensation.

The facts found by the Commission are thus stated in the decision:

"It seems that deceased, a school boy 19 years old, was killed on the first day of his employment by the respondent Power Company during temporary suspension of his school on account of an epidemic. During vacations and out of school hours he had been doing various odd jobs, including driving a public auto, and had been living at home, paying for his own clothing and occasionally turning over to his parents small sums of money and at times buying groceries for the family. It is contended by claimant that his son's earnings during the year preceding his death were about $200 and that of this sum perhaps half was expended for his own pleasure, the rest being a material contribution to the family fund and so to be regarded as a contribution in arriving at compensation for partial dependency inasmuch as a father is bound by law to support his minor children." This is a fair statement of the claimant's contention.

The Commission further found that the "claimant was a man in the prime of life and of vigorous health, with an equity in his house, working at the time as a carpenter and earning $45.50 for a full week, the work of course depending upon weather conditions." Five children are left at home varying in ages from eighteen to five. The two older ones earn small amounts outside of school hours. The claimant up to within two weeks of the accident to the son had been acting as Superintendent of Schools of Ellsworth, Surry and Dedham at a salary of $2,100.

What constitutes dependency in this State under the Compensation Act has been clearly and recently defined in *MacDonald's Case*, 120 Maine, 52. Applying the rule there laid down the Commission held that "from all the evidence in the case it cannot be found that claimant was actually dependent upon his son for support within the meaning of the provisions of the Workmen's Compensation Act as explained by the MacDonald decision."

This ruling, which involves a question of fact, should not be disturbed. The Commission's finding is final under the evidence. Dependency is a condition precedent to award of compensation. Mere reception of assistance does not of itself create it. The test is, were the contributions necessary and were they relied upon by claimant for his means of living, his station in life being considered, and further were such contributions more than offset by the support rendered by the father.

In determining these questions where the decision is against the claimant it must be remembered that the trier of facts is not bound to accept certain testimony as conclusive. Its weight and credibility are for him. *Orff's Case*, 122 Maine, 114.

Appeal dismissed.
Decree affirmed.

LEE E. J. ROSS' CASE.

Franklin. Opinion October 27, 1924.

Under the Workmen's Compensation Act the requirement of the statute that to a petition an answer should be filed may be waived. Testimony as to declarations made by the injured several days after the injury, as proving causative connection between the employment and death of the injured, is inadmissible as hearsay. Such testimony may be admissible if the declarations were spontaneously made and were a natural concomitant of the injury. A finding by the Commission that there was a causative connection between the injury and the death of the injured, in absence of fraud, if supported by some competent evidence, is final and not examinable.

In this case while it is true certain hearsay was improperly allowed into the record, in the effort to establish causative connection between the employment of Mr. Ross and his death, it is equally true that it did not come essentially into the Commissioner's finding and the affirming decree. The report of the accident, as submitted in writing by Mr. Ross' employer to the Industrial Commission, under the duty imposed by statute, rightly had place in the evidence. That report, being believed, notwithstanding it was contradicted by him who made it, by saying that it was wholly based upon narration by Mr. Ross and on rumor, itself justified the finding of the Chairman.

On appeal. One Lee E. J. Ross was in the employ of the Thomas J. Sheehy Company, an assenter under the Workmen's Compensation Act, as finisher in its woolen mill at Phillips. He died from tetanus on February 20, 1923. His employer reported to the Industrial Accident Commission that the death resulted from an accidental injury which arose while and because the man was employed. When the case was up for compensation, physicians were permitted to testify, on the point of causative connection between employment and injury, what Mr. Ross recited the cause of his injury to be. This was error. But, in the situation of the record, it did not constitute reversible error, because the report made by the employer, being believed by the trier of fact, notwithstanding it was contradicted subsequently in the evidence, itself justified the finding and award of the Commissioner. Appeal dismissed with costs. Decree below affirmed.

The opinion states the case.

J. Blaine Morrison, for claimant.

Andrews, Nelson & Gardiner, for respondents.

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

DUNN, J. Petition under the Workmen's Compensation Act. There was failure to comply with the statute requiring that an answer be filed. R. S., Chap. 50, Sec. 32, as amended. This left the petition, analogously to the procedure in equity, to be taken as confessed on the well pleaded facts. *Mitchell's Case,* 121 Maine, 455; *Morin's Case,* 122 Maine, 338; *McCollar's Case,* 122 Maine, 136. But it was not. On the contrary, apparently in the erroneous supposition that an answer was in the file, the case proceeded to full hearing. In the opinion subsequently entered, the Chairman of the Industrial Accident Commission noticed the absence of an answer, but his decision was rested otherwise. As the petitioner ever was and still is indifferent to the lack of answer, and the trial was had as though every material fact had been formally denied, and the case was determined on its intrinsic worth, it is regarded that the direction for answering was waived.

If in the record there be nothing, except that which against objection certain physicians attested, to establish causative connection between the employment of one Lee E. J. Ross and his death, the validity of the claim made by the dependent widow of Mr. Ross against the former employer of her husband, would not be evident. Because the premise of the attesting of each doctor was, that, in the declaration to one or more of the medical men, which the injured man made, several days after the accident, he ascribed the origin of his disability to his daily work. Had Mr. Ross lived, the assertion would have been inadmissible under the hearsay rule. It did not become competent by reason of the death of the maker since it was made. *Queen* v. *Hepburn,* 7 Cranch 290, 3 Law Ed., 348.

A usual expression by an injured person, calculated to indicate existing physical hurt, may be indirectly used as original testimony, in exception to the general rule of evidence, on the ground that it is the spontaneous and natural concomitant of the injury, and virtually the only mode in which the then condition can be shown. *Kennard* v. *Burton,* 25 Maine, 39; *Travelers' Insurance Company* v. *Mosley,* 8 Wall., 397, 19 Law Ed., 437; *Mutual Life Insurance Co.* v. *Hillmon,* 145 U. S., 285, 36 Law Ed., 706; *Northern Pacific R. Co.* v. *Urlin,* 158 U. S., 271, 39 Law Ed., 977; *Elmer* v. *Fessenden,* 151 Mass., 359;

State v. *Howard*, 32 Vt., 380; *Bagley* v. *Mason*, 69 Vt., 175; *Shearer* v. *Buckley*, (Wash.), 72 Pac., 76; *Cleveland, etc. Co.* v. *Newell*, (Ind.), 3. N. E., 836. But recital of the cause that produced the injury is of a past event whereof self-interest may have warped both memory and judgment, it is uncontemporaneous with a present situation, and therefrom does not derive a claim to confidence and credit. It is mere narration or rehearsal and for the most but marks the point where the shade blends with the light and makes the shadow in the delineation of the rule of the law of evidence. *Mary Ann Kelley's Case*, 123 Maine, 261; *Insurance Co.* v. *Mosley*, supra; *Boston, etc. Co.* v. *O'Reilly*, 158 U. S., 334, 39 Law Ed., 1006; *Bacon* v. *Charlton*, 7 Cush., 581; *Chapin* v. *Marlborough*, 9 Gray, 244; *Roosa* v. *Boston Loan Co.*, 132 Mass., 439; *Jones* v. *Village of Portland*, (Mich.), 50 N. W., 731, 16 L. R. A., 437; *Collins* v. *Waters*, 54 Ill., 485.

Dismissing, therefore, the testimony founded on that which Mr. Ross said about the occurrence of his injury, what is there to show the causative connection? This question alone is open. For several years before the 14th day of February in 1923 when he quit work, Mr. Ross was one of the finishers in the woolen mill of the Thomas J. Sheehy Company at Phillips. The finishers sorted wool, they worked on cloth held in place by wires, and used needles in sewing the cloth. The manager of the company, while in the mill about one week before Ross died, saw "a place on his finger . . . as though it was scratched and had been painted with iodine." Physicians later found a wound, slight in the degree of puncture, on the third digit of the man's left hand. Mr. Ross died from tetanus or lockjaw, on the sixth day after he quitted work, with no other cause internally in his body or externally from his environment. The petitioner contended, in the hearing before the Commissioner, that the tetanus came from the wound, or, in other words, that the wound was the real cause of death, the circumstance of the infective bacterial disease an accessory cause, and that the wound arose out of and in the course of the employment of Mr. Ross.

Every compensation-act employer, whose employee is accidently injured in and by reason of his employment, is under the duty of reporting to the Industrial Accident Commission. R. S., Chap. 50, Sec. 41, as amended. The treasurer of the Sheehy Company, who also was its manager, reported in the pending instance, saying in this way:

"Injured received slight cut on 3rd finger, left hand, while working in finishing room, painted it with iodine several times but infection set in causing Lockjaw resulting in death Feb'y. 20, 1923."

That report, being adverse to the interest of the employer, rightly had place in the evidence. *Jacque's Case*, 121 Maine, 353. The employer's insurance carrier undertook to prove, or to raise an inference if it could be, that the actual fact was at variance with the report. The carrier called the treasurer who testified that the report was wholly based on what, on seeing the scratch and speaking to Ross about it, the latter told him, and the rumor that soon was prevalent concerning Ross' death.

The credibleness and significance of the evidence were for the trier of fact. *Mailman's Case*, 118 Maine, 173. The explanatory testimony, had it been accepted, would have discredited the report. The report, being believed, notwithstanding its contradiction, justified the finding, regardless of any circumstantial proof. In cases of this kind, where no fraud appears, the volume of the evidence, or how it might be esteemed elsewhere, is not examinable. The test is simply whether some competent evidence supports the finding. R. S., Chap. 50, Sec. 34, as amended. *Mailman's Case*, supra.

That hearsay was improperly allowed into the record is not overlooked, but it did not come essentially into the finding and the decree, so reversible error was not done. *Mailman's Case*, supra; *Larrabee's Case*, 120 Maine, 242; *Ballou's Case*, 121 Maine, 282; *Lachance's Case*, 121 Maine, 506.

Appeal dismissed with costs.
Decree below affirmed.

HAMILTON BROWN SHOE COMPANY *vs.* JOHN P. MCCURDY.

Washington. Opinion October 28, 1924.

R. S., Chap. 87, Sec. 127, is in derogation of the common law and should be strictly construed. There should be no attempt to extend its terms or plain intent by judicial legislation. It applies only to actions brought on an itemized account. It relates to a statement of the indebtedness existing between the parties to the suit, and intended to facilitate procedure in collection of accounts in actions of assumpsit.

This case is not such an action but one brought to determine and enforce liability of a guarantor. The account which appears in the case is against H. B. Thayer, who is not a party to the suit, as the terms of the statute provide. In no way is the statute applicable to this action.

On report. An action of assumpsit to recover on an account annexed for merchandise sold and delivered by plaintiff to one H. B. Thayer, the defendant having guaranteed the payment of the account in the name of a copartnership of which he was a partner. The application of Sec. 127 of Chap. 87 of the R. S., was involved. Plaintiff nonsuit.

The case is fully stated in the opinion.

Gray & Sawyer, for plaintiff.

J. H. Gray, for defendant.

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

PHILBROOK, J. On report. The plaintiff claims to have sold and delivered merchandise to one H. B. Thayer. The Columbian Packing Company is a partnership, consisting of the defendant and his brother James J. McCurdy, engaged in a grocery and fish business. This defendant, signing the partnership named thereto, gave the plaintiff the following writing:

"Lubec, April 16, 1914.

HAMILTON BROWN SHOE CO.,
Boston, Mass.

Please deliver to H. B. Thayer of Lubec, County of Wash, State of Me., such goods as he may want from time to time, and for valuable considerations, which we hereby acknowledge to have received to his full satisfaction, we hereby agree to become fully responsible to you for any balance either in open accounts or in notes which he may from time to time owe you (not exceeding the amount of $1500.00, for such purchases until you have written instructions from us to the contrary. All such purchases to be on a credit of thirty days from date of bill. We waive all notice respecting your assent to this agreement and acknowledge that we have received all notice necessary to charge us as guarantor in case any deficiency shall in fact ever exist.

COLUMBIAN PACKING CO."

Thayer having failed to pay for merchandise which plaintiff claims to have sold and delivered to him, this suit was brought against the defendant as guarantor to recover the balance alleged to be due from Thayer. Not deciding any question of liability, nor amount due, if any, we are to determine whether the plaintiff offered sufficient evidence to make out a prima facie case.

The plaintiff relies upon the affidavit provided in R. S., Chap. 87, Sec. 127, which reads thus:

"In all actions brought on an itemized account annexed to the writ, the affidavit of the plaintiff, made before a notary public using a seal, that the account on which the action is brought is a true statement of the indebtedness existing between the parties to the suit, with all proper credits given, and that the prices or items charged therein are just and reasonable, shall be prima facie evidence of the truth of the statement made in such affidavit, and shall entitle the plaintiff to the judgment, unless rebutted by competent and sufficient evidence. When the plaintiff is a corporation, the affidavit may be made by its president, secretary or treasurer."

This statute is in derogation of the common law and should be strictly construed. There should be no attempt to extend its terms

or plain intent by judicial legislation. It applies only to actions brought on an itemized account. It relates to a statement of the indebtedness existing between the parties to the suit. It may be appropriately called a statute to facilitate procedure in collection of accounts in actions of assumpsit. The case at bar is not such an action but one brought to determine and enforce liability of a guarantor. The account which appears in the case is against H. B. Thayer, who is not a party to the suit, as the terms of the statute provide. In no way is the statute applicable to this action. The plaintiff having failed to prove his case the entry will be,

Plaintiff nonsuit.

GEORGE R. DESJARDINS *vs.* JORDAN LUMBER COMPANY.

Penobscot. Opinion November 5, 1924.

"Manufactured lumber" as used in Chap. 30, Public Laws of 1913, (R. S., Chap. 10, Sec. 14) means all manufactured lumber whatever its source and is not limited to lumber manufactured by portable mills.

In the instant case the box boards of the defendant company sawn at the defendant's steam mills in Milford and piled on its sticking ground in Milford for the purpose of seasoning, and there situated on April 1, 1923, were legally taxable in Milford that year.

The fact that these box boards were intended later to be transported to the defendant's box mill in Old Town there to be manufactured into box shooks and sold in the ordinary course of business does not affect the legal situation. The word "manufactured" is used in this section in its ordinary sense as distinguished from "unmanufactured." When the logs have been sawn into boards in the Milford mills they no longer remain unmanufactured lumber, but "manufactured" within the meaning of this section, although they may pass through another process in Old Town.

On report on an agreed statement. An action to recover $2,700 as taxes assessed on April 1, 1923, by the city of Old Town upon certain box boards owned by defendant corporation doing business at said Old Town where it owned and operated a mill for manufacturing box

boards into box shooks. Defendant also owned and operated steam mills in Milford, where it had sawed the box boards in question and stuck them up on its sticking ground in said Milford, where they remained on April 1, 1923, when said tax was assessed, but later after they were seasoned, they were to be transported to the mill of defendant at Old Town and manufactured into box shooks. On the same property for the same year a tax had been assessed by the town of Milford and paid under protest. The question involved in the action was as to whether the property was taxable in Old Town. Upon an agreed statement of facts the cause was reported to the Law Court with a stipulation that if the property was taxable in Old Town judgment to be entered for plaintiff for $2,700 and interest from date of writ; otherwise judgment for defendant. Judgment for the defendant.

The opinion states the case.

Stanley F. Needham, for plaintiff.

William H. Powell and Ryder & Simpson, for defendant.

SITTING: CORNISH, C. J., PHILBROOK, DUNN, SPEAR, STURGIS, BARNES, JJ.

CORNISH, C. J. This is an action to recover the sum of $2,700 assessed by the city of Old Town upon certain box boards owned by the defendant and situated in the town of Milford on April 1, 1923, and comes before the Law Court on an agreed statement of facts, which shows the situation to have been as follows:

The Jordan Lumber Company is located in Old Town. It owned and operated at the time in question and for some previous years, permanent steam mills in Milford where these box boards had been sawn, and then were piled on the sticking ground of the defendant in Milford for the purpose of seasoning.

On said April 1, 1923, and for some years previous the defendant also owned and operated a mill in Old Town where it regularly manufactured these box boards into box shooks made up in regular sizes for boxes, but not nailed together. Defendant sold these box shooks from its office in Old Town and shipped them knocked down for the economy of space. The box boards taxed in this case were intended by the defendant to be transported from its sticking ground in Milford to its box mill in Old Town and there to be manufactured into box

shooks and sold in the ordinary course of business. The defendant has paid under protest a tax assessed for the same year upon these boards by the town of Milford.

The question is, were these box boards under the statute in force on April 1, 1923, legally taxable by Old Town?

1. ORIGINAL STATUTE. R. S. (1903), Chap. 9, Sec. 13.

It is conceded by the defendant that prior to the passage of Chapter 140 of the Public Laws of 1911 and of Chapter 30 of the Public Laws of 1913, this property would have been legally taxable in Old Town.

The governing statute of that earlier period was R. S., (1903), Chap. 9, Sec. 13, viz.: "All personal property employed . . . . in the mechanic arts shall be taxed in the town where so employed on the first day of each April; provided that the owner, his servant, sub contractor or agent, so employing it, occupies any store, shop, mill, wharf, landing place or shipyard therein for the purpose of such employment." Public Laws of 1909, Chapter 4, added the word "storehouse" after the word "store," but that is unimportant here.

The court construed this statute to cover a case where lumber sawn and piled in one town was intended to be further manufactured into boxes in the company's mill in another town, and was taxable in the latter town, it being regarded as employed in the mechanic arts in the latter town. This was squarely decided in *Boothbay* v. *Dupont De Nemours Powder Co.*, 109 Maine, 236, where the statutes and the precedents were carefully considered and the court reached the conclusion that the manufacture of lumber into boxes was unquestionably a mechanic art within the meaning of the statute, that it was so employed in the town where it was intended to be so manufactured, and that "property employed in the mechanic arts, as this lumber was employed, is not taxable in the town where found on April first if it is so employed in some other town in the State."

Had the statute remained unchanged judgment in the case at bar would follow for the plaintiff.

But it has been twice amended.

2. AMENDMENT OF 1911.

This amendment adds to the original statute these words: "All portable mills, logs, at or in the same town as said portable mills, to be manufactured at said portable mills and the lumber manufactured

by said portable mills, shall be taxed in the town where said portable mills, logs and lumber are on the first day of April each year." This amendment applied to portable mills, logs to be manufactured therein, and the product thereof alone, and rendered such property taxable in the town where located on April first. It in no way affects the question before us, because the lumber in question here is not the product of a portable but of a permanent mill.

3. AMENDMENT OF 1913.

The Legislature of 1913 again amended the statute, striking out entirely the amendment of 1911, and substituting therefor the following:

"Portable mills, logs in any town to be manufactured therein, and all manufactured lumber, excepting lumber in the possession of a transportation company and in transit, shall be taxed in the town where situated on the first day of April of each year."

So stood the statute when this tax was assessed. Its terms are broadened from "the lumber manufactured by said portable mills" as specified in the statute of 1911, to "all manufactured lumber" excepting that in possession of a transportation company and in transit. Should it be construed as meaning just what it says, all manufactured lumber, whatever its source, or is it still confined by the context to the lumber manufactured by portable mills, leaving other manufactured lumber to be governed by the first part of the paragraph and if it is further manufactured in another town, to be taxed in the latter town as employed in the mechanic arts in that town?

If any doubt might arise on this point from the language of the amendment itself taken with the context, it would seem to be removed when we consider the legislative history of this amendment of 1913, a source of information always open in the interpretation of statutes.

As originally introduced, the amending statute of 1913, (Chapter 30) simply struck out the word "portable" from the Act of 1911, so as to read: "All mills, logs, at or in the same town as said mills, and the lumber manufactured by said mills shall be taxed in the town where said mills, logs and lumber are on the first day of April of each year."

It was reported by the Committee and passed in a new draft in its present form, viz.: "Portable mills, logs in any town to be manu-

factured therein, and all manufactured lumber excepting lumber in the possession of a transportation company and in transit, shall be taxed in the town where situated on the first day of April of each year." As originally introduced the injunction to tax all mills in the town where located was unnecessary so far as permanent mills were concerned. They are real estate and must be taxed there like all other real estate. But portable mills are personal property and therefore to make the proper distinction the word "portable" was inserted in the new draft. The manufactured lumber however, was not confined to the product of portable mills but was left as in the original draft, "all manufactured lumber" &c. as it stood when the opening words were "all mills" &c.

In view of the plain words of the amendment of 1913, and also in view of the legislative history of that amendment, we are forced to the conclusion that the lumber in the case at bar was legally taxable in Milford and not in Old Town.

The learned counsel for the plaintiff raises the further point that even if lumber fully manufactured might be so taxable, yet as the box boards in question were intended to go through another process in Old Town and be changed into box shooks, they cannot be regarded as manufactured lumber under the amendment of 1913 but must still be regarded as property employed in the mechanic arts under the original and first part of R. S., Chap. 9, Sec. 13, before quoted. In other words, that "manufactured" must be construed as meaning wholly manufactured. We cannot assent to this interpretation. We think the word "manufactured" is used in its ordinary sense as distinguished from "unmanufactured." This amendment recognizes it. It specifies "logs . . . . to be manufactured." Certainly when the logs have passed through the mill and been converted into boards they no longer remain logs or unmanufactured lumber. They are manufactured though not perhaps fully so.

Our conclusion, therefore, is that the plaintiff cannot prevail and the entry must be:

Judgment for Defendant.

ROY CREAMER *vs.* SAMUEL H. LOTT.

Kennebec. Opinion November 10, 1924.

As a condition precedent to the right of an employer, under the Workmen's Compensation Act, to recover damages against another person, by subrogation, is that the injured employee has claimed compensation and that it has been awarded under the act, and the employer has paid the compensation or become liable therefor.

In this case there is no proof of an award, and the proof that the employer did in fact pay compensation whether voluntarily or not, falls short of the necessary conditions precedent under which the action may be maintained.

On exceptions and motions. This action arose from an automobile accident. Roy Creamer, while in the employ of one Arborio who was constructing a new state highway between Belgrade and Augusta, was injured by coming in contact with an automobile owned and operated by the defendant on said highway. Said Creamer at the time of the accident was on foot, just having alighted from a truck, and running around the rear of the truck desiring to cross the highway to get a shovel and in so doing came in contact with the side of the car of defendant which was passing the truck at a standstill on the right side of the road, heading in the opposite way from the direction which defendant was driving on the right side of the road. The injured employee had made a claim for compensation under the Workmen's Compensation Act, but compensation had not been awarded prior to the bringing of this action. The action though in the name of the injured employee was really brought by the insurance carrier to recover damages of defendant by right of subrogation. At the close of the evidence counsel for defendant moved for a directed verdict for defendant on the ground that no award under the Workmen's Compensation Act had been showed and that therefore no right of subrogation existed in the employer or his insurance carrier. The motion was denied and defendant entered exceptions, and a verdict for plaintiff of $1,364.75 was rendered. Defendant filed a

general motion for a new trial and also a motion for new trial on newly-discovered evidence. Exceptions sustained. Motions not considered.

The case is stated in the opinion.

Hinckley & Hinckley and James H. Thorne, for plaintiff.

Bradley, Linnell & Jones, for defendant.

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

PHILBROOK, J. This case is before us upon defendant's general motion to set aside a verdict in favor of the plaintiff, motion for new trial upon the ground of newly-discovered evidence, and exceptions. It is unnecessary to consider either motion. The exceptions must be sustained.

The action is brought under Public Laws, 1919, Chap. 238, Sec. 26, as amended by Chapter 238 of the Public Laws of 1921, a section from the Workman's Compensation Act. The precise section now reads:

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

The basis upon which subrogation rests, in this statutory right of action, and a condition precedent to instituting suit thereon, is that compensation be claimed and awarded under the act. It is only when the injured employee claims compensation under the act, and the same is awarded, and the employer has paid the compensation or has become liable therefor, that the employer succeeds to the rights

of the injured employee to recover damages against the other person. *Donahue* v. *Thorndike & Hix Inc.*, 119 Maine, 20.

There is no proof of award. Proof that the employer did in fact pay compensation whether voluntarily or not, falls short of the necessary condition precedent under which this action may be maintained. The refusal of the court below in refusing to direct a verdict for the defendant on the ground "that no award under the Workman's Compensation Act had been shown and that therefore no right of subrogation existed in the employer or his insurance carrier" was error.

Exceptions sustained.
Motions not considered.

LEVI B. LATHAM, Appellant from Decree of Probate Judge.

Cumberland. Opinion November 17, 1924.

The rights of descent flow from the legal status of the parties, and where the status is fixed, the law supplies the rules of descent, with reference to the situation as it existed at the death of decedent.

So, in this case, the statute passing and distributing the estate of the adoptive father dying intestate since the adoption, rather than that in force at the time that the child was adopted, determines whether the child is capable of taking the relation of an inheritor to the property that the parent left.

On exceptions. Seward M. Latham late of Falmouth died intestate January 20, 1922, leaving an estate. Between the years of 1864 and 1866 decedent adopted George S. Latham. In the Probate Court a decree was made ordering the distribution of the estate, after the payment of bills and charges against the estate, to the said George S. Latham as the only heir-at-law. From this decree an appeal was taken to the Supreme Court of Probate where the decree was sustained and the appeal dismissed. Levi B. Latham, a nephew of decedent, appellant, entered exceptions to the ruling that the said George S. Latham was an heir-at-law of decedent. The question involved was

as to whether the statute in force at the time of the adoption governed as to the rights of inheritance, or the statute as it existed at the time of the death of decedent. Exceptions overruled. Case remanded.

The opinion states the case.

Samuel L. Bates, for appellant.

Frank H. Haskell, for appellee.

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

WILSON, J., concurring in the result.

DUNN, J. The brief of the appellant is prepared upon the conception, that the statute in force at the time a child is adopted, rather than that passing and distributing the estate of an adoptive father subsequently dying intestate, determines whether the child is capable of taking the relation of an inheritor to the personal property that the parent left. The rule is otherwise.

In the early 60s, when Seward M. Latham adopted George M. Latham, by decree of the Probate Court in Cumberland county, the inherent capacity of succession or inheritance did not arise from that relation. By the statute then operative, the child was freed from duties to his natural parents, and, for the custody of the person and right of obedience, "but not of inheritance," was made the child of his adopter. R. S., 1857, Chap. 59, Sec. 29.

Changes in the statute are without the need of mention until that of the year 1880, and it simply historically. In 1880, where not otherwise provided by the decree, the right or capacity of inheriting property from the adopter, but not from him in the case of entailment, or from lineal or collateral kindred of the adopting parent, was endowed in future adoptions. 1880 Laws, Chapter 183. This provision remained unaltered till 1917. Then the proviso restrictive to instances since February 24, 1880, was stricken out, and, as far as essential here, the statute made to read in this wise:

"Sec. 38 . . . . and he is, for the custody of the person and rights of obedience and maintenance, to all intents and purposes, the child of his adopters, with right of inheritance when not otherwise expressly provided in the decree of adoption, the same as if born to them in lawful wedlock, except that he shall not inherit property

expressly limited to the heirs of the body of the adopters, nor properly from their lineal or collateral kindred by right of representation." 1917 Laws, Chapter 245, amending R. S., 1916, Chap. 72, Sec. 38.

Seward Latham, the foster parent, died in 1922, leaving no will, unmarried, without natural children of his own, or their lawful issue, surviving him, owning personal estate. The question requiring examination is, whether devolution of that property was cast, by reason of the amendatory act of 1917, upon the child adopted more than fifty years before.

It is only too clear that the enactment of 1917, conferring upon certain adopted children an heritable status, not theretofore possessed by them, disturbed no existing right or obligation. The adoption itself was not thereby changed. No wedlock-born child was deprived of heirship, for he could not be an heir-at-law while his parent was yet living. The adopting father remained free to dispose of his estate by will, or in other manner, so far as children were concerned, if he would. The statute could find application only in intestacy afterward transpiring.

Of course the law was intended to be retrospective, in the sense that it applied to adoptions decreed previously, but where an adoptive parent died intestate antecedent to the statute, then that statute was subservient to the other statute which had vested the estate at his death to the exclusion of the adopted child.

The rights of descent flow from the legal status of the parties, and where the status is fixed, the law supplies the rules of descent, with reference to the situation as it existed at the death of the decedent. *MacDonough, Appellant,* this same volume; *Re Estate of Hein Rasmussen,* (Minn.), 131 N. W., 325, 35 L. R. A., (N. S.), 216; *Gilliam* v. *Guaranty Trust Co.,* 186 N. Y., 127, 78 N. E., 697, 116 Am. St. Rep., 536; *Ballard* v. *Ward,* 89 Pa. St., 358; 1 R. C. L., 618; 1 C. J., 1400.

The exceptions have no favor.

Exceptions overruled.
Case remanded.

WALTER H. JUAN'S CASE.

Waldo. Opinion November 19, 1924.

That sub-clause (a) under Clause IX., Sec. 1, Chap. 238, Public Laws of 1919, may determine the method of fixing the amount of compensation under the Workmen's Compensation Act, where the employee is employed under coexistent contracts in the employ of more than one employer, it must appear, in order that the total earnings from the different employers may constitute the basis of compensation computation, that such employment has continued under such coexistent contracts during substantially one year immediately preceding the injury.

Sub-clause (c) affords a guide by which the compensation to be paid this dependent might be estimated were the record sufficient in its detail to supply the basis on which to base an award.

It is not shown whether, at the time of the accident, the employee was working during the ordinary working hours constituting a full working day. If it be that he was, then what he earned in concurrent contracts of employment is of consequence in computing the amount of compensation; otherwise not. In any event, the process to be followed is that of (c) and not of (a).

Workmen's Compensation Case. On appeal from an affirming decree. Walter H. Juan was the husband of this dependent petitioner. On November 7th, 1923, he met with the accident that caused his death. For longer than the immediately preceding year he was an employee of the Pejepscot Paper Company, an assenting employer, at a weekly wage of $10.00. Being free to work elsewhere for hire when his services were not needed by the Pejepscot company, he did odd jobs for sundry persons until within somewhat less than four months before the day of the accident. During this last period he tended masons, at the wage of $5.00 in the summer and $4.50 in the winter, daily. It was while he was working under the Pejepscot contract that the accident occurred. Compensation was awarded, under sub-clause (a) of Clause IX., Sec. 1, Chap. 238, Public Laws of 1919, as if the "concurrent" wages were earned in the employment in which Juan was working at the time of the accident. But that clause may not rule the method of computing compensation. The

reason is that, while the employee was employed under one of the contracts during substantially one year immediately preceding his injury, he was not employed for that length of time under coexistent contracts.

Appeal sustained. Decree reversed, and case remanded for proper assessment of the compensation.

The opinion states the case.

Clement F. Robinson, for appellant.

Buzzell & Thornton, for appellee.

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

DUNN, J. Admittedly, because of his employment and in that employment's course, on November 7, 1923, Mr. Walter H. Juan met with the accident which caused his death.

Whether sub-clause (a), of the ninth clause of the first section of the Workmen's Act (1919) Laws, Chapter 238, Clause IX., (a), ruled the method of ascertaining the amount of compensation for his dependent widow, is the immediate question of this appeal.

In the first instance, that sub-clause defines how to find "average weekly wages," as the basis for an award up to a proportionate part thereof, on the footing that the daily wage was for work done in the hours of a full working day in the accident-occurring employment, where the employee himself had worked in that employment, though not necessarily for the same employer, in substantial continuity for the year next before the injury. The mathematical method is, three hundred times one day's wage, divided by fifty-two. The concluding paragraph of the sub-clause which brings in another element, runs:

"But where the employee is employed regularly during the ordinary working hours concurrently by two or more employers, for one of whom he works at one time and for another he works at another time, his 'average weekly wages' shall be computed as if the wages, earnings or salary received by him from all such employers, were wages, earnings or salary earned in the employment of the employer for whom he was working at the time of the accident."

The facts, as gathered from the finding of the Industrial Accident Commissioner, the evidence not being here, are these: For somewhat longer than the period of the immediately preceding year, Mr.

Juan had uninterrupted employment with the Pejepscot Paper Company, chiefly as caretaker or watchman about its Belfast wharf and wood-piling place, at a weekly wage of $10. No hours were fixed within which he was to begin and end the work of each day. He went about the Pejepscot premises at night and in the morning, staying as long as necessary. Between times he was free to work elsewhere for hire, except that the Pejepscot Company had priority of requisition upon his services, and he was expected to be ready to come upon call, that he might aid in making fast such craft as came to the wharf, or in casting off when boats were about to sail, or otherwise performing duty for that company, when and as the particular occasion required. Then he would be at liberty to go back to other work. His later contracts recognized the antecedency of that with the Pejepscot.

Odd jobs about Belfast were the sort of other work till less than four months before the accident. Then Mr. Juan hired to tend masons on schoolhouse construction. His pay was fifty cents an hour, ten hours in the summer time and nine hours in the winter constituting a working day, but when the day began or was over is not shown.

On the aforesaid seventh of November, Juan did not labor with the masons, as the weather was rainy. In the evening, at half after six o'clock, while eating supper at his home, he heard the whistle of a Pejepscot tug, and made for the wharf. By some mischance he fell from the wharf and was killed.

An agreement for compensation, reckoned solely from the decedent's wages at the Pejepscot Company, was denied approval by the Labor Commissioner. In consequence of that denial the petition for an award, which is behind this appeal, was filed.

It was wrong, in the eye of the law, to regard the case as falling within the lines of sub-clause (a), which the Industrial Chairman did. Patently, from the phrase and context of the sub-clause, the final or "concurrent" paragraph refers to instances where the total earnings were from different employers during substantially one year immediately preceding the injury, and not where the earnings for that space came from but one of the employers, though the accident arose out of and in the course of the contract of longest duration. As the idea of liability without regard to fault, as a matter of right, where his own self-will was not the proximate cause of the employee's injury,

is the underlying conception of the whole act, so that of an indemnity proportioned with regard to the fair average of the diminution in wage-earning power, in which respect the wages from more than one employment, when the contracts of employment were coexistent, count as though earned in a single employment, within the limit of a full working day, spreads through every part of the sub-clause. The concurrent contracts of service which Mr. Juan had, on which the award of compensation was related, were not throughout the year preceding the injury, hence sub-clause (a) was not applicable.

Compensation ought to be paid, but how shall the amount be ascertained?

Sub-clauses (b) and (c), and there is none other, introduce substitutes for sub-clause (a). "B," leaving out the wage of the injured employee, where he was not in the employment for the preceding year, brings in as a multiplicand the day wage of any other employee of like class and similar duties, who was. For the rest, (b) is in line with (a), except that no sharp *but* is connective to a new thought ushering in a determinative factor, equivalent to the original statement with which it is closely and vitally joined, where there were concurrent contracts of service, done at different times, during the "ordinary working hours."

The concurrent-employments paragraph, let it be noticed, is expressly written solely into sub-clause (a). And it may be observed, too, that our concurrent provision varies from that in the English law enacted in 1906 (6 Edw. VII., Chap. 58), not alone in the absence from the English of the phraseology "during the ordinary working hours concurrently . . . .," but in that ours, as has already been taken notice of, carries the concurrent provision as the last paragraph of (a), whereas the difference is an independent clause under a section in the general schedule, thus:

"(b) Where the workman had entered into concurrent contracts of service with two or more employers under which he worked at one time for one such employer and at another time for another such employer, his average weekly earnings shall be computed as if his earnings under all such contracts were earnings in the employment of the employer for whom he was working at the time of the accident." *English Act*, supra.

Obviously sub-clause (b) of the Maine statute, to return to the matter the appeal puts in hand, is without relevancy to the situation.

No other employee had "such employment during substantially the whole of (the) immediately preceding year."

When neither the method of (a) nor that of (b) may be "reasonably and fairly" applied, then, by the authority of sub-clause (c), the average weekly wage standard of ascertainment, on survey of the position that the injured employee had, and that of the positions had by other employees in the same or most similar employment, there or thereabouts,—always regarding virtually one year constitutive when practicable (*Thibeault's Case*, 119 Maine, 336), but only where feasible (*Clara E. Scott's Case*, 121 Maine, 446), shall be an approximation of the wages of the injured employee in his employment at the time he was hurt.

Sub-clause (c) affords a guide by which the compensation to be paid this dependent might be estimated were the record sufficient in its detail to supply the basis on which to base an award. But, on what the statute contemplates as the practical averaging of the sum of the wages of the employees, what sum would fairly represent "the weekly earning capacity of the injured employee at the time of the accident?" The employee had been paid $10 weekly, for longer than the year, in the employment in which he was working when injured. And he had other contracts of service in the same year, all, however, of shorter length than the ten-dollar contract, in one of which he averaged $30 weekly.

Does the last paragraph of (a) apply? It would beyond doubt or question had it outstanding distinctiveness and lucidity like the clause in the English act, where the reader's eye gathers meaning and the scope of application at a single stroke. (*S. S. Raphel* v. *Brandy*, 1911 A. C., 413; *Lloyd* v. *Midland Company*, 1914 2 K. B., 53). Our provision is rather inaptly placed. Yet, mindful of the idea beneath the statute, that of insurance against the loss of capacity to earn, with employees classified uniformly from the standpoint of actual earnings in "the ordinary working hours," the final paragraph of (a) following the advance and association of legislative purpose from point to point, woven section and clause and sub-clause in a succession embodying great intrinsic might, must be held to be read by attraction into the sub-clauses succeeding (a), within the policy and spirit and true intent of the Legislature.

Distinction between the English act and the Maine statute is worthy notice once more. England's standard comprehends all the

earnings from all the concurrent contracts. Therefore, overtime on an employee's part would add to and short time by him would subtract from, the amount of the standard in the individual case. Or, to say to the same effect in another way, all earnings under contracts, regardless of when, one after the other, the contracts were worked, are to be considered. In Maine there is restriction to actual earnings from regular employments during the ordinary working hours. Beyond this there never was legislative design to make the industry of the accident responsible. Actual earnings, "working the number of hours constituting a full working day in (the) employment," two or more contracts of employment existing at the same time shading into each other through ordinary working hours, mark the way.

Nothing on the record shows whether, at the time of the fatal accident, the employee was working during the ordinary working hours constituting a full working day. If it be that he was, then what he earned in concurrent contracts of employment is of consequence in computing the amount of compensation; otherwise not. In any event, the process to be followed is that of sub-clause (c) and not that of sub-clause (a).

Let the appeal be sustained, the decree below reversed, and the case remanded to the Industrial Accident Commission for proper assessment of the compensation upon further hearing.

Appeal sustained.
Decree reversed.
Case remanded.

ROBERTS' CASE.

Cumberland. Opinion November 21, 1924.

Where the only access to a manufacturing plant from the public streets is over land of another by a right of way in which the employer has a right of passage for all persons having business with it and for its employees in going to and from their work, an injury received by any employee while on his way home from his work and while passing along such right of way may be said to have arisen out of and in course of his employment.

The period of employment within the meaning of the Compensation Act does not begin and end with the actual work the employee was employed to do, but covers the period between his entering his employer's premises a reasonable time before beginning his day's work, and his leaving the premises within reasonable time after his work is finished, and during the usual lunch hour, he being in a place where he reasonably may be in connection with his duties, or entering or leaving the premises by any way he may reasonably select.

On appeal. A petition by Violet J. Roberts, a minor, by next friend, daughter of Seth Roberts, deceased, praying for compensation as a dependent. Seth Roberts, father of claimant, on June 2, 1923, while in the employ of Portland Rendering Company as a laborer, having finished his day's work, and going from the plant of the company to the public street over land of the Grand Trunk Railway, the employer having a right of way over said land for all of its employees, and it being the only means of access to and from the plant of employer to the public streets, was struck at the railroad crossing by a locomotive of said railway company and killed. The only question at issue on the appeal from the awarding of compensation was as to whether the injuries so received by the employee were received "in the course of his employment" within the meaning of the Compensation Act. Appeal dismissed. Decree affirmed with additional costs.

The opinion states the case.

Harry E. Nixon and Sherman I. Gould, for claimant.

Clement F. Robinson, for respondents.

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

WILSON, J. Appeal from a decree awarding compensation under the Workmen's Compensation Act.

The employee, who lost his life in the accident, was at the time employed by the Portland Rendering Company at its plant in the city of Portland.

The only access by teams or automobiles to the nearest public street from the premises of the Rendering Company, where the deceased was employed, is over the land of the Grand Trunk Railway by a private way, which crosses tracks of the Railway about thirty feet from the land of the Rendering Company on which its plant is located.

The Chairman of the Industrial Accident Commission found, and there was evidence to support the finding, that the Rendering Company had obtained from the Grand Trunk Railway the right to use this private way in connection with its plant as a means of ingress and egress for such as might have business with it, its own teams, and its employees in going to and from their work, and that the Rendering Company so far as was necessary for its uses kept the way in repair.

The deceased at the time of the accident had just finished his work for the week and was leaving the plant of the Rendering Company on Saturday noon in his automobile over this private way. As he was crossing the railroad tracks above described he was struck by a locomotive of the Grand Trunk Railway and received the injuries which resulted in his death.

The sole ground upon which the respondents ask that their appeal be sustained, is that the Chairman erred as a matter of law in holding that the injuries so received by the employee were received "in the course of his employment."

In construing this phrase the courts are not in accord as to when the "course of employment" begins and ends. Two rules, however, appear to be generally accepted: First, that injuries received by an employee in going to and from his work on a public street or in a public conveyance, unless his means of conveyance is furnished by his employer, are not received in "the course of his employment"; Bradbury's Workmen's Compensation Law, 2d Ed., Vol. 1, Page

403, 404; *Hills* v. *Blair*, 182 Mich., 20, 26; *Rourke's Case*, 237 Mass., 360, 363; *Bell's Case*, 238 Mass., 46, 50; *In re McInerney*, 225 N. Y., 130, 133; *Fairbanks* v. *Ind. Com.*, 285 Ill., 11; Second, that "the course of his employment" does not begin and end with the actual work he was employed to do, but covers the period between his entering his employer's premises a reasonable time before beginning his actual work and his leaving the premises within a reasonable time after his day's work is done and during the usual lunch hour, he being in any place where he may reasonably be in connection with his duties or entering or leaving the premises by any way he may reasonably select. *Dulac's Case*, 120 Maine, 31, 34; *Stacy's Case*, 225 Mass., 174; *Bylow* v. *St. Regis Paper Co.*, 166 N. Y. Suppl., 874, 877; *Fournier's Case*, 120 Maine, 236, 240; *Westman's Case*, 118 Maine, 133; *Bradbury's Workmen's Compensation Law*, 2d ed., Vol. 1, Page 402; *Bryant* v. *Fissell*, 84 N. J. L., 72. Also see *White's Case*, 120 Maine, 62, 63, where the same general rule is laid down.

Where, however, the employee is about to enter the premises of his employer, or has left them, over some private way or land over which his employer has no control, and in using which the employee may be a trespasser, or at best a mere licensee, but by a way customarily used by his fellow employees without objection by his employer, and the way used is one of several practical and convenient means of access to his employer's premises or the only practical means of access thereto, and which it must have been anticipated by his employer that he would use in coming to and going from his work, the courts have not yet arrived on common ground. *Sundine's Case*, 218 Mass., 1; *Stacy's Case*, supra; *Fumiciello's Case*, 219 Mass., 488; *Bell's Case*, supra; *Bylow* v. *St. Regis Paper Co.*, supra; *Procaccino* v. *Horton & Sons*, 95 Conn., 408; *Judson Mfg. Co.* v. *Ind. Acc. Com.*, 181 Cal., 300; *DeConstantin* v. *Pub. Ser. Com.*, 75 W. Va., 32; *Reed* v. *Bliss & Van Auken Lumber Co.*, 225 Mich., 164, 196 N. W. Rep., 420; *Cudahy Packing Co.* v. *Ind. Acc. Com.*, 60 Utah, 161; also see *Cudahy Packing Co.* v. *Mary A. Parramore*, 263-418 U. S. In applying the conclusions arrived at in the different jurisdictions, heed must be given to the language of the Act of that jurisdiction. For instance, the Utah Act covers accidents, wherever occurring, and either arising out of *or* in the course of the employment. A difference which might well account for the extent to which the court went in that case, the accident happening in a public street.

Without undertaking to lay down a general rule to cover all cases of this nature, we are of the opinion that the injuries received by the employee in the case at bar were clearly received within "the course of his employment" within the meaning of Section 11 of our Compensation Act. We see no difference in principle here and in the case of a common stairway leading to an upper story of a building in which the employer's plant is located, over which stairway the employer may have no control, but a right to use, it being the only means of ingress and egress to and from his premises. *Sundine's Case,* supra. The mere fact that the employee in that case was going out to lunch in midday cannot affect the principle, if "the course of employment" also covers the entering or leaving the employer's premises before and after work. A right of way such as the Chairman found, and the evidence shows, existed in the case at bar may well be regarded as a part of the employer's premises.

Appeal dismissed.
Decree below affirmed with additional costs.

LEO DEPIETRO, In Equity *vs.* ABRAHAM MODES.

Cumberland. Opinion November 21, 1924.

On an appeal in equity a transcript of all the evidence must be transmitted to the Appellate Court. A failure to comply with this well-established rule of equity practice must result in a dismissal of the appeal.

In this case the only purpose of the allegations contained in the first paragraph is to show that the contract, under which the labor and materials were furnished, was direct with the owner, in compliance with Sec. 35, Chap. 96, R. S., and that it required no compliance with Sec. 31, Chap. 96, R. S., to preserve the lien.

The second paragraph with the account annexed appraised the defendant that the labor and materials were furnished under two or more contracts, and the amendments allowed over the objection of the defendant went no farther than to render more specific what already appeared in the account annexed and were not essential to the admission of the evidence offered by the plaintiff.

On appeal. A bill in equity to enforce a lien claim for labor and materials furnished on a building under Sec. 29, Chap. 96, R. S. A hearing was had on the bill, answer, replication and proof, and the sitting Justice entered a decree of $1,636.70 in favor of the complainant, from which decree respondent entered an appeal to the Law Court to which a transcript of none of the evidence was submitted. Appeal dismissed, with additional costs. Decree of court below affirmed.

The case is fully stated in the opinion.

Frank P. Preti, for complainant.

Clinton C. Palmer, for respondent.

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

WILSON, J. A bill in equity to enforce a mechanic's lien. It comes before this court on appeal by defendant. No copy of the evidence has been transmitted to this court. The appeal must, therefore, be dismissed in accordance with the well-established rules of equity practice. *Emery* v. *Bradley*, 88 Maine, 357; *Redman* v. *Hurley*, 89 Maine, 428; *Caverly* v. *Small*, 119 Maine, 291.

If the evidence had been transmitted, the appeal could not have been sustained. The chief ground of the appeal appears to be that the court below allowed two amendments over defendant's objection setting forth in greater particularity the contracts under which plaintiff's right to a lien on defendant's land and building arose.

Neither amendment, as we view it, was necessary, unless upon demurrer for lack of certainty in the bill; and their allowance did not injure the defendant.

The defendant's main contention appears to be that the bill only seeks to obtain a lien for labor and materials furnished under a single and written contract, while the amendments set forth a claim for an additional lien under a separate and oral contract and therefore introduced a new cause of action.

It is true that the bill in the first paragraph sets forth that "by virtue of a contract" with the defendant, who is the owner of the premises, the plaintiff furnished certain material and performed certain labor. This, however, is the common form of allegation to conform to Sec. 35 of Chap. 96, R. S., in order that it may appear

whether the materials furnished and work done was by virtue of a contract with, or by consent of the owner, or if not, whether Section 31 of said Chapter 96 had been complied with. It does no more in this instance than set forth that the contractual relations under which the materials and labor were furnished were direct with the owner of the premises. Whether under one contract or two is immaterial on this point.

It is paragraph two of the plaintiff's bill and the account annexed, therein referred to, which discloses whether the materials and labor were furnished and performed under one contract or two; and in this it clearly appears that the materials and labor for which the plaintiff claims his lien were not furnished under a single contract, but that the part covered by the defendant's objection was furnished under a separate contract or contracts as extra work and material.

If the account annexed was not specific enough to apprise the defendant of the nature of the plaintiff's claim, the court below on demurrer would undoubtedly have ordered the plaintiff to have filed a bill of particulars before going to a hearing. The defendant, however, went to a hearing on the bill as originally framed, and although the presiding Justice out of abundant caution allowed the amendments, which were in effect no more than specifications of what already appeared in the account annexed, they were not essential to the consideration of the evidence offered by the plaintiff, and hence their allowance was not prejudicial to the defendant.

Upon the merits of the defendant's main contention, as well as under the practice in equity in this State, the entry must be:

Appeal dismissed.
Decree of court below affirmed with additional costs.

STATE *vs.* JOSEPH H. GALLANT.

Cumberland. Opinion November 22, 1924.

Where an instruction to a jury unexplained may have been prejudicial to a respondent, an exception, seasonably taken, must be sustained.

On exceptions. The respondent was indicted for taking indecent liberties and indulging in indecent and immoral practices with a female under sixteen years of age, and tried before a jury.

At the conclusion of the evidence, counsel for the respondent filed a motion for a directed verdict for the respondent which was denied by the presiding Justice and respondent entered an exception. After the charge to the jury counsel for respondent also took an exception to a certain part of the charge. The exception to the refusal of the court to direct a verdict in favor of the respondent was not considered. Exception sustained.

The case is stated in the opinion.

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

S. St. F. Thaxter and W. A. Connellan, for the respondent.

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

CORNISH, C. J., DUNN, MORRILL, JJ., concurring in the result.

WILSON, J. This case comes before this court on exceptions to a portion of the charge of the presiding Justice and also to his refusal to direct a verdict of not guilty.

The respondent was indicted under fifteen separate counts for immoral practices and taking indecent liberties with and assaults upon three young girls, on five different occasions, widely separated in time. He was tried, however, on only three counts each relating to the same incident and with only one of the girls and was convicted under one count for the taking of indecent liberties.

The portion of the charge of the presiding Justice to which exceptions were taken was as follows:

"Another suggestion was made in argument that I think is proper for you to have in mind. It is right that you should give due and fair attention to the query raised by counsel for this respondent—What about the situation of an innocent man with an unspotted past who finds himself confronted with a charge like this? What is he to do? Now, that is a fair question for you to ask yourselves. But in disposing of that question I would suggest that it is equally pertinent and equally fair for you to ask yourselves—What about the likelihood as things develop, as matters break in a community generally, what about the likelihood of a man innocent of any wrong being confronted with a charge of this sort, and, if so confronted, what are the reasons which will prompt it? What about the likelihood, if one is so confronted, when in fact he is innocent, what about the likelihood of there being an explanation for the charge being brought, such as malice or, not in this particular situation, which would be inconceivable, but in this class of cases where there are grown people, perhaps blackmail, purpose to extort money, such motives as that? Different motives may cause people to bring these false charges. So I say, if you are asking yourselves—What about the situation of one who is innocent and confronted with this charge? take it on the other side, set one off against the other,—what about the reasonableness or likelihood of such a charge being brought against an innocent person without reason?"

At the close of the charge, before the jury retired and presumably in their presence, counsel for respondent took exceptions to the above portion of the Judge's charge and assigned his reasons as follows: "Because it invades the law which provides that the respondent is presumed to be innocent and the fact that an indictment has been found against him is not, must not, and should not be considered against him."

Unfortunately the charge does not make clear what the argument of counsel was to which it refers. The Bill of Exceptions, however, sets forth that it referred to a suggestion by respondent's counsel to the jury that under the circumstances, even if innocent, a denial of the charge and evidence of his good moral character was all the evidence that a man in his sitaution could produce.

The fair inference from the above instructions would seem to be that the jury might properly consider that groundless complaints of this nature are not made without some reason, such as malice or purposes of blackmail, which a respondent, if innocent, might show; and if no such adequate explanation was offered, the jury might well consider the likelihood of such a complaint being made without reason, unless true.

Standing alone and in the sense intended by the presiding Justice, though not couched in his usual happy and clear phraseology, the instructions were not objectionable upon the grounds set forth in the respondent's exceptions.

When read and analyzed, it may be clear that the court was not referring to the charges contained in the indictment but to the the charge, or testimony, of the complainant. Counsel for the respondent, however, with only the impression left on his mind from hearing the charge, felt that it was susceptible of the other construction, and in the presence of the jury gave to it that construction. The court notwithstanding the construction placed upon his language by counsel in open court did not make his meaning clear to the jury, nor in any part of his charge did he caution or instruct the jury that the fact that the Grand Jury had made these charges against the respondent by indictment must not in any way influence them in arriving at their verdict. Considering the nature of the indictment in this case, such an instruction would have been especially appropriate, and in view of the construction placed upon the court's language by counsel in the presence of the jury was, we think, essential to an impartial trial for the respondent.

The failure to so instruct the jury was undoubtedly an oversight such as often occurs in the midst of trials, but which under the circumstances renders it impossible for this court to say that the instructions excepted to, without explanation or qualification, after the construction placed upon them by counsel in open court, may not have been prejudicial to the respondent, or if proper instructions had been given in this respect, a different verdict might not have resulted. This exception must, therefore, be sustained. *State* v. *Houlehan*, 109 Maine, 281, 285; *Starkey* v. *Lewin*, 118 Maine, 87, 91; *King* v. *Ward*, 74 Maine, 349, 351; *Hopkins* v. *Fowler*, 39 Maine, 568; *State* v. *Hart*, 66 Mo., 208.

While there are certain features of this case which entitle the respondent to a most careful scrutiny and weighing of the evidence, the court deems it unnecessary to consider the exception to the refusal to direct a verdict for the respondent.

Entry will be:

Exception sustained.

SAMUEL T. HEAL

vs.

THE INTERNATIONAL AGRICULTURAL CORPORATION
BUFFALO FERTILIZER WORKS.

Penobscot. Opinion November 26, 1924.

The admission of a hypothetical question is not exceptional error where any assumed embraced facts are not supported by evidence unless such specific ground of objection has been called to the attention of the trial Judge; nor where the evidence introduced in the case before the question is propounded fairly tends to prove the assumed facts embraced in the hypothetical question. Under a declaration in assumpsit fraud and deceit are not in issue and if alleged cannot be proved. Scienter is immaterial in an action of assumpsit for breach of warranty.

In the instant case evidence had been introduced before the hypothetical question was asked fairly tending to prove the facts assumed.

The identification of a sample having been fairly established by the evidence, the submission of an analysis of it to the jury was warranted, and if the residue from which the sample was taken be small, this fact goes only to the weight of the evidence, not to its admissibility.

There was no error in the refusal of the trial Judge to instruct that the defendant would not be liable in the absence of fraud or deceit. In the first count of his declaration the plaintiff declared in assumpsit, the gravamen of his cause of action being the breach of the defendant's contract or warranty, and the count is not changed into an action of deceit by allegations of fraud and deceit, which are matters of aggravation only; nor by the defendant's plea of not guilty which was cured by verdict.

The defendant's requested instruction "that if the jury find from the evidence that the defendant had no reason to apprehend that the presence of borax

might be injurious, that it would not be liable in this action" was properly refused, for the scienter is immaterial where there is a warranty.

On motion and exceptions by defendant. An action on the case to recover damages for an alleged breach of implied warranty in the sale by defendant to plaintiff of commercial fertilizer alleged to have contained borax to such a percentage as to be deleterious to the growth of potato plants. The defendant pleaded the general issue of not guilty. The jury returned a verdict for plaintiff in the sum of seven hundred and fifty-nine dollars. The defendant excepted to the admission of a hypothetical question, and excepted to the admission of an analysis of a sample of fertilizer purchased from the defendant by a neighbor on the ground that the identity of the sample had not been established, and that the residue from which it was taken was not sufficient to accurately represent the entire lot, and also excepted to a denial of a motion by defendant for requested instructions. Defendant also filed a general motion for a new trial. Motion overruled. Exceptions overruled.

The case is fully stated in the opinion.

Leon G. C. Brown and John S. Williams, for plaintiff.

Cook, Hutchinson & Pierce, Powers & Mathews, and McLean, Fogg & Southard, for defendant.

SITTING: CORNISH, C. J., PHILBROOK, DUNN, SPEAR, STURGIS, BARNES, JJ.

STURGIS, J. This is an action to recover damages for breach of warranty in the sale of commercial fertilizer, and comes up on motion and exceptions.

Sometime in the Spring of 1917 the plaintiff purchased from the International Agricultural Corporation, through its subsidiary, the Buffalo Fertilizer Works of Houlton, Maine, six (6) tons of commercial fertilizer, and used it in planting six acres of potatoes on his farm in Lagrange. The fertilizer was forwarded by the defendant in a two-car-load shipment to the Lagrange Farmers' Union, which distributed it to the plaintiff and other customers from the cars at the Lagrange Depot. The fertilizer was shipped in barrel containers, each bearing on the outside a guarantee of contents as being four per cent. available ammonia, eight per cent. available

phosphate and four per cent. soluble potash; this formula being commonly referred to in the parlance of the trade as 4-8-4. The gist of the cause of action stated in the declaration is that the defendant promised to furnish fertilizer which should be suitable and fit for the purpose of planting potatoes and free from poisonous or injurious ingredients, but sold the plaintiff fertilizer containing borax which, by reason of its poisonous character and the quantity present, killed the plaintiff's young potato plants and sprouts and substantially reduced his potato crop for that year.

The plaintiff testified that he planted and cultivated his potatoes according to approved and customary methods but when the plants came through the ground they "was kind of goldish yellow right around the edge of the leaf" and "all kind of turned brown and died down." He said the growth was very "pindling" and upon pulling up the plants the seed piece was in "good sound condition," but there were "no fibre roots at all" and the main roots were "kind of yellowish and just stubs." Substantially the same description of the plaintiff's potatoes was given by three neighbors,—one adding that the leaves when the plants were small were yellow around the edge and as they grew the yellow color extended over the leaf, and the last of July or first of August the plants were about all yellow and dead. This last witness also stated that the seed piece looked all right; he did not see any rotten seed, but did notice that the roots of the seed piece were short.

Alfred M. G. Soule, Chief Deputy of the State Department of Agriculture, called as an expert by the plaintiff, qualified by stating that since 1919 he had been making a special study of the effect of borax on potato growth and, for that purpose, had consulted all available literature on the subject, and in company with plant pathologists and soil chemists had examined and observed more than one hundred fields of potatoes and the varying effects of borax upon potato growth. He stated that the characteristic symptoms of borax poisoning of potatoes are: "The general appearance of the leaves shows a pronounced yellow effect, especially at the margin, a dwarfed appearance of the plant; a spindling appearance of the stalks, and the appearance below the ground shows a stunted appearance of the rootlets, and a burned appearance of the small roots—fibrous roots; and a preserved effect, generally, of the seed piece—a dried, particularly dried, appearance of the seed piece."

The plaintiff introduced an analysis of a sample of 4-8-4 fertilizer from the two-car-load shipment sent by the defendant to the Lagrange Farmers' Union, from which the plaintiff obtained his six tons, showing 21.4 pounds of anhydrous borax to the ton. This sample was sufficiently identified with the plaintiff's fertilizer to justify the inference that the fertilizer which the plaintiff used contained borax in the same proportion. Mr. Soule was asked: "What would be the effect of using fertilizer containing twenty-one pounds of borax per ton?" And he replied: "It would be very disastrous in my opinion." It appears that the potash in the fertilizer sold the plaintiff was known as Searles Lake Potash, and the borax present was in combination with this potash. Mr. Soule was cross-examined as to experiments conducted by the Maine Experiment Station in the Presque Isle potato fields and his opinion that 21.4 pounds of borax to the ton was disastrous to potato growth found some confirmation in these experiments. "Q. On the third line of figures the amount of potash in each instance present being 108 pounds per acre; under the sulphate of potash you get 307 bushels per acre, is that correct? A. That is true. Q. Under the Nebraska potash, with no borax present, you get 313 bushels per acre? A. That is true. Q. With the Searles Lake potash, *there being present 17.7 of borax per acre,* you get a yield of 285 bushels? A. Yes, a diminishing of—. Q. On the last line, there being present in each instance 144 pounds of potash; under the sulphate of potash with no borax present, you get 290 bushels? A. That is correct. Q. Per acre. And on the Nebraska potash with no borax present, you get 309 bushels per acre? A. That is true. Q. On the Searles Lake potash *with 23.6 pounds borax present per acre,* you get 281 bushels? A. That is true."

The defendant called to the stand, Edwin A. Rogers of Brunswick, a potato raiser of twenty-five to thirty years' experience, and a writer upon the subject of potato culture, who stated that the yellowing of the leaves of potato plants is a common occurrence, and may be attributable to a too heavy or misapplied use of fertilizer. In support of this statement, he related his experience during the current year wherein an excessive amount of fertilizer was planted by error with the result that when the plants first came up there was a very marked yellowing of the margin of the leaves. He, however, states: "This condition did not last but a week or ten days, or we got a rain within

a short time and they came out of it and grew very nicely." The plaintiff's potato plants, it seems, did not *come out of it and grow very nicely,* but the yellowing spread all over the leaves and they finally withered and died in spite of the fact that there was more than an average rainfall during the early months of their growth. Mr. Rogers was further examined by the defendant's counsel as follows: "Q. And did you examine the fields where there was reported borax injury the preceding year and where grain had been planted in 1920 to find out what the result was? A. I did, several. Q. And what was the result of your investigation? A. As near as I could determine the crop of grain increased practically in the same ratio *that the potato crop was a failure the year before.*" Mr. Rogers also described various plant diseases to which potatoes are subject, but the evidence fails to disclose that the condition of the plaintiff's potato plants was symptomatic of any such diseases.

Other facts and circumstances were shown on the one side and the other which the parties claimed tended to support their respective contentions, but it is impracticable to extend our analysis of the evidence further. The issue was one of fact. If the defendant sold the plaintiff fertilizer of its own manufacture so debased with borax as to render it poisonous and harmful to growing potato plants, it sold an adulterated fertilizer within the provisions of R. S., Chap. 38, Sec. 12, and the plaintiff is entitled to recover in this action the money value of his loss resulting from its use. This issue, together with the correct rule of damages, was clearly presented to the jury by the presiding Judge, and the jury found for the plaintiff. A careful study and consideration of all the evidence does not convince us that their findings ought to be set aside as manifestly wrong.

We are not unmindful of the recent decision of this court in *Rogers* v. *Kendall,* 122 Maine, 248. However, we think that case is to be clearly distinguished from the case at bar. In *Rogers* v. *Kendall,* the amount of borax present was 6.6 pounds. The sole affirmative evidence in support of the plaintiff's contentions was found in the opinion of an expert who stated that 6.6 pounds of borax per acre was deleterious to growing plants. This opinion was not only unsupported by experiment, test, or authority, but the expert's own prior experiment had demonstrated that the application of 6.6 pounds of borax per acre to potatoes was beneficial rather than harmful. This opinion of the expert was properly characterized as

ipse dixit only, and the verdict based on it was set aside. The case at bar presents a very different state of facts. In this case 21.4 pounds of borax were applied to the acre, and the opinion of the expert, Chief Deputy Soule, that the use of this amount of borax is harmful to potato growth is based on years of personal study and observation of effects of borax in the potato fields of Maine, and is supported and confirmed by the tests and experiments of others. It is consistent with established facts and with probability and reason. The opinion of the court in *Rogers* v. *Kendall* upon the motion cannot be extended to a state of facts so materially different as those established by the evidence in this case.

THE EXCEPTIONS.

An exception was taken by the defendant to the admission of a hypothetical question propounded by counsel for the plaintiff. The objection when made at the trial was general and not specific, and while counsel now urge in argument that the hypothetical question embraced facts not in evidence, neither the bill of exceptions nor the evidence reported show that the objection was for that cause. To lay the foundation for an exception on that ground, the attention of the Judge should have been called to the specific ground of objection, so that he could determine whether there was sufficient evidence tending to prove the facts assumed. *Powers* v. *Mitchell*, 77 Maine, 369; *Knight* v. *Overman Wheel Co.*, 174 Mass., 455. The exception, however, had it been properly taken, has no merit. An examination of the record disclosed that while counsel in forming the hypothetical question adopted language varying in slight degree from the exact form of expression used by the witnesses, the evidence introduced in the case before the hypothetical question was asked fairly tended to prove the facts assumed.

The defendant objected to the admission of an analysis of a sample of fertilizer purchased from the defendant by a neighbor on the grounds that the identity of the sample had not been established, and that the residue from which it was taken was insufficient to accurately represent the entire lot. The evidence discloses that the sample analyzed and the plaintiff's fertilizer were both Buffalo 4-8-4 fertilizer, manufactured by the defendant and forwarded from its factory at Houlton in the same shipment. Both lots came out of

the same car on the same day, and the barrel containers bore the same brand and guarantee. These facts were sufficient to fairly establish the identity of the sample and warranted the submission of the analysis to the jury. *Commonwealth* v. *Goodman*, 97 Mass., 117; *Commonwealth* v. *Kendrick*, 147 Mass., 444. This conclusion cannot yield to the defendant's second ground of objection. The fact that the sample was taken from a fifty-pound residue rather than from a larger quantity goes only to the weight of the evidence, not to its admissibility. The defendant's exception to the admission of the analysis must be overruled.

The defendant requested an instruction that it would not be liable in the absence of fraud or deceit, which was refused and an exception reserved. The first count of the plaintiff's declaration is not free from objection, but in substance it follows the approved precedents as laid down in *Oliver's Precedents*, 188 et seq. The gravamen of the cause of action in this count is the breach of the defendant's contract of warranty, and the allegations of fraud and deceit are matters of aggravation only and do not change the count into an action for deceit. Having declared in assumpsit, fraud and deceit are not in issue, and even if alleged could not be proved under this count. 1 *Chitty on Pleading*, 137; *Mahourin* v. *Harding*, 28 N. H., 131; *Dean* v. *Mason*, 4 Conn., 428; *Bartholomew* v. *Bushnell*, 20 Conn., 278; *House* v. *Fort*, 4 Blackf., (Ind.), 295; *Bosworth* v. *Higgins*, 7 N. Y. Sup., 210. Issue was joined on a plea of not guilty, but the character of the action is determined by the declaration and not by the plea, and the mispleading was cured by verdict. *Winslow* v. *Bank of Cumberland*, 26 Maine, 9; *Cavene* v. *McMichael*, 8 Serg. & Rawle (Pa.), 441; *Garland* v. *Davis*, 4 How., (U. S.), 146. There was no error in the refusal of the trial Judge to instruct that the defendant would not be liable in the absence of fraud or deceit.

The defendant's fourth and final exception is based upon the refusal to give the following instruction: "We also request you to instruct that if the jury find from the evidence that the defendant had no reason to apprehend that the presence of borax might be injurious, that it would not be liable in this action." This was an action for breach of warranty, the declaration in the first count being laid in assumpsit. Whether or not the defendant had reason to apprehend that the presence of borax in the fertilizer might be injurious is immaterial. "When there is a warranty, the scienter is immaterial."

Hillman v. *Wilcox*, 30 Maine, 170; *Rogers* v. *Kendall*, 122 Maine, 248; *Shippen* v. *Bowman*, 122 U. S., 575; *Wallace* v. *Tanner*, 118 Ill., Ap., 639; *Wilson* v. *Fuller*, 58 Minn., 149; *Place* v. *Merrill*, 14 R. I., 578.

The entry must be,

Motion overruled.
Exceptions overruled.

HEALEY'S CASE.

Somerset. Opinion December 1, 1924.

Under the Workmen's Compensation Act, that compensation may be awarded to a dependent, it must appear that the employment of the decedent must have been the proximate cause of his death.

In this case the evidence proves that the decedent's death resulted from the doing of something which his employment neither required nor expected him to do, and in a place where his employment did not take him, and to which his employers, if men of ordinary expeirence and sagacity, could not be expected to anticipate he would go, for the purpose of washing his hands.

On appeal. On July 10, 1923, John Galvin, a nephew of claimant, an alleged dependent, was in the employ of the Great Northern Paper Company as clerk of a drive, and stationed temporarily at Rockwood on Moosehead Lake, opposite Kineo. He occupied a desk in the office of the company in its storehouse situated near the water front and at the rear of the storehouse was a wharf. On said July 10, he went to the wharf to wash his hands and presumably walked down the slip of the wharf to the water and slipped and fell into the lake and was drowned. Compensation was awarded and from the affirming decree an appeal was taken. Appellant based his appeal upon the contention that the accident did not arise out of and in course of his employment inasmuch as what the decedent was doing at the

time of the accident was something which his employment neither required him to do nor expected him to do. Appeal sustained. Decree reversed. Petition dismissed.

The case is sufficiently stated in the opinion.

George E. Thompson, for claimant.

Louis C. Stearns, for respondents.

SITTING: CORNISH, C. J., PHILBROOK, SPEAR, STURGIS, BARNES, JJ.

SPEAR, J. The pleadings in this case are regular in form and present all the issues in controversy. The allegations of fact are as follows:

First, that on the 10th day of July, 1923, while working as a clerk in the employ of the Great Northern Paper Company, at Rockwood, Maine, John T. Galvin received a personal injury by accident arising out of and in course of his employment.

Second, said accident happened as follows: Had been handling some dirty material in the storehouse and went to the wharf to wash his hands, preparatory to doing other work when he fell in and was drowned.

Third, which resulted in an injury as follows: Death by drowning. The answer adequately traverses every material allegation.

The second allegation, as above noted, contains the only specification as to how the accident happened.

Under this allegation, the chairman made a finding of facts which, for a proper analysis, should be divided into two parts. The facts as stated in the first part that he "went down to the slip or wharf presumably to wash his hands" can be inferred and are within the terms of the specifications of the cause of the accident as averred in the second allegation. The facts as found in the second part, however, cannot be approved as they are based upon pure assumption and are contradictory of the cause of the accident as alleged in the second allegation. They are thus stated:

"The evidence clearly shows that Mr. Galvin was acting in the usual manner adopted by the employees of the Company with respect to answering a call of nature occurring during working hours at the storeroom, and while so conducting himself, he accidentally fell into the lake and was drowned. It is therefore found that the

accident which caused the death of Mr. Galvin arose out of and in course of his employment as a clerk in the Great Northern Paper Company."

This part of the finding seems to be based upon the endeavor, first, to show that it was "the usual manner," on the part of the employees to go from the place of defecation to the slip to wash their hands, and second to show that the decedent went from such place to the slip in accordance with that "usual manner."

The evidence, however, utterly fails to prove any such "usual manner," or custom and hence any observance by the decedent of a custom that did not exist. Upon the question of custom, Henry M. Chapman, the first witness called by the claimant, testified as follows: "I can't say that I ever saw anybody go down to the slip to wash their hands." "Q. Was it customary for men to walk down to the edge of the walk to do their work? A. No."

John M. Morrison, the second witness called by the claimant said on this point: "Q. Did you ever see anybody wash their hands off this slip before? A. No. Q. Have you known people to wash their hands on the shore? A. Yes. There is a rock shore here with a sandy beach. Any one wishing to wash their hands would go down there to wash their hands. It is only forty feet from the storehouse. A year ago we used to keep a bar of soap right there."

This evidence may prove a custom of the men to go to the beach, a safe and convenient place, to perform their ablutions, and equally confutes the fact that a single person was ever known to go to the slip for that purpose. The above evidence, accordingly, and it is all there is concerning this point, establishes beyond question that the decedent did not go to the slip in accordance with any "usual manner" or custom which was practiced by the employees or known to the employer.

Yet it is upon the assumed existence of this custom, as we interpret the second part of the chairman's finding, that he holds that the accident arose out of and was in the course of the employment. But this conclusion is unsupported by any evidence whatever.

It is claimed, however, regardless of any custom, that the judgment of the court should be affirmed upon the ground that the going to the slip was within or incidental to the employment of the decedent. As already appears, the evidence is convincing that no one was ever known to go to the slip to wash his hands. The reason is manifest.

The shore where the men were accustomed to go for that purpose was convenient, accessible and safe. On the other hand, the use of the slip for such purpose was inconvenient, unsuitable and dangerous, as shown, not only by the fact that the decedent met his death through that danger, but by all the evidence pertaining to that subject. Upon the question of danger in attempting a use of the slip for any purpose, Henry M. Chapman testified as follows: "Q. About how deep is the water there at the end of the slip at the high mark? A. I should say around 18 feet of water. Q. Whether or not you have noticed from time to time—whether or not you have noticed that the slip is slippery and slimy? A. Yes. Q. Explain to the Commissioner how it appeared? A. From the edge of the slip that went into the water up to where the water runs is about 18 inches—under that water it is just as slippery—it is like slime—it is like rocks in a brook under water—you know how slippery they are?"

Upon this subject John M. Morrison said that the morning of the accident the slip was "slippery, slimy."

The testimony amply shows that there was not only the beach that has been referred to, but ample toilet arrangements about the storehouse to furnish the decedent with every opportunity and facility necessary to enable him to do the very thing he is presumed to have gone to the slip to do, and on account of which he lost his life. Furthermore, the evidence shows that the decedent knew of the dangerous condition of the slip.

The evidence compels the inference that whereas the decedent had perfectly safe and ample facilities provided for washing his hands, he voluntarily went for that purpose to a place never intended to be used therefor. It was no part of his employment to go to this slip for the purpose specified. It was not made for that purpose. No one had ever been known to use it for that purpose. It held out no invitation express or implied to him or any one else to go there for the purpose of washing his hands. No custom to that effect ever existed. The negative of such a custom was proved. The employer therefore, could not be expected to anticipate that the decedent or any one else would go there for such a purpose. His employment, therefore, cannot be said to be the proximate cause of the accident. But it must be to make the employer liable. It is so held in *Westman's Case*, 118 Maine, 133: "It might with safety be said that in order for an accident to arise out of the employment, the employment must have

been the proximate cause of the accident." In *Saucier's Case*, 122 Maine, 325, it is said "The practical construction of the proximate cause has been said to be the one from which a man of ordinary experience and sagacity would foresee that the result might probably ensue. . . . . But if the injury results to the employee from the doing of something which the employment neither required nor expected, or in a place where his employment did not take him, it cannot be said to arise out of his employment."

We are of the opinion that the evidence proves that the decedent's death did result from the doing of something which his employment neither required nor expected him to do, and in a place where his employment did not take him, and to which his employers, if men of ordinary experience and sagacity, could not be expected to anticipate he would go, for the purpose of washing his hands.

Appeal sustained.
Decree reversed.
Petition dismissed.

BLAINE S. VILES *vs.* AMERICAN REALTY COMPANY.

Kennebec. Opinion December 2, 1924.

If an offer of money is made to one, upon certain terms and conditions, and the party to whom it is offered takes the money, though without words of assent, the acceptance is an assent and he is bound by it.

In the instant case the oral agreement for payment of an additional fifty cents per cord, which the jury found was made by E. E. Amey assuming to act for defendant, was not an independent contract, but a modification as to price of the existing written contract.

The court finds it unnecessary to decide whether the authority of Amey to make the oral agreement is proved, or whether the defendant had clothed Amey with apparent authority to make it, or whether consideration for the oral agreement is shown.

The check for $9,541.22 sent by defendant to plaintiff on October 12, 1917, after Amey's authority to modify the written contract had been denied and payment of the additional fifty cents per cord had been refused, was expressly stated to be in full settlement for the wood delivered at Solon Boom and final payment on contract 523, and its return was requested, if not correct. The acceptance

and use of that check by the plaintiff, without question or objection, bound him to the terms upon which it was offered, and made complete an accord and satisfaction of the demand. R. S., Chap. 87, Sec. 63.

On report. An action on account annexed with a money count to recover an additional fifty cents a cord for 9,101.35 cords of pulp wood. Under a written agreement dated September 18, 1916, the plaintiff agreed to sell and deliver to the defendant during the following Summer and Fall, 10,000 cords of pulp wood, more or less, for which defendant agreed to pay $8.00 per cord. Under the contract 9,101.35 cords were delivered and on October 12, 1917, defendant gave to plaintiff its check for $9,541.22 in full settlement of the balance under the contract, which check was accepted and used by plaintiff. As a basis for this action plaintiff claimed that the written contract was subsequently modified in a conversation between him and an agent of defendant to the effect that plaintiff was to receive fifty cents more per cord by furnishing an increased amount under the contract. By agreement the cause was reported to the Law Court to render such final judgment as the legal rights of the parties require. Judgment for defendant.

The case is fully stated in the opinion.

Pattangall, Locke & Perkins, for plaintiff.

Ryder & Simpson, for defendant.

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

MORRILL, J. By written agreement dated September 18, 1916, the plaintiff agreed "to sell to the American Realty Company and to deliver to the boom of the International Paper Company, Solon Mill, in the summer or fall of 1917, a quantity of 4′ rough Spruce and 4′ Fir pulpwood, containing not less than 75% Spruce. The amount to be ten thousand cords, more or less at the option of said Blaine S. Viles."

This contract was made and signed in behalf of the defendant by one E. E. Amey, whose name appears in the correspondence and upon the stationery of the company with the title of Assistant to the President. The plaintiff delivered under this contract 9,101.35 cords of wood and was paid therefor at the contract price of eight dollars per cord. He claims and the jury has found in answer to a

question submitted to them, that "Everett E. Amey agreed with the plaintiff to pay him fifty cents per cord in addition to the eight dollars specified in written contract dated September 18, 1916, in a conversation with plaintiff held in Portland in the early part of the year 1917, on the promise of the plaintiff to furnish between nine and ten thousand cords."

This action is in assumpsit to recover that fifty cents per cord, and is before the Law Court upon report, upon the writ, pleadings, evidence and finding by the jury for such final judgment "as the legal rights of the parties require."

Before approaching the decision of the case upon the issue which seems to us controlling, it is profitable, if not absolutely necessary, to interpret the written contract between the parties.

Counsel for the plaintiff contends that "the written contract did not obligate Viles to deliver 10000 cords more or less," and was not so intended; that the words "10000 cords" indicate "what the parties had in mind as the amount which conditions would probably warrant delivering. But it obligated no one."

We cannot so construe the contract; such construction is not in harmony with the situation and defined policy of the defendant, nor with the correspondence between the parties. The defendant corporation is a subsidiary of the International Paper Company, maintained by the latter company as a part of its organization for securing an adequate and constant supply of wood for its mills. In the Fall of 1916 its agents were making contracts for its necessary supply of wood for the coming year. It was vital to the successful operation of the mills of the International Paper Company that an adequate and dependable supply of wood should be secured. Under such circumstances it cannot be considered, unless all other constructions fail, that the executives of the defendant would make a detailed written contract, with specifications as to delivery, and scaling and quality, with the intention of not binding either party, of simply affording a market for whatever amount of wood Mr. Viles might see fit to turn into Solon Boom. The executives of large industrial organizations do not conduct business in that way.

In reply to the plaintiff's letter of December 28, 1916, in which he first suggested that the contract left the amount at his option, Amey replied under date of January 2, 1917, expressing surprise at the tenor of the letter, and concluding: "We should not want any wood at more than $8.00 per cord delivered Solon, and we should like to hear

from you definitely in regard to the amount you expect to deliver." To this letter the plaintiff replied the next day, promising upon his return from Dead River to "attempt to give you some estimate of amount of wood we will have for you." He concludes: "When I wrote you I thought that possibly you would be willing to increase your price if you could secure *more wood.* Other parties have been very glad to do this with us because of the conditions that exist this year." This is not the language of a party whose contract did not obligate him to any extent, but is the language of a vendor on a tight market. It is entirely consistent with the construction for which the defendant contends, that the contract was for the delivery of 10,000 cords within reasonable latitude consistent with good faith, and that the phrase in the contract,—"at the option of said Blaine S. Viles," was an express affirmation that the latitude in amount was to be exercised within reasonable limits by the plaintiff. Their later correspondence harmonizes with this construction. On January 23, 1917, Amey wrote: "Referring to your letter of January 3rd. We wish you would advise us at this time how much pulp wood you will furnish us by river this coming spring." Viles replies the next day: "We shall probably have 5000 cords more or less of wood for you in Dead River. . . . I should think, considering conditions, you would be willing to advance your price some on this short wood." On February 1, 1917, Gilbert Oakley, Resident Manager of defendant, wrote: "We wish you would advise us at this time estimate of your cut on Kennebec Waters this season, which town and from where landed separately. We would appreciate this information at your first convenience." Viles replied on February 7, 1917: "Your letter is at hand on my return from the woods. Our cut of four foot pulp wood on Dead River will be about as follows:

"From the Buxton Tract and other lots in Eustis, about 6000 cords.

"From Bog Brook Tract and other lots in Dead River Plt. about 2,500 cords."

The above was only 500 cords less than the minimum amount named in the oral agreement. The record shows quite conclusively that the agreement for the additional fifty cents a cord, which the jury has found, was made not earlier than February 7, 1917, and that it was not an independent contract, but a modification as to price of the existing contract, a concession on account of existing conditions of an additional fifty cents per cord, for the delivery of substantially

the same amount of wood, in the written contract specified at 10,000 cords more or less, in the oral modification of that contract specified as nine to ten thousand cords.

In the view which we take of this case we need not decide whether the authority of Amey to make the oral agreement is proved, or whether the defendant corporation had clothed Amey with apparent authority to make it; nor need we decide whether consideration for the oral agreement is shown. See *Savage* v. *No. Anson Mfg. Co.*, 124 Maine, 1, 8.

Amey was discharged by the American Realty Company in July, 1917, and had died before the trial of this case. The alleged oral agreement to pay the additional fifty cents per cord was first called to the attention of George M. Stearns, then President of the defendant company, by the plaintiff, early in August, 1917. This is the first knowledge of the oral agreement attributed to any official of the defendant, except Amey. Mr. Stearns promptly denied any authority on Amey's part to make the modification of the written contract, and positively refused to pay the additional fifty cents. They had a second interview placed by Viles as after October 12, in which the denial of liability was repeated; at this latter conversation, according to Mr. Viles, Mr. Stearns said that he would take the matter up with the directors. All later interviews have been between counsel.

The defendant has pleaded by brief statement that the demand in suit was settled by the plaintiff by receipt of $9,541.22 from the defendant, which was received by plaintiff in accord and satisfaction of said demand, under R. S., Chap. 87, Sec. 63.

The court is of the opinion that this defense is sustained by the record before us. The rule of law is familiar and has been so recently stated by this court that an extended restatement here is not necessary. *Fuller* v. *Smith*, 107 Maine, 161, 165; *Chapin* v. *Little Blue School*, 110 Maine, 415, 420; *Bell* v. *Doyle*, 119 Maine, 383. Briefly, "it must be shown that the debtor tendered the amount in satisfaction of the particular demand, and that it was accepted by the creditor as such." *Fuller* v. *Smith*, supra. "If an offer of money is made to one, upon certain terms and conditions, and the party to whom it is offered takes the money, though without words of assent, the acceptance is an assent de facto and he is bound by it. The acceptance of the money involves the acceptance of the condition. Under such circumstances, the assent of the creditor to the terms proposed by the debtor will be implied." *Anderson* v. *Standard Granite Co.*,

92 Maine, 429, 432; 69 Am. St. Rep., 522. *Price* v. *McEachern*, 111 Maine, 573. *Richardson* v. *Taylor, Admr.*, 100 Maine, 175. The offer and its terms, by the one party, and the acceptance by the other party are ordinarily questions of fact for the jury, unless upon the evidence only one inference can be drawn. *Bell* v. *Doyle*, supra. *Horigan* v. *Chalmers Motor Co.*, 111 Maine, 111, 114. In the instant case submitted on report, the court exercises the functions of a jury.

At the time of the interview in August between plaintiff and Mr. Stearns, the wood had been delivered. That interview could have left no doubt in the mind of Mr. Viles as to Mr. Stearns' attitude about the agreement for the additional fifty cents per cord. He positively and unequivocally denied liability of the defendant therefor, and refused to pay it. There is no contention that the attitude of Mr. Stearns or of the company changed. On October 12, 1917, the American Realty Company issued its voucher check to the plaintiff for $9,541.22; on the back of this check the following words appear: "This check is in full settlement of the items shown below, if not correct please return."

"Per statement attached,..... $9541.22"

"Endorsements below"

"For deposit only to credit of Blaine S. Viles."

The following statement accompanied this check:

"AMERICAN REALTY COMPANY,

Portland, Maine,.....

To Blaine S. Viles, Dr.

Augusta, Me.

Cont. 523. Kennebec.		
9101.35 cds. R @ 8.00		72810.80
Less Ck. Jan. 26	2931.84	
Scaling	29.00	
" Ck Feb. 14	4673.32	
" " " 27	7194.00	
" " Mar. 15	5000.00	
" " Apr. 10	11457.52	
" " May 2	22486.68	
" " July 3	9497.22	63269.58
		9541.22

Bal. due Del. at Solon Boom

(Final Payment on Cont. 523)"

This check was received and used by Mr. Viles without question or objection. It is difficult to perceive how in ordinary business dealings the offer of this check in settlement of the unsettled account for wood, and that it was offered upon the terms and conditions, could have been made plainer. It was stated to be in full settlement, and the request was made that it be returned, if not correct. The conversation with Mr. Stearns, and the latter's attitude towards Amey's agreement, must have been fresh in the mind of Mr. Viles. He must be considered to have accepted the check upon the terms upon which it was offered, and is bound by such acceptance. The later interview with Mr. Stearns in which the latter repeated his denial of the company's responsibility for Amey's agreement, cannot affect this result, even if Mr. Stearns did say, as Mr. Viles testified, "that he would take it up with the directors." The accord and satisfaction was complete before that interview. The case cannot be distinguished in principle from *Anderson* v. *Standard Granite Co.*, supra, and is easily distinguishable from *Chapin* v. *Little Blue School*, supra, in which non-acceptance, in full settlement, of the check forwarded was established.

The proof in the instant case measures up to the standard of being "clear and convincing that the creditor did understand the condition on which the tender was made, or that the circumstances under which it was made were such that he was bound to understand it." *Fuller* v. *Smith*, 107 Maine, 161, 166-7.

Judgment for the defendant.

F. A. DANFORTH, Admr. of Estate of LEONARD E. GOODALL

vs.

OWEN EMMONS.

SAME, Admr. of Estate of VIOLET M. GOODALL *vs.* SAME.

Kennebec. Opinion December 8, 1924.

Chapter 92, Sections 9-10, of the Revised Statutes affords a remedy where none existed at common law. The sole test of the right to maintain an action, is the right of the injured person to have maintained an action, had death not ensued. In such an action the plaintiff has the same burden of proof and the defendant may interpose the same defenses, as in an action by the deceased himself for his injuries, had he survived.

As the right of action given by the statute depends solely upon the right of the injured party to recover, if living, the contributory negligence of one of the beneficiaries, not imputable to the decedent, is not a bar to the action.

Nor can such contributory negligence of one beneficiary avail in partial reduction of the damage to the extent of the share of such negligent beneficiary.

The remedy given by the statute includes an action for the benefit of children who have sustained pecuniary injuries resulting from the death of their mother.

On exceptions and motions. Two actions brought under R. S., Chap. 92, Secs. 9 and 10, for the benefit of the same persons, brothers and sister of the decedent in the first action, and minor children of the decedent in the second action. On August 8, 1923, a touring car containing seven persons, one of whom, Henry M. Goodall, was operator, drove upon the ferry boat operated as a public ferry across the Kennebec River between Richmond and Dresden, by the defendant a licensed ferryman, and when part way across the river, the car started backward and went off the rear of the ferry boat into the river and James R. Goodall, his wife, Violet M. Goodall, his son, Leonard E. Goodall, and his niece, Fay M. Goodall, who were in the car were drowned. The plaintiff in each action alleged negligence on the part of the defendant and the defendant pleaded the general

issue and under a brief statement alleged contributory negligence on the part of each of the plaintiff's intestates, and also alleged contributory negligence on the part of the driver of the car, Henry M. Goodall, and that plaintiff could not recover because Henry M. Goodall was one of the beneficiaries named in the writ and would profit by his own negligence. Verdicts for the plaintiff were returned in each case and the defendant excepted to the refusal of the presiding Justice to give a requested instruction, and also filed general motions for new trials. Motions and exceptions overruled.

The case is stated in the opinion.

George W. Heselton, for plaintiff.

Pattangall, Locke & Perkins, for defendant.

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

MORRILL, J. These actions are based upon R. S., Chap. 92, Secs. 9 and 10; they arise out of the same sad occurrence, and are prosecuted for the benefit of the same persons, Henry M. Goodall, James L. Goodall, Kenneth L. Goodall and Dora M. Goodall, brothers and sister of the decedent in the first action, and minor children of the decedent in the second action.

The essential facts are not in dispute. The defendant is a licensed ferryman, operating a ferry across the Kennebec River between Dresden and Richmond. In the early afternoon of August 8, 1923, James R. Goodall, father of Leonard E., the decedent in the first action, and husband of Violet M., the decedent in the second action, with his wife, four children and his niece, returning home in an automobile, attempted to cross the Kennebec River on defendant's ferry boat operated by one Mason C. Carter; when about one third the distance across the river, the automobile from some cause was started backward, and with the entire party was precipitated into the river. The father and mother, the son, Leonard E. Goodall, then a few months less than twelve years of age, and the niece, Fay M. Goodall, were drowned. The automobile was driven by Henry M. Goodall, one of the sons, then about two months more than eighteen years of age.

The cases are before us upon general motions for new trials, and upon exception by defendant to the refusal of the presiding Justice to give a requested instruction.

Upon the controlling propositions of fact, (1) negligence of the defendant as alleged in the writ, and (2) contributory negligence of each decedent, as alleged in defendant's pleadings, the inferences to be drawn from the established facts were peculiarly within the province of the jury. They were fully warranted in finding that the defendant was lacking in due care, in not providing chains or other appliances for the prevention of such an accident as happened; whatever may be the measure of due care in the case of horse-drawn vehicles, with the advent and general use of automobiles new conditions exist to which the standard of due care must be applied.

Upon the issue of contributory negligence the burden of proof was upon defendant (R. S., Chap. 87, Sec. 48), and we cannot say that the presumption of due care has been overcome, and that the verdict upon that issue is clearly and unmistakably wrong.

Exception. The defendant requested the following instruction to the jury: "If the negligence of Henry M. Goodall, the driver of the car, contributed to the injury complained of, the plaintiff cannot recover in view of the fact that the said Henry M. Goodall is one of the beneficiaries named in the writ and would profit by a verdict for the plaintiff." If the proposition so maintained is sound, the record discloses that the issue of fact should have been submitted to the jury. Although the so-called "Death-Liability Act of 1891" (R. S., Chap. 92, Secs. 9-10) has been many times before the court, the proposition here urged is, so far as we can ascertain, presented for the first time. In other jurisdictions the decisions are not in harmony; in some cases they seem to be restricted to the particular facts presented; and the reasons given are often diverse. The broad question is here presented of the effect of contributory negligence of one beneficiary upon the maintenance of an action under the statute to recover damages in which he will share with other beneficiaries to whom contributory negligence cannot be attributed. This question we are free to decide according to our interpretation of the statute of this State. We do not attempt to decide, and intimate no opinion upon, the question of the effect of contributory negligence of a sole beneficiary upon the maintenance of an action under the statute, for the benefit of such sole beneficiary.

The statute in question affords a remedy where none existed at common law; yet it does not provide for the survival to the personal representatives, of a right of action for the benefit of the estate. A

new right of action is conferred, with a different measure of damages; the right of action is not for the benefit of the estate, the creditors or distributees; it is for the benefit of certain designated persons, and the right of action vests immediately and finally at the time of the death in the statutory beneficiary. *Hammond, Admx.* v. *L. A. & W. St. Ry.*, 106 Maine, 209. The right of action thus conferred is measured solely by the statute; while the measure of damages is different, the sole test of the right to maintain the action, is the right of the injured person to have maintained an action, had death not ensued. *McKay* v. *Syracuse R. T. Ry. Co.*, 208 N. Y., 359, 363; 101 N. E., 885. *Hines* v. *McCullers*, 121 Miss., 666, 673; 83 So. 734. The plaintiff has the same burden of proof and the defendant may interpose the same defenses, as in an action by the deceased himself for his injuries, had he survived. *Jones* v. *Manufacturing & Investment Co.*, 92 Maine, 565, 569. If the decedent, Leonard E. Goodall, was prosecuting an action to recover damages for his injuries, his contributory negligence would be a defense; but the contributory negligence of the driver, Henry M. Goodall, would not be a defense. *State* v. *B. & M. R. R. Co.*, 80 Maine, 430. So, in the case of the mother, Violet M. Goodall, while any contributory negligence on her part, of which the jury has entirely absolved her, would be a defense, the negligence of the driver cannot be imputed to her. Inasmuch as the right of action given by statute depends solely upon the right of the injured party to recover, if living, the contributory negligence of the driver cannot avail the defense, unless we read into the statute a new condition not within its terms. *McKay* v. *Syracuse R. T. Ry. Co.*, supra. *Hines* v. *McCullers*, supra. *Kokesh* v. *Price*, 136 Minn., 304; 161 N. W., 715; 23 A. L. R., 643 and note Page 648.

In *Hines* v. *McCullers*, supra, under a state of facts very similar to the facts of the instant case, the court uses this language: "Contributory negligence as a defense in an action of tort is grounded on the common-law rule that the law will not apportion the consequences of concurring acts of negligence. This rule may be modified or abolished by statute (citing authorities), and that is what the statute here under consideration has done in so far as the contributory negligence of the persons benefitted thereby is concerned."

The requested instruction was rightly refused.

Upon the brief, counsel for defendant has suggested a partial and proportionate reduction of the damages found by the jury to the

extent of the shares of any negligent beneficiaries. This suggestion was not made at the trial; there the defendant stood on the contention that the negligence of Henry M. Goodall was a complete bar. In the absence of any provision in the statute for a partial reduction, we think that it is not warranted. Although it is manifest that the "pecuniary injuries resulting from such death to the persons for whose benefit such action is brought" are not equal; that such pecuniary injuries resulting from the death of a mother are greater to a young daughter of the age of the beneficiary, Dora M. Goodall, than to either of her older brothers, there is no separate finding of damages; there is a finding of a single gross amount, which is to be shared by widow and children equally, and in the case of heirs, presumably to be divided in accordance with the statute of distributions. This is an absolute, imperative, and in one view an arbitrary, provision, without an exception. The Legislature in its wisdom might have provided that the share of a beneficiary found guilty of contributory negligence should be deducted from the gross sum, or distributed among those to whom such negligence is not attributed. But in the absence of such provision, we think that here again contributory negligence of a beneficiary must be disregarded unless we read into the statute terms which it does not contain, and which are not to be inferred from the language used. The fact of contributory negligence by one of several beneficiaries whose negligence cannot be imputed to the decedent, is here eliminated. *Hines* v. *McCuller*, supra. *Warren* v. *Street Railway*, 70 N. H., 352; 47 Atl., 735. *Wymore* v. *Mahaska Co.*, 78 Iowa, 396; 43 N. W. 264; 16 Am. St., 449; 6 L. R. A., 545. *C. C. & C. R. R. Co.* v. *Crawford*, 24 Ohio St., 631, 641. *Southern Ry. Co.* v. *Shipp*, 169 Ala., 327; 53 So., 150.

Finally the defendant contends that the second action based upon the death of Violet M. Goodall cannot be maintained because the beneficiaries do not come within the classes named in the statute. Under Section 10, four different classes are provided for, (1) widow without children, (2) children without widow, (3) widow and children, and (4) "his heirs," and the right of action vests immediately and finally at the time of the death in the statutory beneficiary. *Hammond* v. *L. A. W. St. Ry.*, supra. Counsel upon the brief say: "The defendant contends that under this statute no right of action is given to anybody to recover for the loss of life of a woman." This is a broader proposition than we find it necessary to consider; we

are not called upon to decide whether a right of action is given for the benefit of a husband arising from the death of the wife. The question here presented is whether a right of action is given upon the death of a woman, for the benefit of her children. If the contention is sound, then upon the death of a widow, leaving a family of small children, no right of action has been given for the benefit of those children. Such a result cannot be favored unless all other constructions fail. To arrive at its true meaning the entire legislative provision should be considered. By the tenth section the right of action is given in the broadest possible terms. . . . "Whenever the death of a person shall be caused by wrongful act, neglect or default, ... then, and in every such case, the person who, or the corporation which, would have been liable, if death had not ensued, shall be liable to an action for damages." The eleventh section declares by whom, and for whose benefit the action shall be brought, and the rule of damages. Without considering whether the omission of the word "widower" indicates an intention not to give a right of action for the benefit of a surviving husband, we see nothing in the comprehensive language of these sections to exclude actions for the benefit of children who have sustained pecuniary injuries resulting from the death of their mother. The words, "and of the children, if no widow," should not be narrowly construed to limit the remedy to a right of action for the benefit of motherless children who have sustained such injuries from the death of a father. The words of the ninth section are too comprehensive to admit of such construction. The statutory rule of construction . . . . "Words of the masculine gender may include the feminine " . . . . (R. S., Chap. 1, Sec. 6, Par. II.) should be applied here to the words, "his heirs." For a somewhat analogous case, although arising under different circumstances and a different statute, see *City of Chicago* v. *Major*, 18 Ill., 349, 357.

Motions and exceptions overruled.

BRODIN'S CASE.

Hancock. Opinion December 11, 1924.

Under the Workmen's Compensation Act if no answer is filed the Industrial Accident Commission in proceeding upon the petition may treat the allegations of fact which are well pleaded in the petition as admitted and make such award as the facts so stated in the petition will support. Accident is a befalling; an event that takes place without one's forethought or expectation; an undesigned, sudden and unexpected event; an occurrence to be accidental must be unusual, undesigned, unexpected and sudden.

The word "accident" in the Workmen's Compensation Act is used in the popular and ordinary sense of the word as denoting an unlooked-for mishap or an untoward event which is not expected or designed. An injury need not necessarily have a traumatic origin in order to entitle the injured employee to compensation.

Cases arising under accident policies which insure the policy holder against injuries sustained through external, violent and accidental means are not necessarily applicable to cases arising under the Compensation Act. Accident insurance cases have to do with the contract and the intention of the parties. Cases under the Compensation Act deal with the intent of the legislative body.

Cases of occupational disease cannot be said to have arisen from accidental causes since they are generally the result of long continued processes of absorption of a poisonous substance into the system, they lack the element of "sudden or unexpected event."

In this case, from the weight of authority and by reason of the humane and liberal construction to which the Compensation Act is entitled, the plaintiff was entitled to recover.

On appeal. The claimant was in the employ of the State Highway Commission receiving daily wages and in addition thereto was furnished board and lodging by the Commission. The water supplied by the Commission for the use of the camp was taken from a nearby spring or brook, and plaintiff drank the water and became seriously ill with typhoid fever which incapacitated him for labor. The question at issue was as to whether the injury was accidental within

the meaning of the Compensation Act. Compensation was awarded and an appeal taken from an affirming decree. Appeal dismissed with costs. Decree below affirmed.

The opinion states the case.

Sewall C. Strout, for claimant.

Ransford W. Shaw, Attorney General and Clement F. Robinson, Deputy Attorney General, for the State Highway Commission.

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

PHILBROOK, J. This is a Workman's Compensation case coming up on appeal by the State Highway Commission in whose employ the claimant was engaged when he suffered the conditions for which he claims compensation.

Briefly stated, the record discloses that the claimant while thus employed was paid daily wages and in addition thereto was furnished board and lodging by the Commission at a camp located near the road which was then in process of construction under the direction of the Commission. The water which was supplied by the Commission for use at the camp was taken from a nearby spring and brooks. Brodin drank the water and became ill with typhoid fever which incapacitated him for labor. Because of this incapacity he claims compensation. In allowing his claim the Chairman of the Industrial Accident Commission made distinct findings of fact and law.

FINDING OF FACT.

The Chairman found as a matter of fact that the claimant contracted typhoid fever from using the water furnished him by the State Highway Commission, while in its employ, and that as a result of said injury he was totally incapacitated from labor for a certain period of time. This decision upon a question of fact, in the absence of fraud, is final. Public Laws 1919, Chap. 238, Sec. 34. Moreover, the State Highway Commission neglected to file the answer required by Public Laws, 1919, Chap. 238, Sec. 32. "If no answer is filed no facts will appear to be actually in dispute although the petitioner may apprehend, and so state in his petition, that a dispute exists; and the Chairman in proceeding upon the petition may treat the allegations of fact which are well pleaded in the petition as admitted,

and may make such award as the facts so stated in the petition will support, after the analogy of the procedure upon bills in equity taken pro confesso for want of appearance or answer." *Morin's Case,* 122 Maine, 338. For these reasons, and because the record sustains the finding of fact, we are not justified in disturbing this finding.

FINDING OF LAW.

The Chairman found as a matter of law that the typhoid fever so contracted is a personal injury by accident arising out of and in the course of the claimant's occupation and is therefore compensable. Upon appeal this court may reverse or modify the decree, from which appeal is taken, but such reversal or modification must be based upon an erroneous ruling or finding of law. Public Laws, 1919, Chap. 238, Sec. 34.

The appellant urges that the finding of law in the case at bar is erroneous. It says that the sole question is whether the claimant sustained a "personal injury by accident" within the terms of the Maine Workmen's Compensation Act. It demands a negative answer to this question on the ground that there was in fact no outside, visible, causative accident, or, in other words, that the typhoid fever from which the employee suffered had no traumatic origin. It categorically claims that under our compensation statute, in the absence of an outside, visible, causative accident, or one of traumatic origin, the disease of typhoid fever is not compensable.

At the outset it should be clearly stated that the record in this case does not disclose that the employee suffered from an occupational disease, nor from an incipient or existing disease which was aggravated by exposure, strain, or other impelling circumstances. Discussion of these elements, therefore, is not necessary. Nor are we called upon to say whether the injury arose out of and in the course of the employment. Upon these points the appellant issues no challenge. Referring again to its brief, the sole question is whether the claimant sustained a "personal injury by accident."

In searching the authorities upon this point we recognize that the provisions of the British Workman's Compensation Act find place more or less completely in the various legislative acts in this country, and hence the English decisions upon disputed questions

are entitled to great respect. It should be further noted that in six States of our Union, viz., Arkansas, Florida, Mississippi, Missouri, North Carolina and South Carolina, there are no compensation laws, so that the courts of those States afford us no aid. In the remaining forty-two States, and in the Federal Act, there are differences in provisions as to injuries which are compensable, depending upon whether the injury was or was not "injury by accident" or "accidental injury," or whether the "accidental" element is omitted from the act. In twenty-nine States, including Maine, the injury must be "by accident" or "accidental" in order to be compensable. In the remaining thirteen, as well as in the Federal Act, the words "accidental" or "by accident" do not appear.

We, therefore, face the inquiry whether, under the facts in this case, the employee as a matter of law, is entitled to compensation because of a personal injury by accident; or, stating the question in another way, may the disease in this case, not occupational, be said to have arisen from an accident. Hence, the interpretation and application of the words "accidental" or "by accident" must govern in the settlement of this question. The courts are not in harmony as to this interpretation. Obviously it will be impracticable, within the limits of this opinion, to discuss all the cases on one side or the other. We shall cite only what we deem to be leading cases.

For a definition of the word "accident" we content ourselves with that already adopted by our own court. "As defined by lexicographers, an accident is a befalling; an event that takes place without one's forethought or expectation; an undesigned, sudden, and unexpected event. Its synonyms include mishap, mischance, misfortune, disaster, calamity, catastrophe." *Patrick's Case*, 119 Maine, 510, where much attention is given to a definition of the word. "By all authorities an occurrence to be accidental must be unusual, undesigned, unexpected, sudden." *Brown's Case*, 123 Maine, 424. In the latter case the court said "The word is commonly predicted of occurrences external to the body, e. g., wrecks, explosions, collisions, and other fortuitous mishaps in the world of things about us." But neither in these cases, nor in any case, has our court declared as a positive and general rule that a fatal disease, not occupational, nor one pre-existing and aggravated by exposure, strain, or other impelling circumstances, is non-compensable, unless preceded by and growing out of a traumatic injury.

Ferris v. *Eastport*, 123 Maine, 193, relied upon by the appellant, is easily distinguished from the case at bar. That is a case where a member of a fire company became suddenly drenched with slush from the roof of a burning building, contracted a cold, which was followed by pneumonia, and incapacity for work resulted. The court denied compensation, stating as a conclusion, "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." Thus it will be seen that in the *Ferris Case* there is lacking the very essence of the definition of "accident" given in *Brown's Case*, supra, viz., "unusual, unexpected."

Ballou's Case, 121 Maine, 282, is one where a workman, while escaping from a burning mill, inhaled flame, smoke and gas, that produced a condition in the lungs which later resulted in pneumonia and death. Compensation was allowed. In that case no attempt was made to define "accident," but the court held that the evidence showed a line of symptoms, never before present, which continued to afflict the deceased to a greater or less degree from the time of the fire until his death by pneumonia; and further held that there was evidence to show a direct, causal relation between the fire and the death of the decedent.

Larrabee's Case, 120 Maine, 242, is one where an employee, while removing ashes from under the boilers in a mill, breathed gas fumes from the ashes. Bronchial pneumonia developed and death followed. The evidence disclosed that the deceased was a man in good health who had never had any illness prior to the day of the alleged injury except from ordinary "colds." Our court referred to the case as one where "the deceased, through accident, inhaled an excessive amount of the gases." Here, also, no attempt was made to define "accident," nor was any traumatic cause ascribed, but compensation was allowed.

It may be safe to say that among English cases which deal with an interpretation of the expressions "accidental injury" and "injury by accident" no one is more frequently cited than *Fenton* v. *Thorley*, A. C., (1903), 443. This case was considered after Parliament amended the Workman's Compensation Act of 1897 which act is

entitled "An Act to amend the law with respect to compensation to workmen for accidental injuries suffered in the course of their employment." The first section of the Act, Sub. 5, 1, declares that if in any employment to which this Act applies personal injury by accident arising out of and in the course of the employment is caused to a workman "his employer shall be liable to pay compensation." Lord Macnaghten comes to the conclusion that the expression "accident" is used in the popular and ordinary sense of the word as denoting an unlooked-for mishap or an untoward event which is not expected or designed. Lord Shand said also that the word "accident" in the statute is to be taken in its ordinary and popular sense, and thought that it denoted or included any unexpected personal injury resulting to the workman in the course of his employment from any unlooked-for mishap or occurrence. It was also pointed out that cases were numerous depending upon policies of insurance intended to cover injuries described as arising from accidental, violent, and external causes, but Lord Macnaghten said these cases did not throw much light upon the pending question because they turned on the meaning and effect of stipulations for the most part carefully framed in the interest of the insurers. No one of the learned expounders of the law in that case even hinted that an injury must have a traumatic origin in order to entitle the injured employee to compensation. On the contrary the effect of the interpretation in that case found an echo in a case decided two years later by the same tribunal.

Brintons v. *Turvey*, A. C., (1905), 230; 2 American and English Annotated Cases, 137. In the latter case a workman contracted anthrax while engaged in handling wool in the course of his employment. He was awarded compensation. Lord Macnaghten, abiding by the definition of "accident" in *Fenton* v. *Thorley*, supra, said "it was an accident that the noxious thing that settled on the man's face happened to be present in the materials which he was engaged in sorting. It was an accident that this noxious thing escaped the down draught or suck of the fan which the Board of Trade, as we are told, requires to be in use while work is going on in such a factory as that where the man was employed. It was an accident that the thing struck the man on a delicate and tender spot in the corner of his eye. It must have been through some accident that the poison found entrance into the man's system. . . . . I cannot doubt that the man's death was attributable to personal injury by accident

arising out of, and in the course of his employment. The accidental character of the injury is not, I think, removed or displaced by the fact that, like many other accidental injuries, it set up a well-known disease which was immediately the cause of death." Judgment was favorable to the injured employee. Examination of the cases decided by the English Court during the twenty years which have intervened since the decision of *Fenton* v. *Thorley,* supra, has not disclosed any reversal of the position there taken. Certainly there has been no intimation that an accidental injury must have a traumatic cause in order to render it compensable under the British Workman's Compensation Act.

Before leaving the English Courts it is proper to again remark that in that country, as well as in our own, we find many cases arising from accident insurance policies. These policies usually insure the policy holder against injuries sustained through external, violent and accidental means. The accident insurance cases have to do with a contract and the intention of the parties; the cases under a compensation act deal with the intent of the legislative body.

Nor should we overlook cases like *Steel* v. *Cammell, Laird & Co.,* 1905, 2 K. B. 232, a lead poisoning case. It was there held that a disease which is the result of a long continued process of absorption of a poisonous substance into the system is not an accident. The grounds on which this holding was placed are two-fold, one that notice of the injury could not be given because the time at which the injury occurred could not be fixed; the other that the disease was a consequence of the employment engaged in and was naturally expected to result in some instances. These cases do not bear upon the case at bar. They fall within the line of occupational disease cases. Such diseases lack the element of "sudden, unexpected event." *Patrick's Case,* supra.

Coming to courts in our country, cases are multitudinous and rapidly increasing where decisions have been rendered alone upon the phase of the various Workman's Compensation Acts now under consideration. We must content ourselves by citing only a few of the leading cases.

Vennen v. *New Dells Lumber Co.,* (Wisconsin), 154, N. W. 640. The act in that State, Sec. 2394-3, provides that liability for compensation shall exist against an employer for any personal injury accidentally sustained by his employee. The defendant supplied drinking water to its employees for their use while on the premises. The water so supplied became infected with typhoid germs. Vennen

drank the water during the hours and on the premises when and where he was employed. Death from typhoid fever ensued. The defendant urged that the contracting of typhoid fever under the facts and circumstances of that case did not show that his death was due to an accidental occurrence. But the court said: "The term 'accidental,' as used in compensation laws, denotes something unusual, unexpected, and undesigned. The nature of it implies that there was an external act or occurrence which caused the personal injury or death of the employee. It contemplates an event not within one's foresight and expectation resulting in a mishap causing injury to the employee. Such an occurrence may be due to purely accidental causes or it may be due to oversight and negligence. The fact that deceased became afflicted with typhoid fever while in defendant's service would not in the sense of the statute constitute a charge that he sustained an accidental injury, but the allegations go further and state that this typhoid affliction is attributable to the undesigned and unexpected occurrence of the presence of bacteria in the drinking water furnished him by the defendant as an incident to his employment. These facts and circumstances clearly charge that Vennen's sickness was the result of an unintended and unexpected mishap incident to his employment. These allegations fulfill the requirement of the statute that the drinking of the polluted water by the deceased was an accidental occurrence while he was performing services growing out of and incidental to his employment.

Wasmuth, Endicott Co., v. *Karst* (Indiana), 133 N. E., 609. The act in that state, as amended in 1919, Sec. 76-d, provides that "injury" and "personal injury" shall mean only injury by accident arising out of and in the course of the employment and shall not include a disease in any form except as it shall result from the injury. Karst was employed in the factory of the company. The company furnished its employees, while at work, with drinking water from a well in its factory. The water became contaminated with typhoid germs. Karst, while working for the company, used the water for drinking purposes, without knowledge of its pollution, thereby contracting typhoid fever, and was confined to his bed for several weeks. In considering the contention whether Karst received a personal injury by accident the court said, "This Court, in determining questions of liability under the Workman's Compensation Act has adopted the following definition.

"An accident is any unlooked-for mishap or untoward event not expected or designed. Applying this definition to the facts disclosed by the evidence in this case, it is clear that the entering of typhoid germs into appellee's intestines, by reason of drinking the polluted water furnished him by appellant for that purpose, while in its employ, may rightfully be termed an accident. . . . . Did the disease result from an injury by accident, arising out of and in the course of the employment? If it did not, by the express provision of the statute no compensation can be awarded. The injury, however, need not be produced by violence, as our statute, unlike those of some other states, does not so provide. It suffices in that regard, whatever the accident may have been, if it produced a lesion or change in any part of the system which injuriously affects any bodily activity or capability. . . . . The fact that the accident involved in this case occurred while appellee was engaged in quenching his thirst, rather than in the actual performance of some duty which he owed appellant under his employment is not a matter of controlling importance as it is recognized that such acts as are necessary to the life, comfort and convenience of the workman while at work, though personal to himself, and not technically acts of service, are incidental to the service; and an accident occurring in the performance of such acts is deemed to have arisen out of the employment."

Fidelity &c. Co. v. *I. A. C. of California*, 171 Pac., 429. This case arose under the so-called Boynton Act as it stood in 1914 where under Section 12 of the act it was provided that compensation should be granted for personal injuries by accident arising out of and in the course of the employment. The record shows that while using wood alcohol for cleaning purposes the eyes of the employee were exposed to and came in contact with the vapor of alcohol in unusual quantities causing sudden impairment of vision. It was held that this was not an occupational disease and that compensation should be awarded. Insurance cases were there discussed but the court held that the expression "injuries sustained by accident" in the Compensation Act is to be given the broader interpretation in harmony with the spirit of liberalty in which it was to be conceived, so as to make it applicable to injuries to workmen which are unexpected and unintentional and which thus come within the meaning of the term "accidents" as it is popularly understood, citing the British cases which we have above cited.

Other cases supporting the doctrine that traumatic injuries need not be requisite to compensation for injured workmen are found in many states.

On the other hand in *Richardson* v. *Greenburg*, (decided in 1919), 188 App. Div. 248, 176 N. Y.; supp. 651, the court said:

"Had it been the intention of the legislature to include within the meaning of 'injury,' or 'personal injury' all diseases of whatever nature, it would not have been necessary expressly to mention, in addition to 'accidental injuries,' 'such disease or infection as may naturally and unavoidably result therefrom.' This express mention of a disease which is the consequence of injury would seem to exclude all diseases which are not. The particular disease must 'result' from 'accidental injury,' that is to say, it must be preceded by such injury, and therefore cannot constitute the injury, which it follows. Evidently 'disease' and 'accidental injury' are in contrast with each other, so that the former is never comprehended by the latter. The Workman's Compensation Law was drawn with painstaking care, and it cannot be supposed that words and phrases found therein, particularly in the defining clauses, were needlessly, meaninglessly, or obscurely used. The plain meaning of its words, without the aid of judicial interpretation, induces the conclusion that the legislature intended to make compensable no condition or death resulting from disease, unless the disease itself followed a traumatic injury or other injury not partaking of the nature of a disease." In this case death was caused by the disease of glanders contracted through inhalation of the bacteria of glanders and the court, holding that the death did not result from an accidental injury, denied compensation.

The position taken by the New York Court is also supported by decisions in other jurisdictions, which are entitled to great consideration, holding that compensation is not authorized where incapacity results from disease, such as pneumonia, *Linnane* v. *Aetna Brewing Co.*, 91 Conn., 158; *Landers* v. *Muskegon*, 196 Mich., 750, 163 N. W., 43; or typhoid fever, *State* v. *District Court*, 138 Minnesota, 210, 164 N. W., 810. But in the majority of jurisdictions, and we think by weight of authority, it has been held that the phraseology of the compensation acts is broad enough to include all non-occupational diseases although not preceded by traumatic causes provided it is clearly shown that the disease arose out of and in the course of the

employment and was unusual, undesigned, unexpected and sudden. *Ann Cases*, 1918 B., 328; *Vennen* v. *New Dells Lumber Co.*, supra; *Glasgow Coal Co.* v. *Welsh*, 1916, 2 A. C.; *Brintons* v. *Turvey*, supra.

We hold, therefore, that in the case at bar, from weight of authority and by reason of the humane and liberal construction to which the Compensation Act is entitled the mandate must be,

Appeal dismissed with costs.
Decree below affirmed.

WILSON, J. Concurring in result.

I concur in the result of the opinion, but inasmuch as it involves a departure from what I apprehend has been the common understanding of the scope of the Workmen's Compensation Act, and the language of the opinion, unqualified, seems to me to extend the provisions of the Act beyond the legislative intent, I am impelled to express my reasons for concurring only in the result.

No terms of these Acts has been so prolific of discussion and of almost futile attempts at definition as the phrase "personal injury by accident" or its corresponding provision for the grounds on which compensation is based, unless it be the phrase immediately following, "arising out of and in the course of his employment."

The English Act of 1897 is generally accepted as the basis for the provisions of the first Acts adopted in this country and Justice PHILBROOK has referred us in the opinion to the several English cases which are usually cited, when the meaning of the phrase "personal injury by accident" is under consideration.

In *Fenton* v. *Thorley*, App. Cases, 443, (1903)—a case of hernia—and in the *Brinton Case*, App. Cases 230 (1905)—a case of anthrax—there was, as one noble Lord expressed it, much poring over the word accident by learned counsel, which evolved some subtle reasoning and which seemed to him entirely over the heads of workmen and employers and even of Parliament; but after the several Lords who participated in the appeal had separately expressed their views, no more tangible result was evolved than that the word "accident" in the English Act was "used in its popular and ordinary sense of the word as denoting an unlooked for mishap or untoward event which is not expected or designed."

It should be noted also that in each of these cases it was expressly stated by some of the Lords participating in the decision that the doctrines there laid down should not be construed as holding that all diseases contracted in the course of employment are to be regarded as accidents within the meaning of the Act.

There is much force, I think, in the view of the Connecticut Court that a disease was not intended to be included in these Acts under the term "personal injury." *Lenane* v. *Aetna Brewing Co.*, 91 Conn., 158. The Acts of New York, Indiana, Minnesota and no doubt others were apparently drawn with a view to excluding incapacity resulting from disease unless it was definitely traceable to some injury resulting from an accident.

But where the grounds of compensation are as in our Act simply "personal injury by accident" the authorities are in almost hopeless confusion as to its meaning at least as to the application of any definition that can be said to be generally accepted. This court has already adopted one which appears to me as satisfactory as any to be found in the decided cases. In substance, a personal injury by accident is an injury resulting from some unusual, unexpected or unknown mishap or occurrence, as an unexpected fall, or some unusual or unexpected injury resulting from some known and ordinary but sudden occurrence, as hernia or the bursting of a blood vessel from a strain incurred in the ordinary course of the employment. *Patrick's Case*, 119 Maine, 510; *Brown's Case*, 123 Maine, 424.

At the outset we should put out of our mind the concept that the words "by accident" denote only the manner in which the injury was received, that is, by chance, accidentally. In our Act, if not in all, it obviously denotes a distinct event, a happening, an occurrence of which notice can be given as required by Section 17 of the Act and distinct from the injury itself.

It is in view of this, and to avoid the extension of the doctrine laid down in the *Fenton and Brinton Cases*, supra, to include contagious diseases generally, that the English courts, since the decision of those cases, have in defining the word accident added this limitation also: "Unless the applicant can indicate the time, the day, circumstance and place in which the accident occurred by means of some definite event, the case cannot be brought within the purview of the Act." *Eke* v. *Hart-Dyke*, 2 K. B., (1910), 677. In this case it is well to note the later attitude of the court towards the Fenton

and Brinton cases cited by Justice PHILBROOK in the opinion: "In the face of that particular finding of fact (referring to the findings in the court below that the entering of the anthrax germ in the Brinton case into the employee's eye was an accident) the court held that it was an accident. But I think all the Judges carefully abstained from lending color to the suggestion that a mere disease which you could not say was contracted at any particular time or at any particular place by a particular occurrence was an accident which entitled a man to compensation."

The Court of Appeals had already delivered itself to the same effect in still an earlier case. *Broderick* v. *London City Council*, 2 K. B., 807 (1908).

Appreciating, as it seems to me, the necessity of some such limitation to exclude contagious diseases generally, under the broad definition of the term, "accident," found in some of the authorities, the New Jersey Court and those of several other of the States have also adopted it. In *Liondale Bleach Works* v. *Riker*, 85 N. J. L., 426, 429, the court says: "The English Courts seem at last to have settled that where no specific time or occasion can be fixed upon as the time when the alleged accident happened there is no injury by accident within the meaning of the Act. This seems a sensible working rule especially in view of the provisions of the statute requiring notice in certain cases within fourteen days of the occurrence of the injury—a provision which must point to a specific time."

This "sensible rule" has also been expressly adopted in Illinois where the court said: "If an injury can be traceable to a definite time and place and cause, and the injury occurs in the course of the employment, the injury is accidental within the meaning of the Act, and the obligation to provide compensation arises." *Baggot Co.* v. *Ind. Com.*, 290 Ill., 533. Also see *Prouse* v. *Ind. Com.*, 69 Colo., 382, and *Iwanioki* v. *State Indus. Acc. Com.*, 104 Or., 650, 665 where the courts of these States have followed.

To avoid compensation for contagious diseases, some of the States have apparently attempted to so frame their Acts as to accomplish this purpose. The Minnesota Act after the phrase "personal injury caused by accident" defines accident as "an unexpected or unforeseen event happening suddenly and violently or without human fault and producing at the time injury to the physical structure of the body." Under this provision it was held that typhoid fever was not

included, on the ground that the taking of typhoid germs into the system did not happen suddenly and violently nor from any event which produces an injury to the physical structure of the body. *State ex rel* v. *Faribault Woolen Mills Co.*, 138 Minn., 210.

In New York and Indiana the provisions are somewhat similar, enacted apparently with the same legislative intent; yet the courts of those States have taken opposite views as to their effect. In the New York Act, it is provided, "that personal injury shall mean only accidental injuries . . . . and such diseases or infections as may naturally and unavoidably result therefrom."

In Indiana the provision is: "that personal injury by accident shall not include diseases in any form except it result from the injury."

The New York Court in interpreting its provision, however, in a case where glanders was contracted by a workman during his employment held it was not covered by the Act of that State. *Richardson* v. *Greenburg*, 176 N. Y. Sup., 651; while the Indiana Court, though the provisions of its Act seem much stronger, held that typhoid fever was included within its Act, but by a process of reasoning which to my mind well illustrates the extent to which some courts are inclined to go under the provision common to most of these Acts, that they shall be interpreted liberally, in order to carry out what are termed its human purposes. *Wasmuth-Endicott Co.* v. *Karst*, 77 Ind., Appl., 279. It seems to me the New York interpretation of its Act is based on much sounder reasoning.

It is true that Michigan and Wisconsin have under provisions similar to those of our Act held that typhoid fever contracted in the course of employment entitled the employee to compensation.

The Michigan decision, *Frankamp* v. *Fordney Hotel Co.*, 222 Mich., 525, is based on the ground that taking in typhoid germs by the drinking of water not known to be contaminated was an unexpected occurrence and likened it to eating tainted food from which ptomaine poisoning resulted or the inhaling of septic germs from the handling of hides in unloading a car on a particular day.

The Wisconsin case, *Vennen* v. *New Dells Lumber Co.*, 161 Wis., 370, the employee sued at common law for injuries caused by negligence of defendant company in polluting drinking water furnished at its plant. The defendant replied that the injury alleged was

covered by the terms of the Compensation Act of that State which provided an exclusive remedy for "personal injuries accidentally sustained . . . . in performing services growing out of and incidental to his employment." The plaintiff demurred to this answer and the court below overruled the demurrer on the ground that the disability from typhoid fever was within the Compensation Act. The Appellate Court sustained the ruling of the court below, but only upon the ground that the taking in of the typhoid germs was an unexpected occurrence, and the declaration contained sufficient allegations to show the injury suffered in the form of the disease was accidentally sustained.

A dissenting opinion, however, analyzed the case and from the various decisions both here and in England showed the danger of such a general rule and that it was contrary to the latest views of the English Courts and many courts of eminent standing in this country which hold that the accident must be shown to have happened at some definite time of which notice can be given. The Wisconsin Statute provides that within thirty days after the occurrence of the accident notice must be given in writing stating the time and place of the injury. As the dissenting Justice then says: "This must mean that the legislature had in mind something definite and tangible, something that could be located as to time and place when it used the word 'accident'."

The majority opinion in this case, it seems to me, fails to distinguish between accident as indicating the manner in which an injury occurred, and as a definite though unexpected event or occurrence from which the injury resulted, which distinction has for some time been followed in the English Courts. *Broderick* v. *London City Council*, 2 K. B., 807 (1908); *Steel* v. *Cammell Laird & Co.*, 2 K. B., 232 (1905); *Martin* v. *Manchester Corporation*, 5 B. W. C. C., 259; *Findlay* v. *Tullamore Union*, 7 B. W. C. C., 973 in which case it was held that typhoid fever was not shown to be an injury by accident within the meaning of the Compensation Act.

All other compensation cases involving diseases to which my attention has been called can either be distinguished by some provision of the Act or the injury can be assigned to a definite event or occurrence in point of time and place.

To hold that every non-occupational contagious disease, the exposure to which could be fairly said to be measurably increased by reason of the conditions under which the employee is obliged to

work,—as would occur in practically every manufacturing plant or wherever employees are brought together in one room or building in large numbers and so be one of the obvious risks of his employment,—constitutes an injury by accident because the infection through the respiratory organs is unexpected and unforeseen, which seems to me to be the logical consequence of the doctrine laid down in the opinion,—unless there is such force in the word "sudden" as would exclude the very case under consideration,—would involve an extension of the provisions of the Act, to which I cannot yet agree, and open a Pandora's Box out of which would fly a multiplicity of new problems to plague us.

From the language of the Acts themselves, the history and purpose of this class of legislation, and upon what seems to me the best reasoned opinions of the various courts, my conclusion is that the Legislature contemplated by the term, "accident," an unusual, unexpected and unforeseen event or happening or an unusual and unexpected result of an ordinary occurrence, but in either event referable to a definite time or a particular day and place of which notice can be given in accordance with the Act.

It is not the disease itself which constitutes the accident, but the event or happening which caused the transmission of it, or the inciting of it due to some idiopathic conditions.

A contagious disease, therefore, which may have been contracted at any time within a period of a week or ten days, even though unexpectedly, cannot be said to be the result of an accident within the meaning of the Act, nor can its inception even be said to be "sudden" and so brought within the definition given in the opinion.

For these reasons if the case at bar were to be decided upon the evidence, my conclusion would be that the appeal should be sustained as the evidence does not show any definite event or happening in point of time to which this disease can be traced. However, upon the record of the case this question does not seem to me to be open to the State.

The petition sets forth the infection by typhoid germs by accident from drinking polluted water and on a definite date, viz. July 14th, 1923, and the evidence shows it was furnished by the employer in connection with his employment.

No answer was filed. The facts, therefore, stated in the petition cannot now be denied by the respondent. No further proof of them was required. *McCollor's Case*, 122 Maine, 136; *Morin's Case*, 122 Maine, 338.

Upon these facts thus admitted, I think the petitioner was entitled to compensation; although if issue had been joined, no definite time could have been fixed from the evidence in the case when the alleged accidental transmission of the germs took place, and no unusual event or unforeseen occurrence as happening on a definite date and constituting an accident within the meaning of the Act, could have been found.

STATE *vs.* RICHARD S. VERECKER.

Aroostook. Opinion December 11, 1924.

Comity between the United States and State Courts should be observed to the fullest extent when the question of immunity is properly made an issue in the State Court and the statutes of immunity should be given the broadest application.

It is not necessary to discuss the exceptions of the respondent in this case. His conviction is amply sustained upon grounds entirely independent of the question of immunity. He took the witness stand in his own behalf at the trial in the State Court without claiming the immunity guaranteed by the State Constitution, as was his right, voluntarily testified that he was engaged in the liquor business, from August 11, 1922, to October 20 or 21st, 1922. The respondent, however, contends that that admission is not sufficient to be regarded as proof that he was engaged in the business as a common seller. But any other inference would border on the realm of stultification.

On exceptions by respondent. The respondent was indicted as a common seller of intoxicating liquor and duly arraigned and placed on trial at Houlton at the April Term of Court, 1924. The State proceeded to prove its case by the official stenographic notes of the testimony of the respondent, taken at a trial, for conspiracy, of other parties, at the November Term, 1923, of the United States District Court, held at Bangor. Verecker was subpoenaed by the Federal Court. When the evidence was offered in the State Court the respondent objected to its admission, upon the contention that, inasmuch as the respondent in the Federal Court was obliged to testify against himself, regardless of his constitutional protection under the provision of Section 6, Article I. of the State Constitution,

he was entitled to immunity under the Federal Statute, which, while compelling him to furnish evidence against himself, nevertheless undertook to protect his constitutional rights by the guarantee of immunity found in the United States supplementary statutes of 1923, Section 835e. At the close of the testimony counsel for the respondent moved for a directed verdict for the respondent which was refused and exceptions taken. Exceptions overruled. Judgment for the State.

The case is stated in the opinion.

Herbert T. Powers, County Attorney, for the State.

Harry M. Briggs, for the respondent.

SITTING: CORNISH, C. J., DUNN, SPEAR, STURGIS, BARNES, JJ.

SPEAR, J. The respondent in this case was indicted as a common seller of intoxicating liquor, at the April Term of Court, 1924, at Houlton, in the County of Aroostook.

He was duly arraigned and placed on trial. The State proceeded to prove its case by presenting Cecil Clay, official stenographer, as a witness, who was requested by the County Attorney to read from his official stenographic notes the testimony of the respondent, taken at the trial for conspiracy of Edmund W. Grant and Willard S. Lewin, at the November Term, 1923, of the United States District Court, held at Bangor. Verecker was subpoenaed by the Federal Court. The federal indictment charged Grant and Lewin for engaging in a conspiracy "to unlawfully and wilfully violate sections three, title two of the act of Congress, approved October 28, 1919, commonly known as the 'National Prohibition Act' and better known as the 'Volstead Act'."

The evidence of Verecker given at the conspiracy trial was offered as an admission that "from August 11th to October 20th or 21st," 1922, he was engaged "in the liquor business." The indictment of the respondent covers these dates. The only evidence offered to prove the charge in the indictment in the State Court was precisely the same evidence given by the respondent at the conspiracy trial in the District Court, and embraced precisely the same dates.

When the evidence was offered in the State Court the respondent objected to its admission on two grounds: First, that it was incompetent as not being the best evidence. But this objection dis-

appeared during the trial. The second and the real objection was based upon the contention, and urged upon the ground, that, inasmuch as the respondent in the Federal Court was obliged to testify against himself, regardless of his constitutional protection under the provision of Section 6, Article I. of the State Constitution, he was entitled to immunity by virtue of the Federal Statute, which, while compelling him to furnish evidence against himself, nevertheless undertook to protect his constitutional rights by the following guarantee of immunity found in the United States supplementary Statutes of 1923, Section 835e.

"Incriminating Evidence. No person shall be excused on the ground that it may tend to incriminate him or subject him to a penalty of forfeiture, from attending and testifying, or producing books, papers, documents, and other evidence in obedience to the subpoena of any court in any suit or proceeding based upon or growing out of any alleged violation of the Act; but no natural person shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter or thing as to which in obedience to a subpoena and under oath, they may so testify or produce evidence, but no person shall be exempt from prosecution and punishment for perjury committed in so testifying."

We are of the opinion that comity between the United States and State Courts should be observed to the fullest extent when the question of immunity is properly made an issue in the State Court and that statutes of immunity should be given the broadest application.

We are, however, not called upon to discuss the exceptions of the respondent in the present case. His conviction is amply sustained upon grounds entirely independent of the question of immunity. He took the witness stand in his own behalf at the trial in the State Court and, without claiming the immunity guaranteed by the State Constitution, as was his right, voluntarily testified that he was engaged in the liquor business, from August 11, 1922, to October 20th or 21st, 1922. The respondent, however, contends that that admission is not sufficient to be regarded as proof that he was engaged in the business as a common seller. But any other inference would border on the realm of stultification.

Exceptions overruled.
Judgment for the State.

ROSE PARKER *vs.* HAROLD H. KIRKPATRICK.

SAME *vs.* SAME.

Cumberland. Opinion December 11, 1924.

In an action for slander if the words spoken by the defendant accusing the plaintiff of larceny were made to a peace officer either for the detection of crime or the protection of his own property, and were made in good faith and without malice, they would be a privileged communication; but if made to the plaintiff in the absence of a peace officer and in the presence of third persons, they would not be so privileged.

In the assault case, the assault, if any, was merely technical and trifling, and only nominal damages should be allowed.

On exceptions and motion. Two actions, one for slander and the other for assault and battery, based upon the same facts and tried together, and a verdict of $1,016.92 for plaintiff was rendered in the slander suit, and a verdict of $820.91 for plaintiff was rendered in the other case. Defendant excepted to a ruling of the presiding Justice defining a privileged communication in the slander suit, and filed a general motion in the other case. In the slander suit, exceptions overruled. In the assault and battery suit, motion overruled if the plaintiff remits all of the verdict in excess of one dollar within thirty days after rescript is filed with the clerk of the Law Court, otherwise motion sustained.

The case is fully stated in the opinion.

Max L. Pinansky, for plaintiff.

William C. Eaton, for defendant.

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

CORNISH, C. J. These two actions at law, the one for slander and the other for assault and battery, were based on the same set of facts, were tried together, and resulted in a verdict of $1,016.92 for the plaintiff in the slander suit, and $820.92 in the assault and battery suit. The slander suit is now before the Law Court on exceptions, the assault and battery action on motion.

The incidents complained of occurred on December 12, 1921, within and in front of the Eastman Brothers and Bancroft store on

Congress Street in Portland, of which corporation the defendant was an officer, stockholder and employe, and were the result of certain utterances and acts of the defendant at that time, caused by his belief that the plaintiff had been guilty of shoplifting and had unlawfully appropriated some article from the store.

1. SLANDER SUIT.

The plaintiff claimed that on the day in question in company with her sister she visited the Eastman store for the purpose of purchasing a box of rouge. She had with her an empty box of the kind desired which she had previously purchased in the same store, showed it to the saleswoman, and laid it on the counter. The saleswoman took several boxes from the show case, laid them on the counter and then stooped under the counter to investigate further, but did not find just what was wanted. While she was stooping another employee of the company, Miss Stewart, saw the plaintiff put her hand over something on the counter and transfer it to her pocket. Miss Stewart thinking the plaintiff had purloined some article, reported to the defendant what she had seen. The plaintiff and her sister moved away from the toilet goods department to other parts of the store and just as they were leaving by the Congress Street door the defendant stepped up to the plaintiff and said, "What did you take?" She answered, "I didn't take anything." Then he put his hand in her pocket, took out the empty rouge box and said "What is this?" She said "It is mine." He said "Come out here," meaning on to the sidewalk where people were passing and repassing, and said "What else did you take?" The sister asked him to look into the box, which he did and found it empty. He then said, "Never mind; you have done away with it." She said "If you think I have done away with it, take me into the store and search me." He replied "Never mind." All this on the sidewalk in the presence of the sister and of the passers-by.

The defendant set up by way of brief statement, the defense that whatever was said by him was said in the prosecution of an inquiry into a suspected crime in matters where his interest was concerned and to enable him to protect his own and his employer's interest, in good faith and without malice.

On this point the presiding Justice instructed the jury that if these words were spoken to a peace officer, as to a police officer, a detective, or sheriff or county attorney, either for the detection of crime or for

the protection of his own property, if made in good faith and without malice, it would be a qualifiedly privileged communication, but if made to the plaintiff herself, the one charged with crime, it would not be so privileged. The precise point raised by the exceptions, as stated by the learned counsel for the defendant in his brief, is "whether a communication which would have been privileged if made to a sheriff or similar officer, necessarily loses that characteristic if made directly to the plaintiff herself."

We think the instruction was correct.

The words claimed to have been employed by the defendant imputing as they did a crime, were admittedly slanderous and if false and not privileged were actionable per se. *Sullivan* v. *McCafferty,* 117 Maine, 1. If they constituted a qualifiedly or conditionally privileged communication the legal effect was to throw upon the plaintiff the burden of proving by affirmative evidence actual malice on the part of the defendant. *Sweeney* v. *Higgins,* 117 Maine, 415.

It is a firmly established element of the law of slander that "a person who makes a communication to a peace officer concerning the commission of crime is not liable to an action for libel or slander according to the weight of authority if the communication was made in good faith for the purpose of bringing an offender to justice." 17 R. C. L., Page 358. This legal rule rests upon grounds of public policy. The detection and punishment of crime demand it. *Elms* v. *Crane,* 118 Maine, 261. But no such reason exists when the communication is made, as in the case at bar, directly to the alleged culprit in the absence of a peace officer and in the presence of third persons. *Hupfer* v. *Rosenfeld,* 162 Mass., 131. It then becomes merely a slanderous charge rather widely published. *Dale* v. *Harris,* 109 Mass., 193. No question of public policy is then involved which can remove such a communication from the realm of actionable slander. The reason for the exception having ceased, the exception itself ceases.

Counsel for defendant confidently relies upon *Brow* v. *Hathaway,* 13 Allen, 239, and *Pion* v. *Caron,* 237 Mass., 108. Those cases contained an element that does not exist in the case at bar and are clearly distinguishable. The words uttered in those cases were in answer to questions put to the defendant, and the rule applicable on such occasions is well stated in the syllabus in *Brow* v. *Hathaway* as follows: "If one who has lost goods by theft goes to the house of the person whom he suspects to have stolen them and then in reply

to questions put as to the object of his visit accuses that person of theft and states the grounds of his accusation the communication is privileged, if made in good faith, with the belief that it is true and without express malice, although made in the presence of others and although it may have been intemperate and excessive from excitement." Those conditions did not obtain here. No inquiry was put to the defendant. His statement was purely voluntary.

The ruling stands and as no motion was filed in the slander suit judgment must follow the verdict.

2. SUIT FOR ASSAULT AND BATTERY.

This is before the Law Court only on a general motion. We think the motion should be sustained on the ground that the plaintiff is entitled to only nominal damages if anything.

A careful study and sifting of the evidence can detect only a technical assault and battery by the defendant, when he placed his hand in the plaintiff's pocket and removed the empty rouge box. A persistent attempt was made to magnify this and by leading questions to inject other elements, but we think this was the extent of the charge of assault and battery. There were no actual damages and therefore there could be no punitive damages. Yet the jury gave a verdict of $820.92. We cannot escape the conclusion that they practically duplicated the damages in the two actions, giving the plaintiff in the slander suit $1,016.92, which must have included both actual and punitive damages, and was a generous sum, and then allowing as much less only two hundred dollars in the assault and battery case where no damage whatever was proved. The slander was the main offense; assault and battery merely technical and trifling. This verdict should not stand. The plaintiff in this action was entitled to only nominal damages.

The result in the two cases therefore is this,

In the slander suit, exceptions overruled.
In the assault and battery suit, motion overruled if the plaintiff remits all of the verdict in excess of $1.00 within thirty days after rescript is filed with the Clerk of the Law Court; otherwise motion sustained.
So ordered.

LILLIAN M. ABBOTT ET AL. *vs.* IDA M. CLARK.

Lincoln. Opinion December 11, 1924.

In a real action the plaintiff must recover, if at all, on the strength of his own title.

In this case the defendant pleaded an equitable defense under R. S., Chap. 87, Secs. 15-22, claiming that the deed was in fact an equitable mortgage, given as security for the purchase price of oxen, and that the mortgage had been fully paid.

Two issues of fact were framed for the jury, and they found specially, sustaining the contentions of the defendant. Thereupon the presiding Justice filed a decree affirming the special findings and ordering the plaintiffs to execute a release to the defendant.

The findings, which were merely advisory, were supported by sufficient evidence to warrant the decree.

On appeal and exceptions by plaintiff. A real action for the recovery of land in Somerville. As a defense defendant alleged that the deed under which the plaintiffs claimed was an equitable mortgage, and that the debt thereby secured had been paid. The jury by special findings sustained the defense and a decree affirming the findings was entered from which decree plaintiffs appealed. Exceptions were also taken to the admission of certain documentary evidence, but not considered. Appeal dismissed. Decree of sitting Justice affirmed with costs.

The case is stated in the opinion.

Harold R. Smith, for plaintiffs.

Cyrus R. Tupper, for defendant.

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

CORNISH, C. J. This is a real action for the recovery of certain land situated in the town of Somerville. The plaintiffs' title rests upon a warranty deed of the premises given by Isaac M. Clark to S. C. Kennedy dated November 24, 1894, and recorded March 5, 1895. The plaintiffs are the heirs at law of said Kennedy. The defendant, who is the widow of Isaac M. Clark, set up a two-fold defense. She pleaded the general issue with a brief statement in

which she alleged an equitable defense under R. S., Chap. 87, Secs. 15-22, namely, that the deed above referred to was in fact an equitable mortgage, having been given merely as security for the purchase price of oxen bought by Clark from Kennedy and that the mortgage had been fully paid. Thereupon two issues of fact were framed for the jury, viz.:

"1—Was the warranty deed from Isaac M. Clark to Sebra C. Kennedy, dated November 24, 1894, given for security?"

"2—If said warranty deed was given for security has the debt secured thereby been paid?"

The jury returned an affirmative answer to each question and the presiding Justice thereupon made and filed a decree affirming the special findings and ordering the plaintiffs to make, execute and deliver to the defendant a quit-claim deed of the premises. From this decree the plaintiffs took an appeal.

The other defense set up by the defendant in her pleadings was that of adverse possession, under certain tax deeds, but this defense need not be considered as the rights of the parties can be fully determined by the result of the issues under the equitable defense.

The special findings in this case were merely advisory to the court, as in all equity proceedings, and the duty then devolved upon the court to affirm them and incorporate them in his findings or to reject them. In this case the court approved and affirmed them and they must stand unless they are so manifestly and glaringly wrong under the testimony and the circumstances preceding and succeeding the transaction as to require this court to reverse them. The testimony is somewhat meagre, as might be expected when the transaction occurred thirty years ago and both parties to it have been removed by death. Enough, however, remains to justify both findings and therefore to warrant the decree. The continued possession of Mr. Clark, who died in 1919, and of the defendant since his decease, and the absence of any claim on the part of Mr. Kennedy who lived until February, 1920, add great force to the equitable claims.

The plaintiffs must recover if at all on the strength of their own title, and in this they have failed.

Appeal dismissed.
Decree of sitting Justice affirmed with costs.

METHODIST CHURCH OF MONMOUTH ET AL., In Equity

vs.

JOHN FAIRBANKS ET ALS.

Kennebec. Opinion December 11, 1924.

When by will a testator bequeaths and devises all his property, real, personal and mixed, to his wife and daughter to their free use and benefit forever and free from the interference and control of any one, with a gift over at the death of the survivor of what was left, if anything, the remainder is void.

The intent of a testator, however clear, cannot be permitted to violate any rule of substantive law or firmly established canon of interpretation.

It is a well known rule of substantive law that a gift over after an absolute estate with an unqualified power of disposal in the first taker cannot take effect either as a remainder or an executory devise; and it is a firmly established canon of interpretation that a devise without words of inheritance or limitation but coupled with an unqualified power of disposal, either express or implied, conveys an absolute estate.

An unqualified power of disposal is implied by a devise without words of limitation or inheritance followed by a gift over of "the residue," or "the remainder thereof" or "what is left."

Only where there is a simple devise or bequest without words of limitation or inheritance, or any power of disposal, express or implied, in the first taker, and an absence of any other provision showing an intent to create an absolute estate in the first taker, may a gift over overcome the presumption created by Sec. 16 of Chap. 79, R. S., and take effect as a remainder or an executory devise.

On report. A bill in equity seeking a construction of the first paragraph of the will of Oran Fairbanks who died in 1893. The only question involved was as to whether the first part of the paragraph of the will conveyed an absolute estate. After a hearing upon the bill, answer and replication, by agreement of the parties the cause was reported to the Law Court. Bill sustained. Decree in accordance with opinion.

The opinion states the case.

Andrews, Nelson & Gardiner, for complainants.

Leroy T. Carleton, for respondents.

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

WILSON, J. A bill in equity for the construction of the will of Oran Fairbanks, late of Monmouth.

The testator by will, drawn apparently by an inexperienced scrivener, disposed of all his property in the following terms: "First, I give bequeath and devise to my beloved wife, Sybil G. Fairbanks and my beloved daughter Clara Fairbanks all the real, personal or mixed property that I may be seized or possessed at my decease to their free use and benefit forever and free from the interference and control of anyone; but if at the decease of my wife Sybil and my daughter Clara, there is any of my property that I give devise and bequeath to them left, it shall be equally divided between the Methodist Episcopal Church of Monmouth Maine and the American Bible Society."

The plaintiffs urge that this language should be construed as creating a life estate only in the first takers, with power of disposal and remainder over to the plaintiffs, inasmuch as such was the apparent intention of the testator.

It is a well settled rule of construction that the intent of the testator should govern unless it conflicts with some positive rule of law or violates some canon of interpretation so firmly established as to have become a fixed rule of law governing the transfer of property. *Barry* v. *Austin*, 118 Maine, 51; *Gregg* v. *Bailey*, 120 Maine, 263.

To uphold the construction contended for by the plaintiffs would violate both.

A devise without words of inheritance but coupled with an unqualified power of disposal, either express or implied, conveys an absolute estate. This rule has been so frequently laid down by this court that it is no longer open to question. It is now recognized as a "fixed canon of interpretation." *Shaw* v. *Hussey*, 41 Maine, 495; *Hall* v. *Preble*, 68 Maine, 101; *Jones* v. *Bacon*, 68 Maine, 34; *Gregg* v. *Bailey*, supra.

An unqualified power of disposal is implied in the first taker by a devise without words of inheritance followed by such words as: "as to the residue of my estate" and a gift over, *Jones* v. *Bacon*, supra; "the remainder thereof," *Mitchell* v. *Morse*, 77 Maine, 423; "residue of my estate," *Wallace* v. *Hawes*, 79 Maine, 177; "all that remains unexpended," *Loring* v. *Hayes*, 86 Maine, 351; "what remains," *Taylor* v. *Brown*, 88 Maine, 56; "so much as remains," *Bradley* v. *Warren*, 104 Maine, 423.

The language of the will in the case at bar is especially emphatic. The devise is "to their free use and benefit forever, and free from the interference and control of any one." It is only what is "left" that was to pass to the plaintiffs. Under the decisions above cited and numerous others of similar import an unqualified power of disposal in the wife and daughter was clearly implied, and they took an absolute estate in fee simple in the real estate and an absolute title to any personal property. The remainder over must, therefore, fail, as it is a well known rule of substantive law that a fee cannot be limited upon a fee or another absolute estate, nor can it take effect as an executory devise where there is an unequalified power of disposal in the first taker.

The intent of the testator, however clear, must yield to these fixed rules and what has been termed the judicial intent controls. *Barry* v. *Austin*, supra. Only where there is a simple devise or bequest without words of inheritance or any power of disposal, either express or implied, in the first taker, or any other provision showing an intent to create an absolute estate in the devisee first named, may a provision for a disposal of the property after the death of the first taker overcome the presumption created by Sec. 16, Chap. 79, R. S., that an absolute estate was intended in the first taker, and the remainder to be given effect. In case it otherwise appears, either by words of inheritance or an unqualified power of disposal, that an absolute estate was intended in the first taker, a remainder over must fail for the reason above stated. See *Barry* v. *Austin*, supra, and *Gregg* v. *Bailey*, supra, where the cases involving this question have been collected and distinguished.

Sybil Fairbanks and Clara Fairbanks, therefore, took under the will of Oran Fairbanks an estate in fee in the real estate and an absolute title to any personal property of which he died seized and possessed; and both mother and daughter having died intestate, the balance now in the hands of the administrator of the estate of the daughter, who survived her mother and was her only heir at law, being ready for distribution in the ordinary and usual course of administration of the daughter's estate, may be distributed among her heirs according to provisions of Chap. 80, R. S.

Bill sustained.
Decree in accordance with opinion.

FRANK L. WEBBER *vs.* ERNEST WRIGHT.

Kennebec. Opinion December 11, 1924.

A grant of land described as bounded on a passageway and referring to a plan on which a strip of land is marked off corresponding to the passageway described in the deed may convey to the grantee an easement therein of passage, light and air.

Where an alleged nuisance has been created or erected by a third party, the present owner into whose hands it has come by purchase since the erection or creation of the nuisance cannot be held liable therefor without notice of the existence and a request for its abatement.

Nor will a landlord be held for a nuisance created by his tenant until the expiration of the term and surrender of the premises and then only after notice and request for abatement.

On exceptions. An action on the case to recover damages for the obstruction of an easement of passage, light and air, in a strip of land five feet wide. Defendant pleaded the general issue denying the existence of any such easement; setting up title by prescription; and further contended that the alleged nuisance having been erected, not by the defendant, but by his tenant, a lessee under a lease antedating defendant's purchase of the property, and no notice of the alleged nuisance having been given, and request for removal having been made by plaintiff to defendant before the action was brought, the action cannot be maintained. At the conclusion of the evidence, the presiding Justice directed a verdict for the defendant and plaintiff excepted. Exceptions overruled.

The opinion states the case.

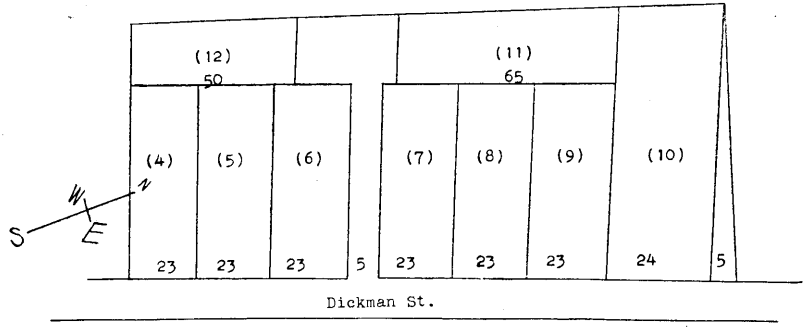
McLean, Fogg & Southard, for plaintiff.

Pattangall, Locke & Perkins, for defendant.

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

WILSON, J. An action on the case to recover damages for the alleged obstruction of a passageway and the interference with the plaintiff's easement of passage, light and air.

Sometime prior to 1870, the city of Augusta acquired title to a parcel of land situated in that city on the westerly side of Dickman Street, and had an engineer by the name of Patterson plot it into lots. A copy of this plan, referred to in the muniments of title of both plaintiff and defendant and their predecessors in title as "J. W. Patterson's Plan," was made a part of the case by agreement, and is herewith in part reproduced:



In 1914, the defendant acquired title to lots 7, 8, 9, and 11, as shown on the "Patterson Plan," at which time, there was an old barn standing on lot 7 about twenty-two or twenty-three feet in width on Dickman Street and extending back about thirty-five feet, and referred to in the evidence as the Grant barn and erected, as one witness testified, about fifty years ago. In January, 1916, the defendant leased lot 7, or the land on which the old barn stood for a term of eight years. The tenant soon afterwards tore down the barn and erected a new building on the same locus with respect to the passageway as was formerly occupied by the barn, except that the new building extended back from Dickman Street about fifty feet instead of thirty-five.

The plaintiff in 1920 acquired title to lots 4, 5, 6 and 12 and apparently also to that part of the space lying westerly of lot 6 and southerly of the northerly side line of lot 6 extended westerly; and proceeded to erect a building on lot 6. Upon a survey of the premises the present controversy arose.

The plaintiff claims that the new building erected by the defendant's tenant on lot 7 occupies a part of the passageway between lots 6 and 7, as shown on the "Patterson Plan," and obstructs the plaintiff's easement therein of passage, light and air.

At the trial of the case below, after the evidence was all in, upon motion of the defendant, the presiding Justice directed a verdict for the defendant, and the case is before this court on plaintiff's exceptions to this ruling.

It appears from admissions of the parties, that when the city of Augusta conveyed lots 4, 5, 6 and 12 to the plaintiff's predecessor in title, it referred to the "Patterson Plan" and described lots 4, 5 and 6 as being each twenty-three feet in width and their easterly line as running "northerly on Dickman Street to a passageway and thence westerly by the southerly line of said passageway 60 feet."

The deeds of the defendant's property also identify the lots thereby conveyed by reference to the "Patterson Plan."

It may well be that the grantee of the city of Augusta, and the plaintiff's predecessor in title, thereby acquired an easement of passage, light and air in the five-foot strip, shown on the Plan, for the benefit of lots 6 and 12: *Young* v. *Braman*, 105 Maine, 494; *Sunderland* v. *Jackson*, 32 Maine, 80; *Bangor House* v. *Brown*, 33 Maine, 309, 314; 9 R. C. L., 766, 767; *Franklin Ins. Co.* v. *Cousens*, 127 Mass., 258, 261; *Durkin* v. *Cobleigh*, 156 Mass., 108.

And whether the old barn formerly occupied, or the present structure now occupies any part of the passageway, or if so, whether such occupation was actually adverse, may have been questions for the jury, if they could fairly be determined from the evidence in the case.

However, regardless of such rights as the plaintiff may now have, if any, in the five-foot passageway delineated on the "Patterson Plan," the exceptions must be overruled. It does not appear that the defendant erected the building of which the plaintiff now complains. According to the testimony in the case, it was erected by a tenant under a lease, and several years before the plaintiff acquired any title to the land adjoining the passageway, and has not yet come back into the possession of the defendant.

When an alleged nuisance has been created or erected by a third party, the present owner into whose hands it has come by purchase since the creation or erection of the alleged nuisance, cannot be held liable without notice that the nuisance exists and a request for its abatement; nor can a landlord be held for an erection by his tenant until the expiration of the term and after notice and request for abatement, even though it amounts to a continuance of a nuisance existing at the time of the lease, if the original nuisance was not

erected by the landlord, but existed at the time he acquired the premises, and if no notice of the existence of the original nuisance was ever given to him, or request for its abatement made upon him. *Pillsbury* v. *Moore*, 44 Maine, 154; *Holmes* v. *Corthell*, 80 Maine, 31; *Staples* v. *Dickson*, 88 Maine, 362.

Exceptions overruled.

LUKE PELLETIER *vs.* CENTRAL MAINE POWER COMPANY.

Waldo. Opinion December 15, 1924.

In a common law action brought by an employee to recover compensation for injuries received in the employ of a non-assenting employer under the Workmen's Compensation Act, since negligence is the basis of all actions for injuries suffered by employees, the plaintiff must allege and prove that his injury was in whole, or in part, caused by the negligence of his employer or of some person for whose care the employer is responsible, which, in the case of so-called large employers, includes negligence of fellow servants.

The question of negligence of fellow servants is one of fact, and their negligence and its causative effect are to be decided by the jury; and a verdict in favor of the plaintiff will not be disturbed unless it appears affirmatively that their verdict was the result of bias, prejudice or misunderstanding of the testimony and the law applicable to the case.

It is not necessary to consider exceptions to the admission or exclusion of testimony relating to negligent methods of the employer, independent of the negligence of fellow servants, where the verdict is clearly sustainable because of the negligent acts of those fellow servants independent of any alleged negligent methods in vogue by the defendant itself.

On motion and exceptions. A common law action by an employee to recover for injuries received in the employ of a non-assenting employer under the Workmen's Compensation Act. The plaintiff with other employees of defendant were engaged in hauling poles on a truck and in unloading one of the large poles, the plaintiff, in assisting the other employees, let go of the pole with his hands and got under the end of it back to the others and lifted with the pole on his

shoulder and back and as the pole swung over the side of the truck the weight of the pole forced him to the ground resulting in his injuries. Plaintiff alleged negligence on the part of defendant and also negligence of fellow servants. Defendant pleaded the general issue. A verdict for plaintiff was rendered for $4,390, and defendant filed a general motion for a new trial, and also excepted to several rulings; granting leave to amend; the exclusion of certain testimony; and refusal to direct a verdict for defendant. Motion and exceptions overruled.

The case is fully stated in the opinion.

Thaxter & Holt, for plaintiff.

McLean, Fogg & Southard, for defendant.

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

PHILBROOK, J. This is an action brought by an employee of the defendant to recover compensation for injuries received while in its employ and claimed by him to be due to the defendant's negligence. At the time when the injuries were suffered the defendant was not an assenting employer under the Workmen's Compensation Act and was therefore denied the privilege of the defenses of contributory negligence of the plaintiff, negligence of a fellow servant, or assumption of risk. On the other hand, since negligence is the basis of all actions for injuries suffered by employees, the plaintiff must allege and prove that his injury was in whole, or in part, caused by the negligence of his employer or of some person for whose care the employer is legally responsible, which, in the case of so-called large employers, includes negligence of fellow servants. *Nadeau* v. *Caribou Water, Light & Power Co.,* 118 Maine, 325.

Briefly stated, the plaintiff, with fellow employees, was engaged in moving electric light poles from another location to the defendant's yard where the same were to be piled. The large ends of the poles were placed on a small motor truck and securely lashed thereto. The small ends dragged upon the ground. The body of the truck had vertical sides, surmounted by a flange which inclined outward. On arriving at the piling place the lashings were loosened. The crew then lifted the large ends of the poles over the side and flange of the truck body and threw or dropped them upon the ground.

At the time of the accident the crew had unloaded one pole successfully. They then attempted to unload the remaining pole, two poles constituting a load. Because of the weight of the pole, or because it was crooked and not easily handled, or for some other reason, the members of the crew who were lifting it were not readily accomplishing their effort. Whereupon the plaintiff, standing upon the ground, put his shoulder and back underneath the pole and lifted. When the pole, by the combined efforts of the plaintiff and the other members of the crew, was raised sufficiently to clear the side and flange of the truck body, then, to use the words of the plaintiff, "I felt the weight on me, onto my shoulder, and down I went with the pole on top of my shoulder and back."

The negligence charged consisted of several elements; (1) that the other employees, fellow servants of the plaintiff, suddenly and without warning to the plaintiff, and while he had the pole on his shoulders and back, carelessly and negligently let said pole slip from their arms and the whole weight of the same came on the plaintiff who was thrown to the ground with the pole on top of him; (2) that as the pole was lifted above and over the flange, suddenly and without warning to the plaintiff, and while he had the pole on his shoulders and back, the other employees, fellow servants of the plaintiff, carelessly and negligently threw the pole sideways to the ground while the plaintiff was still carrying the same, from which negligent act the injuries were suffered; (3) that the defendant negligently failed in its duty to provide a sufficient number of men to lift the pole and handle the same without causing injury to those engaged in unloading; (4) that it was the duty of the defendant to provide proper and safe appliances in order to lift the pole or to bear the weight of same while it was being removed from the truck, but neglecting its duty the defendant provided no appliances of any kind to be used in handling the poles and that the accident happened because of the failure of the defendant in this respect; (5) it was the duty of the defendant to adopt a proper and safe method of removing poles from the truck but, neglecting its duty in that respect, it did not unlash the pole and pull the truck from underneath it, thus permitting the pole to fall to the ground without the necessity of its being lifted; nor did the defendant use a trailer for supporting the poles by means of which they could have been unlashed from the truck and rolled from the trailer to the ground without necessity of lifting; (6) that the defend-

ant negligently failed to use cant-dogs and skids to roll the poles from the truck and permit them to fall to the ground without the necessity of lifting the same.

Thus it will be seen that the first two charges are directed against the negligence of fellow servants in either letting the pole slip, or in throwing it, suddenly, negligently and without warning. The other four directly charge the defendant with negligence in not providing a sufficient crew, nor proper appliances, nor proper methods of doing the work.

The plaintiff recovered a verdict and the case is before us upon defendant's motion for a new trial and exceptions.

MOTION.

The defendant strenuously claims that in fact no negligence existed as charged by the plaintiff, and that the record does not disclose any conditions or circumstances which would justify a finding of negligence by the jury. The two-fold grouping of charges just pointed out might warrant consideration of the testimony under two heads; (a) negligence of fellow servants as causing the injuries; (b) negligence of the defendant in failing to provide sufficient crew, appliances, or proper methods of doing the work, as causing those injuries.

In argument the plaintiff frankly states that his main contention is that this accident happened through the negligence of fellow servants who were handling the pole with him, either through their failure to retain their hold on the pole a sufficiently long time to permit him to clear himself from the dangerous position in which he was; or through their negligence in throwing the pole after he had helped them lift it and before he was clear of it. He further admits that so far as negligence is concerned it does not make much difference which they did. In this last statement, as a legal proposition, we concur.

It is difficult to visualize the particulars of the accident as it happened in a very brief moment. Upon the plaintiff's side of the case he is the only witness who attempts to tell us just what occurred. Taking his story at its full face value he placed himself in a position which would become one of danger if his associates voluntarily or involuntarily released their hold upon the pole. If that release were done negligently, without regard for his safety, then the plaintiff

has sustained his case. If it were a pure accident, as might have happened, then there was no negligence so far as the conduct of fellow servants is concerned.

The defendant claims a pure accident to which the plaintiff contributed. It especially claims that when the plaintiff got under the pole, and lifted, his effort was so effective and the result of his effort was so instantaneous that the pole by that effort, was thrown out of the grasp of the other employees. Could this theory be true? In order to be so then it must also be true that the strength of this one man, in lifting, exceeded the combined efforts of all the other four men for they, admittedly, could not lift the pole any higher by their united strength. Moreover, the pole moved away from the truck body after the final lift. But the testimony shows that the plaintiff lifted vertically. From whence came the force which pushed the pole laterally if not from the other employees, and could this force come from them if, as defendant claims, the pole was suddenly thrown out of their grasp and control when the plaintiff lifted? Again, if there were time for the other workmen to push the pole laterally, after it was lifted, then there was time for some one of them to have given the word "heave," so commonly used in such work, and there was time for some one to have said "out from under" if all those engaged with the plaintiff, and who should have appreciated his danger, had been using the degree of care which the dangerous conditions demanded. We are fully convinced that the jury was justified in finding for the plaintiff on this branch of the case and it is unnecessary to discuss the other charges of negligence alleged in the declaration.

THE EXCEPTIONS.

During the progress of the trial, several exceptions were reserved but in argument only two are relied upon.

(1) relates to the admission of evidence as to the method of unloading poles, the plaintiff being permitted to give testimony as to other customary methods of unloading poles; (2) exclusion of evidence that the method of unloading poles employed by the defendant had been used by it for a considerable period of time and had uniformly proved safe, adequate and convenient. The defendant asked one of its witnesses, who had testified to a long experience in

unloading poles and who had been employed by the defendant for many years where this method was used, if in his experience he had ever known of any one being injured in unloading poles by the method employed by the defendant at the time of the accident. We have already sustained the charge of negligence as to the acts of the fellow servants in dropping or throwing the pole, and as the rulings complained of both relate to charges of negligence which we have found it unnecessary to discuss, we hold that even if the rulings were exceptionable, which we cannot admit, then the defendant was not prejudiced upon the determining issue.

Motion and exceptions overruled.

STATE *vs.* ALBERT S. CONANT.

Cumberland. Opinion December 18, 1924.

An indictment based upon Public Laws of 1921, Chap. 211, Sec. 74, which simply alleges "that A. of P. in said County on the thirteenth day of October A. D. 1923, at said P., did operate and attempt to operate a certain motor vehicle while being then and there intoxicated and under the influence of intoxicating liquor, against the peace" etc., is insufficient upon general demurrer; it does not sufficiently charge the offense which the statute was intended to punish, and may include an act which is not punishable.

An indictment like the one in the instant case might include an act which is not punishable; as, for example, the operation or attempt to operate a motor vehicle by an intoxicated man within his own dooryard or on a private driveway on his own premises. In neither case would the act be penal.

On exceptions by respondent. Respondent was indicted under Sec. 74, Chap. 211, of the Public Laws of 1921, for operating or attempting to operate a motor vehicle while under the influence of intoxicating liquor. Counsel for respondent filed a general demurrer to the indictment alleging that the indictment was insufficient on the ground that it did not allege that the operation or use of the vehicle was upon some way, including public parks, parkways, and

bridges. The demurrer was overruled by the presiding Justice and the indictment adjudged good, to which ruling respondent entered exceptions. Exceptions sustained. Indictment adjudged bad.

The case is stated in the opinion.

Clement F. Robinson, Deputy Attorney General and Ralph P. Ingalls, County Attorney, for the State.

Harry E. Nixon, for the respondent.

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

DUNN, J., did not participate.

MORRILL, J. This indictment, based upon Laws of 1921, Chap. 211, Sec. 74, charges "that Albert S. Conant of Portland in said County on the thirteenth day of October A. D. 1923 at said Portland, did operate and attempt to operate a certain motor vehicle while being then and there intoxicated and under the influence of intoxicating liquor, against the peace" etc.

A general demurrer was overruled and the case is before us on respondent's exceptions. The exceptions must be sustained.

The indictment, while following verbatim the language of Section 74, does not state facts which constitute a crime. Section 1 of the same act defines the prohibiting language as follows: "Words in the context of this act indicating operation or use of a vehicle refer to its operation or use upon any way or bridge in this state, including public parks and parkways," and further, "As used in this chapter, unless the context otherwise indicates, the word 'way' includes all kinds of public ways." The operation of, or the attempt to operate, a motor vehicle when the operator is intoxicated or under the influence of intoxicating liquor or drugs, is declared to be a crime only when the act is committed upon a way or bridge, including public parks and parkways.

While it is a general rule that, where an offense is created by statute, an indictment or complaint charging the offense in the words of the statute, as charged here, is sufficient, "there is an exception to the rule, where the words of a statute may, by their generality, embrace cases falling within its literal terms, which are not within its meaning or spirit. In such cases, the offense intended to be made

penal is ascertained by reference to the context, and to other statutes in pari materia, and the indictment or complaint must allege all facts necessary to bring the case within the meaning and intent of the legislature." *Com.* v. *Barrett,* 108 Mass., 302. *Moulton* v. *Scully,* 111 Maine, 428, 441.

In 1 Wharton's Criminal Procedure, 10 Ed. by Kerr, the principle is thus stated in Section 291, on page 332: "If it be clear that an act is only to become a crime when executed by persons of a particular class, or under particular conditions, then this class or those conditions must be set out in the indictment, no matter in what part of the statute they may be expressed."

The decisions of this court afford numerous instances of the application of this principle, holding indictments merely following the words of a statute insufficient. *State* v. *Lashus,* 79 Maine, 541, thus stating the reason of the rule:

"The law affords to the respondent in a criminal prosecution such a reasonably particular statement of all the essential elements which constitute the intended offense as shall apprise him of the criminal act charged; and to the end, also, that if he again be prosecuted for the same offense, he may plead the former conviction or acquittal in bar."

Other cases are *State* v. *Hosmer,* 81 Maine, 506, quoting the above language. *State* v. *Androscoggin R. R. Co.,* 76 Maine, 412. *State* v. *McLoon,* 78 Maine, 420. *State* v. *Doran,* 99 Maine, 329. "The court, in ascertaining the offense with which the defendant is charged cannot look beyond the words of the indictment itself. If those words do not sufficiently charge the offense which the statute was meant to punish, the indictment is fatally defective." Metcalf, J. in *Com.* v. *Bean,* 11 Cush., 414. In *Com.* v. *Bean,* 14 Gray, 52 the rule is again stated.

So tested the indictment fails. Clearly by its terms it may include an act which is not punishable; as, for example, the operation or attempt to operate a motor vehicle by an intoxicated man within his own dooryard or on a private driveway on his own premises. In neither case would the act be penal.

Exceptions sustained.
Indictment adjudged bad.

EDWARD F. MAXIM, In Equity *vs.* ERNEST THIBAULT ET ALS.

Androscoggin. Opinion December 18, 1924.

It seems, that from general knowledge alone that repairs are contemplated and are being made, the consent of the lessor is not to be inferred so as to charge his interest with a lien, but the evidence must go to the extent of showing knowledge of what work was actually being done and that it was more than mere preservative repairs. The consent of the owners must be inferred from the language of the lease, their knowledge of what was contemplated and was actually being done, and their conduct. A claim must stand or fall substantially as made unless inadvertence or mistake is shown.

The evidence in the instant case goes to the extent of showing that at least one of the lessors knew that alterations to the extent of a substantial reconstruction of the interior of the fourth floor and the exits were contemplated and in progress, to fit it for the use proposed, and was consulted about the changes.

Although the plaintiff was unable to show what items of lumber and of labor, for which he charged, actually went into the job, and charged for very substantial amounts of material which were not used, and for a great amount of labor which was not performed, the owners, having agreed to the rather unusual method of determining the amount of material and labor for which a lien attached, by the examination and report of an impartial examiner or assessor, cannot overturn, for want of such proof and on account of such excessive charges, a finding of fact by the sitting Justice based upon that report, with which they made no complaint, and by which result, substantially just, has been attained.

The liability of Bell, the lessee, upon the covenants to pay the expense of repairs contemplated in the leases was not discharged or affected by the assignment to Turner; he still continued liable to Thibault & Faucher, as before.

Bell was a proper and necessary party to the bill, as a person interested in the property upon which the lien was claimed, and is bound by the decree as to the existence and amount of the lien.

The plaintiff is entitled to judgment against his debtor only for any deficiency in the proceeds of sale. If his judgment against the property is satisfied from the proceeds of sale, or is paid by the owners to prevent the sale of their property, judgment against the debtor is not authorized.

On appeal. A bill in equity to enforce a lien claim on a building and lot for labor performed and materials furnished in making extensive alterations, the plaintiff being a contractor and the defendants,

Ernest Thibault and Philias Faucher, being the owners of the building, and the other defendants, Hyman I. Glovsky, alias, Bell, being a lessee, and Charles N. Turner with whom the contract was made, being an assignee of the lease assigned by the lessee, Bell. A hearing was had and the sitting Justice decreed that the bill be sustained; that the plaintiff had a valid lien on the building and lot for $3,008.48 with interest, and a personal judgment against Turner for $3,187.96, and that the bill be dismissed as to the defendant, Bell, from which decree the owners of the building entered an appeal. Appeal sustained. Decree to be modified in accordance with opinion.

The case is stated in the opinion.

D. J. McGillicuddy, for plaintiff.

L. J. Brann and Harry Manser, for Thibault and Faucher.

Benjamin L. Berman, Jacob H. Berman and Edward J. Berman, for Hyman I. Bell.

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

MORRILL, J. Bill in equity to enforce a mechanic's lien under R. S., Chap. 96, Sec. 33, for materials and labor furnished in the repair and alteration of a hall in Dominican Block, so called, in Lewiston. The sitting Justice adjudged that the plaintiff has a lien for $3,008.48, with interest from the date of the bill, upon the land and buildings described. The owners of the building appeal. Their contentions are confined to three points.

CONSENT OF THE OWNERS.

By indenture under seal dated October 26, 1922, the owners of the building, Thibault & Faucher, leased to one Hyman I. Glovsky, otherwise known as Hyman I. Bell, "the hall in the building numbered 145 on Lincoln Street, known as the Dominican Hall," for a period of five years from November 1, 1922. This lease contained no provision as to assigning or sub-letting; on the following day Glovsky made and signed the following endorsement upon his copy of the lease: "Oct. 27, 1922. I assign this lease to Charles Turner," and delivered the lease to one Berman, who was interested with Turner in the undertaking, and at whose request Glovsky had obtained the lease from the

lessors. No assignment was made upon the lessors' copy. Turner thereupon, contracted with the plaintiff for the repairs and alterations of the leased premises, to fit it for use as a gymnasium and place of athletic exhibitions. The lease contained the following covenant: "It is hereby agreed that all repairs in said hall shall be done by and at the expense of the Lessee herein." The materials and labor were furnished between November 9, 1922 and December 18, 1922, both inclusive, during the life of this lease, as the sitting Justice found.

While the lease did not state the use of the hall contemplated by the lessee, the evidence clearly establishes that the lessors, or at least one of them, Mr. Thibault, knew the purpose for which the hall was leased. The lease itself gave notice to the lessors that repairs were contemplated and might be made. Mr. Thibault testifies in answer to his counsel: "I made the lease for him to make the repairs himself;" and again upon cross-examination: "I can't make any objection because I made the lease for them to make the repairs."

It seems, however, that from general knowledge alone that repairs were contemplated and were being made, the consent of the lessor is not to be inferred, so as to charge his interest with a lien, but the evidence must go to the extent of showing knowledge of what work was actually being done and that it was more than mere preservative repairs. *Greenleaf & Sons Co.* v. *Shoe Co.*, 123 Maine, 352, 356. The sitting Justice found, "that the owners, or one of them at least, had full knowledge that certain alterations and repairs were being made on the fourth floor of the building." This is a very conservative statement. The evidence goes to the extent of showing that Mr. Thibault knew that alterations to the entent of a substantial reconstruction of the interior of the fourth floor and the exits were contemplated and in progress, to fit it for the use proposed, and was consulted about the changes.

The case is governed by *Shaw* v. *Young*, 87 Maine, 271, and *York* v. *Mathis*, 103 Maine, 67. The consent of the owners must be inferred from the language of the lease, their knowledge of what was contemplated and was actually being done, and their conduct.

THE AMOUNT OF THE LIEN.

The plaintiff's claim was $3,942, of one hundred and sixty-six items; thirty-six items aggregating $1,726.03, were for labor, the

remainder, $2,215.97 was for materials. A jury trial being waived, the sitting Justice heard the parties upon this issue without a reference to a Master. The plaintiff was the only witness in support of the amount of the claim. He was unable to show what items of lumber or of labor, for which he charged, actually went into the job. The contention of counsel for the owners in that respect is fully sustained by the evidence and the decision of the sitting Justice. By agreement of the parties, the court then chose Mr. Frank E. Tracy, a competent, impartial contractor and builder who was "authorized and directed to make an examination and measurements of the alterations and repairs made by the plaintiff and an estimate of the cost of the labor required to make the same, and to report the result of his investigation for the enlightenment of the Court and the parties." Mr. Tracy made a report which appears in the record in which he found the amount of the materials used to be $1,830.03 and for labor $1,153.16. The court adopted his figures as to the materials, deducting $174.76 for non-lien items; as to the labor item the sitting Justice says:

"Realizing that the cost of labor may be somewhat more difficult to accurately estimate than the cost of material, in order to be on the safe side as to the cost of labor, I have added $200.00 to the estimate of Mr. Tracy, thereby allowing for labor $1,353.15."

Of this result counsel say upon the brief:

"We make no complaint, however, of the decision of the Presiding Justice upon the evidence as to the amount of labor and material. That is a matter upon which we have had a fair hearing."

They do contend, however, that a lien should be denied because, to quote from the brief:

"It is clearly shown that the plaintiff has charged for very substantial amounts of material and for a great amount of labor which never went into the job; . . . . that for every hundred dollars which honestly went into the building he has charged for enough additional labor and materials to make $124.00. Scattered through his bill there are items of lumber and charges for labor which were never furnished or performed. He has not undertaken to eliminate them and no one else can."

A careful examination of the record fully justifies this arraignment by counsel; a claim must stand or fall substantially as made unless inadvertence or mistake is shown, 2 Jones on Liens, Sec. 1408 and

note; but having agreed to the rather unusual method of determining the amount of material and labor which did actually go into the job, by the examination and report of an impartial examiner or assessor, we think that the owners cannot here overturn a finding of fact by the sitting Justice based upon that report, with which they make no complaint, and by which a result, substantially just, has been attained. The finding must stand.

THE DISMISSAL OF THE BILL AS TO BELL.

The plaintiff alleges in his bill that the materials and labor in question were furnished by virtue of a contract with Charles N. Turner, Jr., and Hyman I. Bell; this allegation the defendant, Bell, denies by answer and testimony. The sitting Justice found in his favor, and was unquestionably warranted in so finding. But it does not follow, upon the facts before the court, that Bell was improperly joined as a party defendant. The statement in the opinion below "that Bell had no interest in the lease further than the friendly interest of assisting Turner" is not accurate as a legal proposition, however truly it may describe Bell's intention. He had assumed legal obligations in signing the lease which cannot thus be disregarded.

The lease dated October 26, 1922, given by Thibault & Faucher, the owners of the building, to Bell, therein called Glovsky, and the latter's assignment thereof to Turner, have already been referred to. It appears that another lease under seal, of the same premises, dated November 1, 1922 containing no provision as to assigning or subletting, was given by Thibault & Faucher to Hyman I. Bell, the defendant, for the term of ten years from the first day of November, 1922, with a lessee's option to renew the lease for an additional period of five years; this lease was acknowledged by the parties on December 19, 1922, and Bell's counsel admits on the record that it was made on that day, which was the day following the last charge in the account of the plaintiff; it was later recorded in the registry of deeds. No rent was paid under either lease until December 23, 1922. By an instrument under seal dated November 1, 1922, acknowledged December 23, 1922, and recorded December 27, 1922, to which the lessors were not parties, Bell assigned to the defendant, Turner, all his right, title and interest in and to said lease, describing it by date, and book and page of record. This lease contained the following covenant:

"It is hereby agreed that all repairs in said hall shall be done by and at the expense of the lessee herein and that anything and everything added to the building, including portable bleachers, in the alteration and repair of said leased premises shall become and remain the property of the said lessors at the expiration of this lease."

The liability of Bell upon the covenants to pay the expense of repairs contemplated in the leases, was not discharged or affected by the assignment to Turner; he still continued liable to Thibault & Faucher, as before. He cannot by his own act avoid his covenants. 2 Taylor's Landlord and Tenant, 8 Ed. Sec. 438. *Wall* v. *Hinds*, 4 Gray, 256. *Washington Natural Gas Co.* v. *Johnson*, 123 Pa. St., 576; 10 Am. St., 553, Note 559. *Dwight* v. *Mudge*, 12 Gray, 23, 25. *Way* v. *Reed*, 6 Allen, 364, 368-9. *Farrington* v. *Kimball*, 126 Mass., 314. *Mason* v. *Smith*, 131 Mass., 510.

Nor does the finding of the sitting Justice that the only interest of Bell was a "friendly interest," affect his liability. He loaned his credit to Turner, who was financially irresponsible, and the lessors relied thereon in making the lease and accepting his covenant as to the expense of repairs. If the new lease superseded the first, the protection of Thibault & Faucher, and the liability of Bell to them was preserved. Bell was therefore a proper and necessary party to the bill as a person interested in the property, upon which the lien was claimed, (R. S., Chap. 96, Sec. 33) who might be liable upon his covenant for the amount of the lien adjudged against the leased premises, as a prior warrantor is liable, who has been vouched in to defend an action for breach of covenant of warranty. The last paragraph of the decree, dismissing the bill as against Hyman I. Bell, should be stricken out. The defendant Bell is bound by the decree herein as to the existence and amount of the lien.

The third paragraph of the decree below should be omitted. The plaintiff is only entitled to judgment against his debtor for any deficiency in the proceeds of sale. If his judgment against the building is satisfied from the proceeds of sale, or is paid by the owners to prevent the sale of their property, judgment against the debtor is not authorized. R. S., Chap. 96, Sec. 38. If the lien judgment is satisfied by the payment thereof by Thibault & Faucher within a time to be fixed in the decree, the cause proceeds no further; otherwise the cause is to be retained upon the docket for sale of the prop-

erty and further proceedings, in accordance with R. S., Chap. 96, Sec. 38, and said decree. The costs should be taxed and stated in the decree.

We have not overlooked the fact that the plaintiff has alleged in his affidavit filed in the city clerk's office and in his bill, a joint contract with Turner and Bell, and that the contract proven is not the contract alleged. The statement in the affidavit is not material; it is not required by the Statute. R. S., Chap. 96, Sec. 31. *Witham* v. *Wing,* 108 Maine, 364, 370.

But the allegation in the bill is a material, substantial allegation which should be proved, and failure to prove it may be ground for dismissal of the action, even in an equitable proceeding. *Thurston et als.* v. *Schroeder et als.,* 6 R. I., 272, 280-1. *Garrison* v. *Hawkins Lumber Co.,* 111 Ala., 308; 20 So. 427. *Witham* v. *Wing,* supra.

The defendants, however, have not raised the point; had it been raised at the hearing below, the sitting Justice in the exercise of a sound discretion might have allowed an amendment upon such terms as seemed to him proper, fixing time for filing answers to the amended bill; otherwise the lien would be lost by expiration of the ninety days limitation. R. S., Chap. 96, Sec. 33. The cause having been fully heard, as if such an amendment had been offered and allowed, we think that an amendment may be now considered as seasonably made. *Morin's Case,* 122 Maine, 338, 343.

Appeal sustained.
Decree to be modified in accordance with opinion.
No costs allowed on appeal.

ELLA F. GUILD *vs.* EASTERN TRUST AND BANKING COMPANY ET AL.

Penobscot. Opinion December 18, 1924.

In an action on a check by payee against the executor of the estate of the drawer, who deceased before the check could be presented to the drawee for payment, it being claimed that the check was in part payment of an amount the drawer had promised, orally, and prior thereto, to pay to payee in consideration of marriage, an affidavit in support of the claim presented by the plaintiff against the estate of the decedent is not admissible as evidence in behalf of the plaintiff of the facts therein stated; it is admissible in her behalf only to show that the claim in suit was properly presented; it is admissible as evidence against the plaintiff of any facts therein stated which militate against plaintiff's contention. The facts so stated must be considered in the light of admissions against interest.

In the instant case the statement signed by the plaintiff, dated and verified by her oath on March 5, 1921, containing a full statement of her relations with the decedent which led to the giving of the check in question, is not admissible as evidence in behalf of the plaintiff of the facts therein stated; it is admissible in behalf of the defendant so far as its statements of facts controvert the contentions made in plaintiff's behalf.

In her first statement the plaintiff said: "Mr. Hill intended the check to be in part performance of the undertaking we had reached at the time we became engaged to be married;" she made substantially the same statement in her proof of claim. The jury were correctly instructed that the plaintiff could not recover, if they believed the plaintiff's statement above quoted, as such understanding was alleged by plaintiff and set forth in her statement, and were further instructed at length to the same effect, the plaintiff's statement of the understanding referred to being read to them. Upon these instructions the jury should have found for the defendant, and unmistakably erred in failing to give effect to the written statements of the plaintiff.

The theory of even a tacit renewal by the plaintiff of her promise to marry, and the delivery of the check by the decedent in consideration of her promise then and there renewed to marry him, and that she received the check understanding his intention and participating in it, finds no support in the present records.

On motion and exceptions by defendant. An action of assumpsit brought by the plaintiff against the executors of the will of Frederick W. Hill, late of Bangor, deceased. The action was based on a check drawn by Frederick W. Hill on April 10, 1920, for seventy-five

thousand dollars, on the Eastern Trust and Banking Company, payable to the plaintiff and given to the plaintiff by the drawer on the day it was drawn. The drawer deceased on the day the check was drawn and on presentment of the check to the drawee on April 12, 1920, acceptance and payment was refused. After the defendants were appointed executors of the will of the said Frederick W. Hill demand of payment of the check was made upon them, but payment was refused. The defendants pleaded the general issue, the statute of frauds and under a brief statement alleged want of consideration. At the conclusion of testimony counsel for defendants filed a motion for a directed verdict for defendants, which the presiding Justice refused, and defendants excepted. A verdict for $88,350 was rendered for plaintiff, and defendants filed a general motion for a new trial. Other exceptions were taken but not considered. Motion sustained. New trial granted. Exception to refusal to direct a verdict for defendants sustained. This is the second trial of this case, the first one being reported in 122 Maine, 514.

The case is fully stated in the opinion.

Louis C. Stearns and Alfred A. Shaefer, for plaintiff.

Ryder & Simpson, for defendants.

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

MORRILL, J. Frederick W. Hill late of Bangor, died April 10, 1920. On April 25, 1921, the plaintiff presented her written claim, against his estate, verified by her affidavit, which she therein states "is intended to be a presentment of four distinct claims against the estate of Frederick W. Hill," but which in fact presents only two distinct claims, one upon the check to be immediately referred to, the other for $300,000 alleged to be due upon an oral ante-nuptial agreement.

Three of said claims as presented are based upon a check for $75,000, dated April 10, 1920, drawn by the deceased in favor of the plaintiff and delivered to her a few hours before he died. The only consideration for the check stated in the claim is that it was drawn and delivered "in part performance of an agreement entered into by said Hill and myself in the spring of 1919, it being provided by said agreement that if and when said Hill and I should enter into an

engagement of marriage he would settle funds or property upon me sufficient to make me financially independent." The engagement of marriage is alleged.

The fourth claim so presented is for $300,000, "being the sum now due me from said estate under an agreement made in the spring of 1919 between said Hill and myself, said agreement providing that if said Hill and I should enter into an engagement of marriage he would settle funds or property upon me sufficient to make me financially independent." The engagement of marriage is alleged.

This action is upon the check described in the first three claims so presented, and has previously been before the Law Court (122 Maine, 514) upon exceptions to a ruling directing a verdict for defendant. In the opinion then rendered it is said: "We think that the plaintiff's exceptions should be sustained . . . . because a promise to marry is not in any case within the Statute of Frauds." That question was not necessarily involved in the ruling then under consideration, and does not appear to have been, and in fact was not, the ground of the ruling at the former trial.

The controlling reason for sustaining the exceptions on the former occasion is stated at the close of the opinion,—that the jury might have found "that an agreement was made in January (1920) as testified to by Henry Guild; . . . . that in the delivery of the check on April 10th the testator intended to so deliver it in consideration of the renewal or continuance of the plaintiff's promise to marry him;—that in receiving the check the plaintiff understood Mr. Hill's intention, participated in it and so received the check in consideration of the continuance or renewal of her promise."

Throughout the opinion the case is discussed upon the theory of an engagement of marriage in January, 1920 and an oral promise by Mr. Hill at that time to settle $500,000 upon Mrs. Guild, as testified by Henry J. Guild whose testimony is quoted in the opinion. (122 Maine, 518).

The issue was also thus stated:

"Was the check proffered and received on April 10th as a gift prompted by relationship, friendship or love? or did the parties mutually intend to renew the promise which made before had been ineffective for want of a consideration?" (122 Maine, 523).

The case is now before us upon exceptions to a ruling denying a motion for a directed verdict in favor of defendant, to certain instruc-

tions to the jury, and upon a general motion for a new trial. The foregoing reference to the earlier opinion is considered necessary for a clear understanding of the theory upon which the case was submitted to the jury at the second trial.

The proof of claim which has been referred to is made a part of the present case. It is not admissible as evidence in behalf of the plaintiff of the facts therein stated; it is admissible in her behalf only to show that the claim in suit was properly presented; it is admissible as evidence against the plaintiff of any facts therein stated which militate against plaintiff's contention.

In addition to the proof, we have before us for the first time a statement signed by Mrs. Guild, dated and verified by her oath on March 5, 1921, which gives such a full and frank statement of her relations with Mr. Hill which led to the giving of the check in question, and is so convincing of its truthfulness, that we regard it as of controlling influence in the decision of this case. This statement, like the proof of claim, is not admissible as evidence in behalf of Mrs. Guild of the facts therein stated; it is admissible in behalf of the defendant so far as its statements of facts controvert the contentions made in plaintiff's behalf in the present case; the facts so stated must be considered in the light of admissions against interest. The evidentiary value of this statement is of the same character as that of the proof of claim.

This statement by Mrs. Guild of March 5, 1921, discloses the intimate relations of kinship and friendship, which existed for more than twenty-five years, ante-dating the death of Mrs. Hill in 1915, which led the latter in her last illness to ask Mrs. Guild to take care of Mr. Hill in case of her death; which made Mr. Hill a daily visitor at the plaintiff's home, led to substantial gifts to the plaintiff and her children, to the making of a will in which the plaintiff was given a legacy of $100,000, and substantial legacies were also given to her children, and finally to an engagement of marriage; this culmination of relations, which "give significance and color" to the making and delivery of the check in question on April 10, 1920, is best described in Mrs. Guild's own words:

"In the spring of 1918 Mr. Hill declared his affection for me and proposed marriage. I myself had great affection for Mr. Hill and would have married him except for my doubts whether such a plan might not interfere with the happiness of my family, that it might be

thought undesirable by my children, and that in one way or another, either on his account or on theirs, friction might develop between them. I had in mind also that it might be thought I was marrying Mr. Hill for mercenary reasons. From that time on, however, Mr. Hill besought me constantly—almost daily—to marry him, insisting that I need have no fears on any possible score. At the time of his marriage proposal he suggested changing his will again and making my legacy considerably larger, but I requested him not to do this for the reason that if anything happened to him I might find myself the subject of remark. Through that summer and the following winter he continued to urge his marriage proposal, and in the spring of 1919 he suggested an arrangement which he believed would relieve my doubts. He wanted me, as soon as our engagement became a fact, to make over to my boys all the property which I myself then owned, he at the same time to settle property upon me sufficient to make me absolutely independent, stating, among other reasons, that this would care for me in case anything happened to him before the marriage itself took place. He named no amount at the time, but later proposed $500,000 to both Henry and me, but we were unwilling to consider any exact sum, and told him that anything of that sort which he did must be in such amount as he himself should decide to be best. This arrangement seemed to me to do away with some of the objections and possible embarrassments which had theretofore stood in my way, and it was agreed between us that we would be married."

Then follows the account of their plans for marriage, and the necessary postponement, first in August, then at Christmas, then on account of sickness in Mrs. Guild's family. They "still planned to be married, as soon as circumstances would permit." On February 27, 1920, Mr. Hill was stricken with the illness which proved to be his last. The next day he came to the house of the plaintiff, and from that date until he died he did not leave the house or even come down stairs; during his illness he transferred to the plaintiff securities of $40,000 par value; he worked upon redrafting his will. Mrs. Guild says in her statement referred to: "He planned at that time to give me $500,000, either *by gift or legacy.* He was urgent during this period that we should be married on the spot, his chief reason being that this would secure me financially. I was unwilling, how-

ever, to have him go through the strain of such proceedings." After describing the occurrences when the check was made and delivered, she closes the statement thus:

"To the best of my recollection, the foregoing statement sets out everything which might be material or important in connection with the check referred to. Mr. Hill intended the check to be in part performance of the understanding we had reached at the time we became engaged to be married."

The last sentence quoted is the same assertion made in the proof of claim; we think that it is decisive of the case. The proof of claim links the delivery of the check on April 10, 1920, with the agreement made by Mr. Hill in the spring of 1919. The jury were instructed that the plaintiff could not recover, if they believed the plaintiff's own written statement that "Mr. Hill intended the check to be in part performance of the understanding" reached by plaintiff and Mr. Hill at the time they became engaged to be married, as such understanding is alleged by plaintiff and set forth in plaintiff's written statement. They were also instructed to the same effect more at length, the plaintiff's statement of the understanding referred to being read to them at length.

No exceptions to these instructions were taken by counsel for the plaintiff. They were in accord with the former decision in this case. *Guild* v. *Banking Co.*, 122 Maine, 514, 521. Browne on Statute of Frauds, 3 Ed., Sec. 215.

The truthfulness of Mrs. Guild's statement is apparent; there is nothing in the record to refute it. The conversations of Mr. Hill with Henry J. Guild in January, 1920, as given by the latter on the present record, did not disclose an engagement to be married then made, but referred to such an engagement as already existing and to his decision to make the amount of the settlement $500,000; it is in exact accord with Mrs. Guild's statement: "He named no amount at the time, but later proposed $500,000 to both Henry and me, but we were unwilling to consider any exact sum, and told him that anything of that sort which he did must be in such amount as he should decide to be best."

Upon these instructions the jury should have found for the defendant, and unmistakably erred in failing to give effect to the statements of Mrs. Guild.

Upon the theory, however, of a renewal of her promise by Mrs. Guild when the check was given, in consideration of which Mr. Hill gave the check in question and orally promised to "fix up the rest" if he lived until Monday, the jury was instructed that if they found a mutual promise of marriage, they must go further and determine that the promise of marriage was intended by both of the parties at the time the check was given as a consideration. After discussing this issue the learned Justice submitted the case to the jury in the following language:

"Now did Mr. Hill have in mind when he gave this check that he was giving it to her, handing it to her and delivering it to her in consideration of her promise *then and there renewed to marry him?* And did she in receiving it understand what his intention was, and did she participate in that intention? If so, while there was nothing at the time said about marriage, you would be justified in finding a verdict for the plaintiff. But if there had not been anything said in the past about marriage there would be nothing to base such a judgment upon. And even if there had been an agreement of marriage, if at that time he did not have it in mind, if the idea of marriage had been given up in view of his extremity, his illness, if he did not intend it in consideration of marriage, and *if what he intended was to give it to her,* then the plaintiff cannot recover."

The theory of even a tacit renewal by Mrs. Guild of her promise to marry, and the delivery of the check by Mr. Hill in consideration of her promise then and there renewed to marry him, and that she received the check understanding Mr. Hill's intention and participating in it, finds no support in the record. It is controverted by Mrs. Guild, on her part, in her statement of March 5, 1921, and in her formal proof of claim. As to Mr. Hill's attitude when the check was given, the record unmistakably shows that throughout the period of his illness the predominant thought in his mind was that Mrs. Guild should be secured financially; if he thought of marriage during that period, it was only to promote her security financially, by urging an immediate solemnization, to which she was unwilling to consent.

That no thought of a renewal of the marriage promise was in Mr. Hill's mind when the check was given is conclusively shown by the statement of Mrs. Guild and the testimony of Miss Sharpe, the nurse. They do not disagree in any essential particular. Mrs. Guild says:

"At about noon time that day, (April 10) shortly before lunch, he called for a blank check and writing materials, *this without any previous reference to anything of that sort.* When the check was brought, he made out and delivered to me the check to my order for $75,000. . . . . He asked Miss Sharpe, the nurse, to witness the check. A little while afterward he told me that he was going to turn over to me the balance of my settlement as soon as possible, but at seven o'clock that evening he had another attack. He seemed for a time to recover, but between twelve and one o'clock that night he suddenly died. The $75,000 check was of course not presented to the bank until after Mr. Hill's death."

The testimony of Miss Sharpe discloses that the impulse to give this check came to Mr. Hill shortly after two o'clock in the morning; that through her ministrations he fell asleep; that upon awakening "he was still anxious to write, to do some writing;" that after a while he went to sleep again. She continues:

"But in the morning about quarter of twelve—he passed a fairly comfortable morning and then he woke up, and he felt so well again and he said he must do some writing, and Mrs. Guild came in and he asked for a check, and Mrs. Guild asked if she should write it for him, and he said no, he would do it himself, and I got the table and Mrs. Guild got the check, and he wrote out this check, and he asked me to witness it, and I think I had written my first name, and he asked me if I had read the check, and he said, 'Don't ever put your name on a paper that you don't know what you are signing,' and I read the check aloud to him and finished, and he called Mrs. Guild and gave it to her and said 'Here is this, and if I live until Monday I will fix up the rest'."

This scene does not present a man contemplating a renewal of a promise of marriage; it does not portray Mr. Hill as giving to the woman, whom he had expected to marry, and with whom an engagement of marriage was unbroken, a check in consideration of her promise then and there renewed to marry him. It portrays a man, conscious that death might come at any time, who had heard "the rustle of his sombre robe," and was anxious to complete a provision for the financial security of Mrs. Guild. Mr. Hill's acts are in perfect accord with Mrs. Guild's statement that "Mr. Hill intended the check to be in part performance of the understanding we had reached at the time we became engaged to be married."

The jury unmistakably erred, perhaps in an excusable wish to carry out Mr. Hill's purposes, which death had interrupted before their full execution. To sustain the verdict, however, upon the issue submitted to the jury, that of a renewal by Mrs. Guild of her promise to marry Mr. Hill, and of her acceptance of the check knowing that it was the intention of Mr. Hill to give it in consideration of such renewal, is under the circumstances to attribute to Mrs. Guild mercenary motives which the record shows were foreign to her nature.

Motion sustained.
New trial granted.
Exception to refusal to direct a verdict for defendant sustained.

WILLIAM C. JORDAN *vs.* HARRY C. MCNALLY, Trustee.

Cumberland. Opinion December 23, 1924.

In an action of assumpsit to recover a broker's commission on the sale of real estate, a valid and definite agreement between the owner and the would-be purchaser for the purchase of the property is a condition precedent.

In the instant case no such agreement was made between the sellers and the purchaser. The most that could be claimed was an oral agreement to make a subsequent agreement if the terms could be agreed upon in the future, which is no agreement whatever.

On motion by defendant. An action of assumpsit to recover a broker's commission on the sale of real estate. A verdict for $5,250 was rendered for plaintiff and defendant filed a general motion. Motion sustained.

The case is fully stated in the opinion.

Harry L. Cram and Ralph M. Ingalls, for plaintiff.

Thomas L. Talbot, for defendant.

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

CORNISH, C. J. This is an action of assumpsit to recover a broker's commission on the sale of certain real estate known as Saddleback farm in East Baldwin. The plaintiff recovered a verdict of $5,250 and the case is before the Law Court on defendant's general motion.

The determining facts are as follows: Henrietta Pierce Watkinson, a resident of San Francisco, California, died testate in August, 1920, leaving as a part of her estate the land above mentioned. Under the terms of the will and codicil Frank J. Hurley and Lucy Ward Stebbins, both residents of San Francisco, were duly appointed executors with the general power to convey real estate, and this particular real estate was devised to Harry C. McNally, the defendant, and Lucy Ward Stebbins as trustees with the power to cause the pine timber to be cut therefrom and the proceeds devoted to certain specified purposes. Ancillary administration was taken out in Cumberland County, Maine, and the trustees were duly qualified here on December 6, 1920.

The plaintiff desired to handle the property as a broker and had several interviews with the defendant. On December 7, 1921, the plaintiff's attorney, Mr. Cram, prepared the draft of a so-called option of purchase by Blanchard Sons Company of Wilton, Maine. The plaintiff first took this document to Mr. McNally to sign but he declined to do so. Then at his suggestion it was sent to the executors in California to be signed by them and assented to by the trustees. This so-called option, after reciting the preliminaries and describing the property read as follows:

"In consideration of one dollar and other valuable consideration to them paid, the executors of said Henrietta Pierce Watkinson estate hereby grant to said Blanchard Sons Company an option for the purchase of said land and timber and wood as aforesaid, at such price as may be mutually agreed upon, upon condition that a preliminary examination of said land and timber and wood shall be made by said Blanchard Sons Company on or before January 1st, 1922, said executors on their part agreeing to name their lowest price for said land, timber and wood on or before said January 1st, 1922, and provided further, that if after said preliminary examination, and the

receipt from said executors of the lowest price for said land, timber and wood as aforesaid, said Blanchard Sons Company shall desire to make a further detailed examination and survey of said land and timber and wood that this option shall be extended to February 1st, 1922, to enable said Blanchard Sons Company to make such further detailed examination and survey, and on the further condition, that if after said preliminary examination and the receipt from said executors of the lowest price for said land, timber and wood as aforesaid said Blanchard Sons Company decide not to make said further detailed examination and survey and not to purchase said land and timber and wood, that they shall at once notify said executors of said estate; and on the further consideration that decision as to the purchase of said land and timber and wood shall be given by said Blanchard Sons Company on or before said February 1st, 1922."

This document was sent to executor Hurley on December 10, 1921, by Mr. McNally, and under date of December 16, 1921, Mr. Harrison, the attorney for the executors, answered Mr. McNally as follows: "The Executors prefer not to give an option in the form submitted by Mr. Cram; and would much prefer not to tie themselves up with an option at all. They recognize, however, that a prospective purchaser can hardly be expected to invest substantial time and expense in an investigation or survey of the property submitted for sale, unless reasonably protected in so doing. They have placed upon the property a price of $160,000 and see no occasion yet for any reduction of this as their lowest price. If the property at this price interests any prospective purchaser, the executors would be willing to give an option to such purchaser at that figure for thirty days in consideration of his prosecution of the necessary examination and investigation to enable him to reach an intelligent conclusion concerning the same.

"In view of the variance between us with reference to the form of option, it does not seem worth while to have one executed by the executors and forwarded with this. If however an option in the form indicated would be satisfactory to Messrs. Blanchard Sons Co. and you will so inform me I will have such a one signed and acknowledged and sent forward without delay." The paper was returned unsigned.

Under the same date Mr. Hurley wrote to Mr. McNally stating that he had received a letter from Fox Brothers of Fryeburg in

regard to purchase of this property and further saying: "As to giving an option to anyone, that is not the policy of this Company nor the policy of the executors of the estate, notwithstanding that we realize it requires time to examine the property. We are willing to give them a verbal agreement to the effect that we will wait thirty days until they are able to make an examination of the property before we will negotiate with any other parties, that is if this arrangement is satisfactory to you. The price we are asking for the property is $160,000 and if Fox Brothers are willing to pay this amount for it, we will be glad to sell to them. In the event they are not willing to pay this amount, it is up to them to make us an offer. Under the circumstances you can see that it would be very foolish to give an option to any one other than a verbal agreement allowing them to examine the property, and holding it up, until the examination is made, for thirty days.

"It seems to me it would be advisable for you to communicate with Fox Brothers immediately and find out whether they are willing to pay us $160,000 for the property. In the event they are not then you can proceed along the lines as may be suggested by Mr. Harrison in his letter to you."

Here correspondence closed, and that already quoted shows beyond a doubt that up to this time not only was no option of purchase given, but the giving of one was definitely refused. All that the executors were willing to do was to agree verbally to allow a prospective purchaser thirty days for exploration, in case the Fox Brothers did not pay $160,000, the price already set.

A careful study of the evidence settles to this, that all that the plaintiff proved in the nature of an alleged option from the estate to Blanchard Sons Company was an oral statement by McNally in January, 1922, that the price was $160,000 and that Blanchard could have thirty days in which to cruise the lot and decide whether he would take it at that figure or not. Mr. Blanchard did not then agree to take it at $160,000 or at any price. In fact none was ever agreed upon. The whole matter was left in the air. That was the only interview between McNally and Blanchard. Blanchard says he told McNally that if the lot contained the amount of timber estimated by the estate he would give $160,000 for it, and if it contained less he would take it at the market price of the various kinds of timber estimated on further exploration. McNally denies that

he ever agreed to sell to Blanchard at any other figure than $160,000 and that he ever agreed to a price based on Blanchard's estimate and an undetermined market stumpage price and his claim is reasonable. But even taking Blanchard's version as true it negatives a meeting of minds. Blanchard was willing to pay $160,000 for the property in case on his exploration the timber should be estimated to be there, and McNally was only willing and then only authorized to sell for the full $160,000. Blanchard apparently did not think he had any option of any kind because he made no exploration thereafter and the matter dropped so far as he was concerned.

Several interviews between the plaintiff and the defendant followed during the Winter and Spring of 1922, but nothing came of them and finally in the Summer of 1922 the property was sold to other parties for $105,000 with which sale the plaintiff had nothing to do. This suit for commission followed.

The evidence fits the specification of the plaintiff's vague and indefinite claim filed in the case, viz.: "That thereafterwards said plaintiff, said William C. Jordan did procure and produce a customer for said property and by his own effort and at his own great expense and labor and solely and only by means thereof, did arrange and consummate an agreement, whereby said Harry C. McNally as Trustee as aforesaid, did meet, negotiate, talk, agree and barter and sell said real estate and said timber to said customer for a great sum of money and did then and there agree to sell said tract of timber land for a sum certain or thereafter to be made certain, according to the estimated stumpage thereof, based upon the market price which should be then made to appear at the time of said estimate and final delivery of deeds, documents and papers legally conveying the same to said purchaser."

This alleged agreement is simply a promise to make an agreement in the future if the terms could be agreed upon, which so far as this case is concerned is no agreement whatever. It lacks teeth. Waiving the question whether McNally as a single trustee under the will had legal authority to make a contract of sale binding upon the estate, the evidence in this case fails to show that any such contract of sale was in fact made, and that the plaintiff fulfilled conditions necessary to entitle him to a broker's commission.

Those conditions are that the broker shall procure for the owner a customer willing, ready and able to purchase and pay for the property

the stipulated price on the terms defined by the owner. *Smith* v. *Lawrence*, 98 Maine, 92; *Grant* v. *Dalton*, 120 Maine, 350; *Jutras* v. *Boisvert*, 121 Maine, 32; *Mears* v. *Biddle*, 122 Maine, 392. The plaintiff fell far short of doing this and therefore is entitled to no commission. The customer produced by the broker and the principal must come to a final agreement on the terms of the transaction. *Damers* v. *Fisheries Co.*, 119 Maine, 343.

Motion sustained.

ELIZABETH E. GRANEY ET ALS., In Equity

vs.

JOSEPH E. F. CONNOLLY, TRUSTEE ET ALS.

Cumberland. Opinion December 23, 1924.

A passive trust is one in which the trustee is a mere passive depositary of the trust property with no active duties to perform. A passive or dry trust arises when the 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.

In the instant case the trust created in the will was not merely a dry or passive trust, but an active trust, its nature being prescribed by the will and requiring active duties on the part of the trustee.

The estate of the plaintiffs is clearly defined in the will as a life estate.

If the real estate is unproductive the plaintiffs may perhaps obtain relief under R. S., Chap. 73, Secs. 10 and 11.

On report. Bill in equity seeking the construction of certain clauses in the will of Thomas D. Leonard, late of Portland, deceased, and the determination of the character of the plaintiffs' interest in certain real estate mentioned in Clause 8 of the will. 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 with taxable costs payable out of the estate. Decree that plaintiffs hold life estate only under item eight.

The case is stated in the opinion.

Clinton C. Palmer, for plaintiffs.

Joseph E. F. Connolly, for defendants.

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

CORNISH, C. J. Bill in equity praying for the construction of certain clauses in the will of Thomas D. Leonard, late of Portland, deceased, and the determination of the character of the plaintiffs' interest in the Briggs Street real estate mentioned in Clause 8. The precise question as stated by plaintiffs counsel is "Whether complainants hold the fee simple title thereto free and clear from any incumbrance or subject to some interest in favor of the trustee or of complainants' heirs, or hold life estate only."

Clause 8 reads: "I give, bequeath and devise to my two daughters Elizabeth Ellen Graney and Mary Alice Haley for and during the term of their natural lives my houses and lands situated at number 2, number 4, number 10 and in the rear of number 10, and number 12, Briggs Street in said Portland, to manage and control the same, keep the same insured against loss by fire for the benefit of my estate, to keep the same in repair, tenantable and let the same and receive the income therefrom and from such income pay the expenses of keeping the same insured and in good repair. Such repairs and keeping to be subject to the approval of my executor and trustee herein named and his successor or successors. My said daughters are at liberty to occupy the rents in which they now live and continue in the same as they have during my life. The net income after paying the above named expenses is to be divided equally between my said daughters and this life estate is to continue during the life of each daughter and the survivor. This property shall not be sold or disposed of except as above stated during the life of my daughters or the life of the survivor."

In this connection should be read Clauses 11, 12 and 13, viz.:

"Eleventh: In case of the death of either daughter I direct my executor and trustee to take charge of her portion of the estate that

she would have held if she continued to live and pay over the income therefrom to her legal heirs up to the time of the death of the other daughter."

"Twelfth: After the death of my two daughters I give and bequeath to my executor and trustee all the income of my estate of every name and nature to be held in trust for a period of five years and pay over to the heirs of my said daughters respectively as each would be entitled by the right of descent and in that proportion the net income of my said estate and I direct that he during that period keep the premises occupied, rented and in tenantable condition and properly insured for the benefit of my estate."

"Thirteenth: At the expiration of said five years, I order and direct my said executor and trustee to distribute all of my estate amongst the heirs of my daughters in the proportion that they would inherit as heirs of each.

"Lastly, I give and bequeath and devise, to take effect at the expiration of five years after the death of the survivor of my two daughters all the rest, residue and remainder of my estate, real, personal and mixed wherever situated and however or whenever acquired;" but no devisee or legatee was named. This was followed by certain other requests not important here.

It should here be stated that Thomas D. Leonard died on September 3, 1912, leaving no widow and as his only heirs at law two daughters, the plaintiffs here, Mrs. Graney who has three children and Mrs. Haley who has none. The testator named Matthew J. Leonard both as executor and trustee, but Matthew J. Leonard was appointed executor and Joseph E. F. Connolly was appointed trustee. The executor fully performed his duty and turned the estate over to the trustee. The trustee thereupon brought a bill in equity asking first for the interpretation of item eight and especially whether the trustee appointed thereunder, the executor having closed his accounts, was the person to approve the repairs and the keeping. The court answered that he was. *Connolly, Trustee, in eq.* v. *Leonard et als.*, 114 Maine, 29, decided September 7, 1915.

The trustee in that proceeding further inquired whether taking items eight and eleven together a trust was created for the legal heirs mentioned in item eleven and, if so, what became of the life estate of the survivor. The court declined to answer, following the adopted policy not to answer questions in the construction of wills as to con-

tingencies which have not yet arisen. A third question pertained to the party who should hold the deposit books representing deposits in various Portland banks and the court held that the trustee should retain them.

It will thus be seen that in that proceeding begun ten years ago the present interest of the daughters in the Briggs Street property was assumed to be that of life tenants under item eight, and on that basis apparently the affairs of the estate have been since conducted.

Now the parties are reversed and the daughters come in as parties plaintiff and ask to have item eight construed as giving them at once, not merely a life estate in the Briggs Street property but a fee simple, free and clear of any incumbrance and subject to no interest in favor of the trustee or of the plaintiffs' heirs at the termination of the expressed life estate and the five-year period beyond the death of the surviving daughter.

The learned counsel for the plaintiffs presents an ingenious argument to sustain his contention, claiming that the trust created was a mere dry or passive trust, that the restriction against alienation is void, that there was no residuary estate created because no devisee or legatee was named in the will, and therefore not merely the life estate but the entire fee vested in presenti in the daughters and that is their present interest.

We cannot accede to this proposition. Its basis is an alleged passive trust and certainly the trust here created does not fall within that category. The very recent case of *Dixon* v. *Dixon*, 123 Maine, 470, has so clearly defined the two classes and so sharply discriminated between them that it is unnecessary to discuss this proposition at length. The conclusion there reached is that "a passive trust is one in which the trustee is a mere passive depositary of the trust property with no active duties to perform." "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." These definitions do not fit the trust created here. The nature of the trust is prescribed by the donor and in plain terms. The trust itself is not passive, but very much alive, with increasing duties devolving upon the trustee, after the death of one daughter, and still more, continuing for a period of five years, after the death of the survivor. The foundation stone

thus crumbling the contention built thereon falls. The life estates and the trust must be recognized as in full force as in the decision in the former case.

It may be that the Briggs Street property is unproductive and that it would be to the advantage both of the life interests and the remainder that it be sold and the proceeds invested in interest-bearing securities to be held by the trustee in its place, the same as the substantial balance of the trust property is held. This might be done on bill in equity brought by the trustee alleging and proving the necessary facts and asking for instructions under R. S., Chap. 73, Secs. 10 and 11. The life tenants could join the trustee in any conveyance that might be authorized by the court. The provision against alienation affords no barrier to such a proceeding. This has been done, *Elder* v. *Elder*, 50 Maine, 535, and very recently, *Mann* v. *Mann*, 122 Maine, 468.

The entry in the present bill must be,

Bill sustained with taxable costs payable out of estate.
Decree that plaintiffs hold life estate only under item eight.

STATE *vs.* CLEVELAND P. HARVEY.

Lincoln. Opinion January 16, 1925.

The language "knowingly did transport from place to place in said Waldoboro" in an indictment for illegal transportation of intoxicating liquors is sufficient. On a motion in arrest of judgment such grounds of objection to the indictment only as are assigned in the motion can be considered under an exception to its denial.

In the instant case the allegation in the indictment that the respondent "knowingly did transport from place to place in said Waldoboro" affords to the respondent the requisite information as to the locality in which the unlawful transportation is alleged to have taken place, to which the law entitles him, and is a sufficient allegation of the place.

On exceptions by respondent. At the close of the testimony by the State on the trial of the respondent for illegal transportation of intoxicating liquor, counsel for the respondent moved for a directed verdict which was denied and respondent entered exceptions. The respondent was found guilty and his counsel filed a motion in arrest of judgment on the ground that the indictment was bad in that it did not sufficiently describe the place, which motion was denied and exceptions taken. Exceptions overruled.

The case appears in the opinion.

Weston M. Hilton, County Attorney, for the State.

George A. Cowan, for respondent.

SITTING: CORNISH, C. J., PHILBROOK, MORRILL, STURGIS, BARNES, JJ.

STURGIS, J. The respondent was tried in the court below upon an indictment found under R. S., Chap. 127, Sec. 27, as amended by Public Laws, 1923, Chap. 167, Sec. 2, charging him with illegal transportation of intoxicating liquor. At the close of the testimony offered by the State the respondent moved for a directed verdict in his favor which the presiding Justice denied, and to this ruling exceptions were allowed. The respondent thereupon proceeded with his defense and

having been found guilty, filed a written motion in arrest of judgment which was denied, and his exceptions allowed. The case is before this court upon these two exceptions.

The evidence presented by the State was sufficient to justify a verdict of guilty and was neither so weak nor so defective that a verdict based upon it could not be sustained. There was, therefore, no error on the part of the presiding Justice in denying the respondent's motion for a directed verdict, and the exception to that ruling cannot be sustained. *State* v. *Gustin,* 123 Maine, 307; *State* v. *Benson,* 115 Maine, 549.

In the respondent's motion in arrest of judgment, the only ground stated therefor is:

"Because of manifest error in the record appearing, to wit:— Because the indictment under which he was convicted does not allege the place from which and the place to which the respondent transported intoxicating liquor, and because no judgment against him, the said Cleveland P. Harvey, can be lawfully rendered on said record."

Only such grounds as are assigned in the motion in arrest of judgment can be considered under the exception to its denial. A motion in arrest of judgment should specify the causes for which judgment should be arrested, and our review of the ruling below is controlled by the reasons stated in the motion. *State* v. *Donaluzzi,* 94 Vt., 142; *State* v. *Wing,* 32 Maine, 581; 2 Encyc. Pl. and Pr. 816; 16 C. J., 1264, and cases cited. Our consideration of the respondent's second exception must, therefore, include only the sufficiency of the description of place as found in the indictment.

The record shows that the indictment under which the respondent was convicted is in the following language:

"The Grand Jurors for said State upon their oath present that Cleveland P. Harvey of Rockland in the County of Knox, at Waldoboro in said County of Lincoln, on the twenty-ninth day of May in the year of our Lord one thousand nine hundred and twenty-four, knowingly did transport from place to place in said Waldoboro a certain quantity of intoxicating liquor, to wit, ten gallons of alcohol," etc.

This form of allegation of place is not new in the criminal practice of this State. It follows the form provided in Whitehouse on Criminal Procedure, Page 119, and has now for many years been

generally used by the prosecuting officers of this State in charging, in complaint and indictment, the offense of illegal transportation of intoxicating liquor where the transportation does not extend beyond the limits of a given city or town.

An allegation of from place to place in the State of Maine, or from place to place in a given county, is too indefinite to reasonably inform a respondent of the offense with which he is charged, or to identify it in case a subsequent prosecution for the same offense should be instituted. *State* v. *Lashus*, 79 Maine, 541; *State* v. *Libby*, 84 Maine, 461. But in the case at bar, the place in which the act was committed is set out by alleging that the liquor was transported from place to place in said *Waldoboro*. This allegation of the place of the offense affords to the respondent the requisite information to which the law entitles him.

A similar allegation was held sufficient in *Commonwealth* v. *Hutchinson*, 6 Allen, 595, and that court says: "A reasonable degree of certainty in the description of the offense so that the accused may know the locality in which the unlawful transportation is alleged to have taken place is all that is requisite." *Commonwealth* v. *Hutchinson* was considered by this court in *State* v. *Lashus*, supra, and it is there intimated that an allegation of place in the form used in the indictment before us is sufficient. We confirm that intimation.

Exceptions overruled.

J. L. JANNELL *vs.* JOHN MYERS.

Androscoggin. Opinion January 19, 1925.

The findings of a jury on questions of fact are final and not reviewable by the Law Court, unless the jury was manifestly influenced by prejudice, bias, passion or mistake. The burden of proving to the satisfaction of the court that the verdict is manifestly wrong is upon the one seeking to set it aside. A refusal to give a requested instruction, even though it states the law correctly, is not reversible error, if it is substantially covered by the instructions given.

In considering a motion for a new trial, on the ground that the verdict is against the evidence, it is not the province of the Law Court to weigh the evidence for the purpose of determining the preponderance of it between the parties; that is the province of the jury. Where the evidence is conflicting a verdict will not be disturbed if it is found to be supported by evidence, credible, reasonable, and consistent with the circumstances and probabilities of the case, so as to afford a fair presumption of its truth, even though it may seem to the Law Court that the evidence as a whole preponderates against the finding of the jury.

On exceptions and motion by defendant. An action in tort to recover damages resulting from a collision between automobiles, plaintiff alleging negligence on the part of the defendant. The jury returned a verdict of $344 for plaintiff. At the conclusion of the charge by the presiding Justice counsel for defendant requested a certain instruction which was denied and exceptions taken. Defendant also filed a general motion for a new trial. Motion and exceptions overruled.

The case is stated in the opinion.

Harry Manser, for plaintiff.

Tascus Atwood, for defendant.

SITTING: CORNISH, C. J., PHILBROOK, MORRILL, WILSON, STURGIS, BARNES, JJ.

PHILBROOK, J. This is an action in tort to recover damages resulting from a collision between automobiles. The jury returned

a verdict for the plaintiff and the case is before us upon a general motion for a new trial and a single exception based upon the refusal of the presiding Justice to give a requested instruction.

THE MOTION.

It should always be borne in mind that upon a motion like the one at bar, after a jury has rendered its verdict, the Law Court is not a tribunal of the first instance having authority to hear and decide disputes upon questions of fact. Our power is limited to decisions of the question whether the verdict is so plainly contrary to the evidence that manifestly the jury was influenced by prejudice, bias, passion or mistake; otherwise their findings of fact are binding upon this court. *Leavitt* v. *Seaney*, 113 Maine, 119. In considering a motion for a new trial, on the ground that the verdict is against evidence, it is not the province of the court to weigh the evidence for the purpose of determining the preponderance of it between the parties; that is the province of the jury. Where the evidence is conflicting a verdict will not be disturbed if it is found to be supported by evidence, credible, reasonable, and consistent with the circumstances and probabilities of the case, so as to afford a fair presumption of its truth, even though it may seem to the court that the evidence as a whole preponderates against the finding of the jury. *Garmong* v. *Henderson*, 114 Maine, 75; *Same* v. *Same*, 115 Maine, 422. The burden of proving to the satisfaction of the court that the verdict was manifestly wrong is upon the one seeking to set it aside. *Garmong* v. *Henderson*, 115 Maine, 422. These are well settled and time honored principles but in view of the many motions for new trial which are presented to this court it seems proper, if not necessary, to restate them occasionally. In this case, after a careful examination of the record, we are not prepared to say that the burden resting upon the defendant has been sustained.

EXCEPTION.

At the conclusion of the charge of the presiding Justice counsel for the defendant made the following request; "I will ask your Honor to instruct the jury if on deliberation they feel unable to determine who was right, that the plaintiff fails." The presiding Justice

replied "I decline to give that except as I have already given it; I have covered that all in the proper way I think." The requested instruction plainly relates to the rule of law requiring the moving party to satisfy the jury by a fair preponderance of the evidence that his contention is true, and that he is therefore entitled to a verdict; otherwise the defendant is so entitled. The exception must be overruled for the following reasons:

First, because the request is an inapt statement of law. The question for the jury to decide is not whether the plaintiff was right or the defendant was right, but whether the plaintiff has sustained his cause by a fair preponderance of the evidence.

Second, because the true rule of law as to burden of proof was correctly stated in the charge of the presiding Justice.

Third, because the rule has long been established by an unbroken line of judicial authority, that the refusal to give a requested instruction, even though it states the law correctly, does not constitute reversible error if it is substantially covered by the instructions given. 14 R. C. L. ,752, and cases there cited.

Motion and exceptions overruled.

RUEL A. E. AUSTIN

vs.

PRUDENTIAL HEALTH & ACCIDENT INSURANCE COMPANY.

Somerset. Opinion January 24, 1925.

The restrictive and technical rule of pleading provided under R. S., Chap. 87, Sec. 38, requires that in an action on an insurance policy if the defendant relies upon the breach by the plaintiff of any conditions of the policy as a defense, it must be specifically pleaded, or set up under a brief statement, at the election of the defendant; and all conditions, the breach of which is known to the defendant, and not so specifically pleaded, shall be deemed to have been complied with by the plaintiff.

This rule of pleading is too plain for interpretation and too positive to admit of the exercise of discretion. It was undoubtedly meant to be both restrictive and technical.

In some cases which come up on report it is unnecessary to consider technical questions of procedure and pleading but the question here presented is something more than a technical question, it is a positive command of the law power.

On report. An action of assumpsit to recover on an accident insurance policy. The defendant pleaded the general issue setting up as a defense that the policy was not in force at the time of the accident. The defendant did not comply with the provisions of R. S., Chap. 87, Sec. 38, that the breach of any condition in the policy by the plaintiff upon which the defendant relies must be specifically pleaded, or set up under a brief statement, otherwise the breach of all conditions known to the defendant shall be deemed to have been complied with by the plaintiff. Upon an agreed statement the cause was reported to the Law Court for the rendition of such judgment as the law and evidence required. Judgment for the plaintiff for $61.25 and interest from the date of the writ.

The case appears in the opinion.

Harry R. Coolidge, for plaintiff.

Butler & Butler, for defendant.

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

PHILBROOK, J. The plaintiff seeks to recover a sum of money which he claims to be due him by virtue of a contract of insurance. The case comes to us on report based upon an agreed statement and a stipulation that all the exhibits, the writ, declaration and pleadings are made part of the case. The report to the Law Court is for the rendition of such judgment as the law and the evidence shall require.

In the application for the policy, expressly made a part of the contract between the parties, the plaintiff agreed to pay "the monthly premium of one and 50-100 dollars in advance without notice." Neither the application for the policy, nor the policy itself, designates any day in the month when the time for the advance payment has arrived. A premium receipt book, however, offered as an exhibit by the plaintiff, and issued to him by the company, states that the first premium must be made on or before March 1, 1921, and on or before the first day of each month thereafter. Later a second premium receipt book, issued to the plaintiff by the company, offered by the plaintiff as an exhibit, states that the first premium must be paid on or before May 1, 1922, and on or before the first day of each month thereafter. Examination of these books and also of receipts aside from the books, shows that the plaintiff paid and the company acknowledged payment of monthly premiums on several dates later than the first day of the calendar month. On June 25, 1922, the plaintiff sustained an accidental injury for which he claimed a compensation from the company under the terms of his policy. His June premium was not paid until June 24, 1922, when he mailed his check to the company and it acknowledged payment under date of June 27, 1922, the receipt stating that the payment was for the month of June. On July 4, 1922, the plaintiff sent by mail written notice to the defendant of his injury and claim for compensation under said policy. Reply thereto was made by the defendant as shown by his letter of July 5, 1922, as follows:

"We are in receipt of your preliminary notice of disability and in reply would say that you were injured on the 25th of June and your June dues were not received until June 27th. Consequently at the time of accident your policy was not in force."

One clause in the policy provides that "if the payment of any renewal premium shall be made after the expiration of the policy or the last renewal receipt, neither the assured nor the beneficiary will be entitled to recovery for any accidental injury happening between the time of expiration and time of the renewal of this policy." Upon this clause in the policy the defendant now bases its defense.

Such defense demands examination of the law of this State applicable to this action. This is an action of assumpsit brought by special authority of R. S., Chap. 87, Sec. 38, which applies to "All actions at law on insurance policies." The same section permitting this form of action also prescribes the form and limits the scope of the defendant's pleadings, as follows: "If the defendant relies upon the breach of any conditions of the policy by the plaintiff, as a defense, it shall set the same up by brief statement or special plea, at its election; and all conditions the breach of which is known to the defendant and not so specifically pleaded shall be deemed to have been complied with by the plaintiff." The plaintiff observed the demand of the statute by stating in his declaration that "he has complied with all the conditions of said policy of insurance." The breach claimed by the defendant was surely known to it as shown by its letter of July 5, 1922, but it has not "so specifically pleaded," and by the terms of the statute the conditions of the policy must be "deemed to have been complied with by the plaintiff." The defendant pleaded the general issue, non assumpsit, and nothing more. In commenting upon this statute in *Russell* v. *Fire Insurance Co.*, 121 Maine, 248, in an opinion of this court handed down only nine short months before the date of the writ in the case at bar, Mr. Justice SPEAR says, "This rule of pleading is too plain for interpretation and too positive to admit of the exercise of discretion. It was undoubtedly meant to be both restrictive and technical." And again "Whether by brief statement or special plea, the legislature limits and restricts the defendant to what it has traversed in its plea to what it has 'so specifically pleaded.' It enacted this statute for this specific form of action and no other; and the brief statement cannot therefore be extended by construction, but must be confined to what is so specifically pleaded."

It may be urged that when a case comes up on report it is unnecessary to consider technical questions of procedure and pleading, *Robbins* v. *Railway Co.*, 100 Maine, 496, but the question here pre-

sented is something more than a technical question, it is a positive command of the law-making power "too positive to admit of the exercise of discretion." *Russell* v. *Fire Insurance Co.*, supra.

The defendant having failed to properly plead the defense upon which it relies, under the stipulations and order of court the mandate will be

Judgment for plaintiff for $61.25 and interest from the date of the writ.

ELEANOR P. ROBINSON *vs.* HENRY PROCKTER.

Lincoln. Opinion February 6, 1925.

A declaration in slander alleging that the words were spoken of and concerning the plaintiff in the presence and hearing of third persons, "and in conversation with them," and setting out the alleged defamatory words in the second person, is not fatally defective on general demurrer.

In the instant case the language of the declaration is not necessarily inconsistent; it may well be that the defendant while engaged in conversation with third persons, the plaintiff standing by, used language in the second person as set out.

Where the libel or slander is prima facie or per se actionable, a declaration stating the defendant's malicious intent and the defamatory matter, showing that it refers to the plaintiff, is sufficient without any prefatory inducement of the circumstances under which the words were spoken, and if unnecessarily an inducement be stated, it is not material to prove it.

On exceptions. An action of slander. The defendant filed a general demurrer to the declaration alleging that it was fatally defective because the colloquium and the words alleged to be actionable as set out were inconsistent.

The demurrer was overruled and exceptions taken. Exceptions overruled.

The opinion states the case.

George A. Cowan, for plaintiff.

Emerson Hilton and Weston M. Hilton, for defendant.

SITTING: CORNISH, C. J., PHILBROOK, MORRILL, STURGIS, BARNES, JJ.

MORRILL, J. The defendant having filed a general demurrer to the declaration in an action of slander, presents this case upon exceptions to an adverse ruling.

He maintains that the declaration is fatally defective because the colloquium and the words alleged to be actionable as set out are inconsistent; more specifically stated, that the allegation that the words were spoken of and concerning the plaintiff in the presence and hearing of third persons, "and in conversation with them," is equivalent to a charge that the words were spoken in the third person, and is inconsistent with the alleged defamatory words as set out in the second person: "You are no better than he is." "You are keeping a house of ill fame." He relies upon the principle applicable to the consideration of evidence upon the trial of such causes, that a charge of words spoken in the third person is not supported by evidence of words spoken in the second person, "there being a difference between words spoken in a passion, to a man's face, and deliberately behind his back." *Miller* v. *Miller*, 8 Johns., 74; *McConnell* v. *McCoy*, 7 S. & R., 226; *Wolf* v. *Rodifer*, 1 Har. & J. 409 (Md.); *Sanford* v. *Gaddis*, 15 Ill., 229; *Williams* v. *Harrison*, 3 Mo., 290; and that a charge of words spoken in the second person is not supported by proof of words spoken in the third person. 2 Greenleaf on Evidence, Section 414; *Culbertson* v. *Stanley*, 6 Blackf. (Ind.), 67; *McCarty* v. *Barrett*, 12 Minn., 398. In effect the contention is that, as the words alleged to be actionable are set out in the second person, the allegation should have been that they were uttered *to* the plaintiff.

The answer to this contention is two-fold. First. Whatever the evidence might have shown upon a trial, we think that the language of the declaration is not subject to such restricted construction, and is not necessarily inconsistent. It may well be that the defendant while engaged in conversation with third persons, the plaintiff standing by, used language in the second person as set out.

Second. Without the words first quoted, creating the alleged inconsistency, the declaration is sufficient. "Where the libel or slander is prima facie or per se actionable, a declaration stating the defendant's malicious intent and the defamatory matter, showing

that it refers to the plaintiff, is sufficient without any prefatory inducement of the circumstances under which the words were spoken, and if unnecessarily an inducement be stated, it is not material to prove it." 1 Chitty Pleading, 16th Amer. Ed., Page 520. *Robinson* v. *Keyser*, 22 N. H., 323. The words imputing the keeping of a house of ill fame are clearly actionable per se. *Shepherd* v. *Piper*, 98 Maine, 384. *Davis* v. *Starrett*, 97 Maine, 568. The declaration must be held good.

Exceptions overruled.

BRUNO CORMIER'S CASE.

Aroostook. Opinion February 6, 1925.

An employee hauling from the camp of the employer to its mill-yard timber cut into six-foot lengths is engaged "in the work of cutting, hauling, rafting or driving logs" within Section 4 of the Workmen's Compensation Act, each piece being properly termed a log. It is optional with manufacturers, who are also engaged in lumbering operations, to avail themselves of the Workmen's Compensation Act as to their employees engaged in cutting, hauling, rafting, or driving logs, when they accept the Act as to their general manufacturing business.

In the instant case the employer's assent to the Act and the approved insurance policy filed therewith are restricted to the manufacturing operations, and do not include cutting or hauling logs.

On appeal. Claimant was injured while engaged in hauling logs six feet in length from the woods where they were cut to the mill-yard of employer about six miles distant. At the time of the accident he was going out with an empty sled for a load, and stopped his team to fix a chain on the bunk, the team started, and he fell and broke a rib. Compensation was awarded for temporary total disability and an appeal taken. The respondents in taking an appeal alleged that as to claimant the respondent was not an assenting employer within the terms of the Workmen's Compensation Act, in that the kind of

work claimant was doing at the time of the injury was not specified and included in the assent to the Act by the employer. Appeal sustained. Decree reversed. Compensation denied.

The case is stated in the opinion.

Claimant was without counsel.

Andrews, Nelson & Gardiner, for respondents.

SITTING: CORNISH, C. J., PHILBROOK, MORRILL, WILSON, STURGIS, BARNES, JJ.

MORRILL, J. The claimant was injured while employed by Allen Quimby Company in hauling logs to its mill-yard in Stockholm. Allen Quimby Company manufactures veneer; another corporation, Allen Quimby Clothespin Company, has a mill near by; these corporations jointly carry on woods operations for the supply of lumber to their mills, although it appears that the hauling from the camp about six miles distant is paid for by the corporation at whose mill the stock is unloaded. On the day in question Cormier was employed in hauling timber, cut into lengths six feet long, from the camp to the mill-yard of Allen Quimby Company; upon a return trip, when about half way to the camp, he accidentally received the injury for which he seeks compensation.

That Cormier was an employee engaged "in the work of cutting, hauling, rafting or driving logs" within Section 4 of The Workmen's Compensation Act does not admit of doubt. Although the long timber was cut into six-foot lengths before it was sawed into stock for boxes, each piece is properly termed a log. A log is defined as "especially, a cut of timber of any size or length suitable for sawing into lumber." Standard Dict.

The status of such employees with reference to the Act has been recently defined in *Oxford Paper Company* v. *Thayer,* 122 Maine, 201.

It is optional with employers of loggers and drivers to avail themselves of the Act or not as they see fit. They may except this class if they desire to do so when they accept the Act as to their general manufacturing business; they are not compelled to accept the Act as to the logging and driving.

The only question presented here is whether Allen Quimby Company availed itself of the Act as to its employees engaged in hauling

logs. This question must be answered in the negative. Its assent dated December 13, 1923, specifies:

"Kind of business included in assent Veneer Pkg. Mfg.—Veneer Mfg."

In the insurance policy, duly approved by the Insurance Commissioner and filed with the assent, the classification of assured's operations is thus stated, in harmony with the assent:

"2908. Veneer Pkg. Mfg. no barrel Mfg. (No veneer mfg.)

"2714. Veneer Mfg."

While the approved policy does not contain an express provision that it does not cover accidents to employees engaged in the work of cutting, hauling, rafting or driving logs, (*Fournier's Case*, 120 Maine, 191. *Oxford Paper Co.* v. *Thayer*, supra), it carries a more specific endorsement:

"This Policy does not cover woods operations. The line drawn between woods operations and the mill operations shall be that when a car or team is placed in the mill yard, or at a point where the loads are to be unloaded from the car or team this feature of the operations including the unloading of cars and teams, shall be applied as part of the mill or yard operations."

It follows that the employer did not assent to the Act as to its employees engaged in hauling logs. The award did not in terms find, but presupposes, such assent, and being without support in that particular, is erroneous in law.

Appeal sustained.
Decree reversed.
Compensation denied.

AMERICAN MUTUAL LIABILITY INSURANCE COMPANY

vs.

LOUIS E. WITHAM

and

LOUIS E. WITHAM *vs.* ROBERT P. HAZZARD.

Kennebec. Opinion February 16, 1925.

Under the law of the road in cases of collisions, if a party is on his left side of the road at the time of the collision, it is strong evidence of carelessness, and, unexplained and uncontrolled, conclusive evidence of carelessness.

In these cases the jury found for the defendant in the first case; and awarded damages not claimed to be excessive to the plaintiff in the second case. Neither verdict is so clearly wrong as to justify the court in setting it aside.

On motions. These two cases arose out of a collision between the automobile of Louis E. Witham, defendant in the first action, and an automobile owned by Robert P. Hazzard, the defendant in the second action, the Hazzard car being driven at the time by the chauffeur of its owner.

The first action was brought under a right of subrogation, the plaintiff having paid to Mr. Hazzard the damages to his car under the provisions of its insurance policy issued to him. In each case negligence and carelessness were alleged. The cases were tried together and the jury returned a verdict for the defendant in the first action, and for the plaintiff in the second action, in the sum of $524.33. A general motion for a new trial was filed by the plaintiff in the first case, and a like motion filed by the defendant in the second case. Motion in each case overruled.

The case is sufficiently stated in the opinion.

Andrews, Nelson & Gardiner, for the plaintiff in the first action and for the defendant in the second action.

Pattangall, Locke & Perkins, for the defendant in the first action and for the plaintiff in the second action.

SITTING: CORNISH, C. J., PHILBROOK, MORRILL, WILSON, STURGIS, BARNES, JJ.

BARNES, J. Two automobiles collide, one owned and operated by Louis E. Witham, the other owned by Robert P. Hazzard, and driven by an employee of the owner, in furtherance of his master's business.

Two suits follow. In the first, action to recover damages wrought by the collision upon the Hazzard car, is brought by a Company subrogated to the rights of Robert P. Hazzard; in the second, Mr. Witham sues Mr. Hazzard to recover the damages to the Witham car sustained in the same collision. Each is an action of negligence.

Tried upon the same evidence in the court below, the two cases are here considered together.

They involve questions of law and of fact. Of law, because the law of the road still obtains, as expressed in our statutes, and it is pertinent to suggest that, if obeyed by chauffeurs and drivers, our law of the road would render impossible such collisions as the evidence shows this may have been.

It is as follows: "When persons travelling with a team are approaching to meet on a way, they shall seasonably turn to the right of the middle of the travelled part of it, so far that they can pass each other without interference."

The word "team" has been broadened in meaning so as to include automobiles. *Bragdon* v. *Kellogg*, 118 Maine, 42.

"They shall seasonably turn," etc., means that *each* of the drivers of two passenger automobiles, when approaching to meet on a public road, shall turn to the right, with such promptness, in due season, in such season that neither shall be retarded in his progress by reason of the other occupying any part of such road except the half to that other's right.

That a party was at his left of the road at the time of the collision is strong evidence of carelessness is held to be law by this court, which has said further that, unexplained and uncontrolled, such position would be not only strong but conclusive evidence of carelessness. *Neal* v. *Rendall*, 98 Maine, 69.

In these suits both plaintiffs insist that their cars were each well to its driver's right of the middle of the travelled part of a commodious and well-wrought public road. Each insists that the other's

car was, at the time of collision, occupying the half of the highway forbidden by law to a traveller meeting another. One contestant is clearly wrong. A jury, than which our system of trial procedure furnishes no more satisfactory arbiters of questions of fact, found for the defendant in the first, and for the plaintiff in the second suit.

The cases come to this court upon motion, and were argued only upon the evidence.

A painstaking reading of the transcript of the evidence reveals only conflict. It is impossible to reconcile the testimony as to material facts, except that the collision occurred under the light of a June sun, and upon a wide and unobstructed way.

The jury had the benefit to be derived from illustrations upon a plan, constructed in part during the delivery of the testimony, but withheld from this court by the regrettable fact that, in the hurry of the trial, counsel failed to have each question, asked with reference to the plan, and its answer, luminous to the reader.

Confronted by irreconcilable conflict in the testimony, the duty of this court is plain.

"The credibility of witnesses and the weight to be given to their testimony is peculiarly within the province of the jury; and although if we were sitting as jurors, we might reach a different conclusion from that of the jury, yet we should not set their finding aside unless manifest error is shown, or it appears that the verdict was the result of bias or prejudice." *Hatch* v. *Dutch*, 113 Maine, 405.

Which side, in either case, stated the facts we cannot say. The jury found for the defendant in the former; and awarded damages, not now claimed to be excessive, to the plaintiff in the latter case.

We cannot conclude that either verdict is so clearly wrong as to require the court to set it aside.

Motion in each case overruled.

STATE *vs.* NORMAN C. DODGE.

Lincoln. Opinion February 18, 1925.

In criminal cases on motions for a new trial on the ground of newly-discovered evidence, evidence both pro and con may be received by the Justice hearing the motion. The question before the Justice hearing the motion is not whether an issue of fact is raised by the motion, but whether in view of all the evidence both old and new, it appears probable that another jury would arrive at a different result. The issue on an appeal from the ruling of the Justice below is whether his decision was clearly wrong. Recantation by an important witness is not alone sufficient grounds for granting such a motion.

Recantation by an important witness is generally regarded with suspicion and in the instant case the alleged recantation of the complainant under the circumstances is entitled to little if any weight.

In this case the evidence of the other witnesses offered in support of the motion either does not support the allegations or it does not appear that it could not have been discovered at or before the trial with proper diligence.

The requested instruction was not applicable to the evidence in the case and the exception to the refusal to grant it is without merit.

Without giving the usual weight to the decision of the Judge at nisi prius on the motion based on newly-discovered evidence, this court cannot say that another jury, with all the evidence before it, would be likely to arrive at a different result.

On exceptions and appeals. The respondent was indicted under Chapter 112 of the Laws of 1919, for lewdness, and was convicted at the April Term, 1924, of the Supreme Judicial Court for Lincoln County. At the trial the presiding Justice denied a requested instruction and counsel for the respondent excepted. The respondent then filed a general motion for a new trial which was denied and an appeal taken. At the October Term, 1924, the respondent filed a motion for a new trial based upon newly-discovered evidence, which was denied by the presiding Justice and an appeal taken. Appeals dismissed. Exceptions overruled. Judgment for the State.

The case appears in the opinion.

Weston M. Hilton, County Attorney, for the State.

Edward W. Bridgham and George W. Heselton, for the respondent.

SITTING: CORNISH, C. J., PHILBROOK, WILSON, STURGIS, BARNES, JJ.

WILSON, J. The respondent was indicted for taking indecent liberties with the person of John H. Farnsworth and was convicted at the April Term, 1924.

Following his conviction he filed at the same term a general motion for a new trial upon the usual grounds which was overruled by the Justice presiding and an appeal taken to this court.

At the October Term, 1924, the respondent filed a motion for a new trial based upon alleged newly-discovered evidence. Testimony was taken out in support of and in opposition to the motion and upon being presented to the presiding Justice the motion was denied and an appeal taken; and the evidence presented at the trial and in connection with the motion, in each case certified to by the court stenographer but not reported by the presiding Justice, is a part of the printed case.

The case also comes forward on an exception to a refusal by the presiding Justice at the trial to give the following requested instruction, "The evidence of a demented youth alone is insufficient to convict a respondent charged with the crime of lewdness."

We are confronted *ad limine* with certain questions of procedure on motions for new trials in criminal cases.

At common law in both civil and criminal cases the granting of a new trial rested wholly within the discretion of the Justice presiding at the trial, and all motions seeking relief through a new trial must be directed to him. His decision thereon was final and not subject to review. *Moulton* v. *Jose*, 25 Maine, 76, 85; *State* v. *Hill*, 48 Maine, 241; *State* v. *Carter*, 121 Maine, 116.

In 1841, R. S., Chap. 115, Sec. 101, it was provided that motions for a new trial might be presented to the whole court upon a report of the evidence; and in 1852, Chapter 246, Public Laws, it was further provided when the motion was based on some ground not shown by the evidence at the trial, that the testimony respecting the allegations in the motion shall be heard and reported by the Judge, which provisions are now found in Sec. 57, Chap. 87, R. S. These provisions, however, relate only to civil actions. *State* v. *Hill*, supra; *State* v. *Gilman*, 70 Maine, 329, 334; *State* v. *Gustin*, 123 Maine, 307.

In criminal cases a motion for a new trial based on any ground must still be directed to the presiding Justice, whose decision thereon prior to 1883 was final. *State* v. *Pike,* 65 Maine, 111.

It was not until 1883, Chapter 205, Public Laws, when the death penalty was restored in this State that an appeal to this court was given from the decision of the presiding Justice at *nisi prius* on motions of this nature, and then only in capital cases, which right of appeal was not extended to other felonies until 1909, Chapter 184, Public Laws. On all motions for a new trial in misdemeanors the decision of the presiding Justice is still final. *State* v. *Simpson,* 113 Maine, 27; *State* v. *Carter,* 121 Maine, 116.

While no express provision is found either in the Act of 1883 applying to capital cases, or in the Act of 1909 extending the right of appeal to other felonies, authorizing an appeal on motions for new trial based on other facts than those appearing in the evidence taken out at the trial, the language of these Acts now found in Sec. 28, Chap. 136, R. S., is broad enough to include all motions for a new trial based on any grounds whatever; and appeals from decisions of the Justice presiding at *nisi prius* upon motions for a new trial based upon newly-discovered evidence having already been taken in several important cases and entertained by this court, *State* v. *Beal,* 82 Maine, 284; *State* v. *Stain et al.,* 82 Maine, 472; *State* v. *Terrio,* 98 Maine, 17, and also been recognized as an appropriate procedure by this court in the recent case of *State* v. *Gustin,* 123 Maine, 308, we think this statute may now fairly be said to have received an accepted construction in this respect which may with propriety be followed in the future.

The method of review by appeal, however, is a purely statutory proceeding and had no place in actions at law under the common law procedure, 3 C. J., 316, and hence its scope, limits and conditions must either be found in the express terms of the statute authorizing it, or be implied from the nature and purpose of the act itself. Being remedial in their nature, such acts should be liberally construed.

There is, perhaps, no strictly analogous statute from which we may fairly infer what is the nature and scope of the review provided for in Sec. 28, Chap. 136, R. S., by an appeal. It is not defined by its terms, but following the long established practice under the statute in civil actions at the time this statute was enacted, this court has already given an appeal from a denial of a general motion for a new

trial practically the same effect as a review of a trial in a civil action on a motion for a new trial directed to this court, viz: Whether upon all the evidence the jury was warranted in arriving at their verdict in finding the respondent guilty beyond a reasonable doubt, having in mind that it is for the jury to determine the credence to be given the witnesses and the weight of their testimony. *State* v. *Stain et al.*, 82 Maine, 484, 489, 490; *State* v. *Lambert*, 97 Maine, 51.

On motions based on newly-discovered evidence in civil actions the evidence comes direct to this court for determination at first hand, while under Sec. 28 of Chap. 136, in criminal cases, the question on appeal must be, was the decision of the presiding Justice, from which the appeal was taken, wrong in view of all the evidence in the case and that presented on the motion. *State* v. *Stain et al.*, 82 Maine, 484, 491.

Two other questions of procedure are presented, viz.: What evidence may be received by the Justice at *nisi prius* on a motion for a new trial based on newly-discovered evidence and how shall the evidence, when presented to this court, be authenticated.

The moving party may, of course, introduce any evidence in support of the necessary allegations on his motion. The question then arises, should evidence be received from the opposing party in rebuttal?

Under the statute relating to such motions in civil cases Sec. 57, Chap. 87, R. S., this court held in *White* v. *Andrews*, 119 Maine, 414, that only evidence in support of the allegations in the motion could be received, in effect overruling *Greenleaf* v. *Grounder*, 84 Maine, 50, which followed the Massachusetts practice laid down in *Parker* v. *Hardy*, 24 Pick., 246.

As this statute does not apply to criminal cases, the practice in such cases may be determined in accordance with what seems to be more productive of justice and the practice elsewhere.

The great weight of authority appears to sanction the receipt of counter affidavits in rebuttal, where the practice confines the evidence in support of such motions to affidavits, and this appears to be a salutary rule, and must in principle apply equally to the receipt of oral testimony in rebuttal where oral testimony may be received instead of affidavits as in this State, *Snowman* v. *Wardwell*, 32 Maine, 275, 277.

The purpose and effect of all rules of procedure should be to end litigation and not prolong it. If the opposing party by evidence in his possession can not only impeach the witnesses relied upon in support of the motion, but can show that the evidence relied upon is wholly false, or for any reason not entitled to any weight, he should not be put to the inconvenience, and both he and the State to the expense of again prosecuting or defending his cause before another jury, and in no case, unless the presiding Justice, or this court on appeal, shall first decide after hearing all the evidence that justice requires another trial.

This rule has apparently been followed in practice in this State in the three important criminal cases above cited: *State* v. *Beal*, supra, *State* v. *Stain et al.*, supra, and *State* v. *Terrio*, supra; and in practically all the other States it is the recognized course of procedure in both civil and criminal cases. 25 Am. Ann. Cases, 1912 B., 1303, Note; 14 Ency. Pl. & Pr., 912; *Zeller* v. *Griffith*, 89 Ind., 80; *People* v. *Sing Yow*, 145 Cal., 1; *Finch* v. *Green*, 16 Minn., 315; *Williams* v. *Baldwin*, 18 Johns, 489; *Burlingame* v. *Cowee*, 16 R. I., 40; *Burr* v. *Palmer*, 23 Vt., 244; *Hammond* v. *Pullman*, 129 Mich., 567; *Hopkins* v. *Knapp, etc.*, 92 Ia., 212; *Chrisco* v. *Yow*, 153 N. C., 434.

We, therefore, hold that upon motions for new trials in criminal cases based upon the ground of newly-discovered evidence testimony may be received not only to impeach the witnesses offered in support of the motion, but in strict rebuttal of their testimony.

One more question of procedure remains as to how the evidence taken out at the trial or upon a motion for other reasons than appears in the evidence at the trial when presented to this court on appeal shall be authenticated. While Sec. 28 of Chap. 136, R. S., makes no provision for a report of the evidence, a provision for an appeal, of necessity, implies that a copy of the evidence upon which the appeal is based shall be transmitted to the Appellate Court as in equity cases, from which jurisprudence this form of review is adopted. It being required under the statute, though by implication, the provision for authentication by the court stenographer under Sec. 169 of Chap. 87, clearly applies. The case, therefore, appears to be properly before this court and all the evidence submitted proper for our consideration.

To consider the questions raised in their order: The appeal from the ruling of the presiding Justice denying the general motion for a

new trial on the ground that verdict is against the law and the evidence must be dismissed. There was abundant evidence if believed by the jury to warrant the verdict.

The exception to the refusal to give the requested instruction likewise has no merit and must be overruled.

It was not applicable to the evidence in the case, and could not have been properly given. There was no evidence on which it could have been found that the witness Farnsworth was "a demented youth." He is, it is true, mentally immature for his age of twenty years,—a moron of the mentality of a youth of thirteen years according to his mother; but a person of that grade of intelligence can in no sense be properly termed "demented" as that term is ordinarily used. Neither could the court upon the evidence have properly instructed the jury that the case against the respondent rested alone upon the testimony of Farnsworth, as is implied in the requested instruction.

The only question, therefore, meriting consideration is the respondent's motion for a new trial based upon alleged newly-discovered evidence. This motion rests upon three supports: (1) upon evidence that the complainant, and of necessity the State's chief witness, has changed his testimony from that given at the trial, has recanted, confessed himself a perjurer; (2) that the mother of the complainant would testify that one Wilder Dodge, who it is claimed the evidence at the trial disclosed was instrumental in inducing by threats the complainant to make the charges against the respondent, had said to her that he would pay all bills in case the complainant got into any trouble by testifying against the respondent, and he would give the complainant a home as long as he, Wilder Dodge, had one, and that the same Wilder Dodge endeavored to persuade her to testify at the trial that the story told by her son of his abuse by the respondent was true of her own knowledge; (3) that a witness by the name of James P. Cushman would testify that he had heard the same Wilder Dodge state after the trial and conviction of the respondent, "I will get Norman C. Dodge before I get through with him."

As to the testimony of James P. Cushman, as it appears in the printed case, no more need be said than that it does not support the allegations in the motion, nor can it be said that it could not have been discovered by reasonable diligence prior to the trial in which the witness Cushman testified for the respondent. The alleged state-

ment, if made at all, was made prior to the trial and not afterwards and a diligent preparation of the case would have then disclosed it; and further his testimony is so vague, his recollection of the occurrences so indefinite as to render his evidence of little probative value.

The evidence of the mother of the complainant alleged to have been newly-discovered likewise fails to support the allegations in the motion and by itself discloses no more than a neighborly, humane interest on the part of Wilder Dodge toward a boy apparently deprived of paternal counsel and support when he most needed it, nor is it clear that such testimony could not have been discovered with reasonable diligence previous to or at the trial.

It only remains to consider the testimony of John H. Farnsworth which by reason of its nature requires careful scrutiny.

If his statements now made are true, the respondent was, of course, wrongfully convicted and should not even be put to the expense and inconvenience of another trial; but newly-discovered evidence occurring after conviction, and especially recantation of testimony given at the trial, with a witness of less than the average mentality, the courts are inclined to view with no little suspicion, and properly so, in cases of this nature.

The mere fact that an important witness comes forward and confesses himself a perjurer at the trial does not *ipso facto* warrant the court in granting a new trial. Recantation has frequently been declared by the courts to be the most unreliable form of evidence on which to base a new trial. As the court said in *People* v. *Tallmage*, 114 Cal., 427: "It cannot be said as a matter of law that a new trial should be granted whenever an important witness against the defendant shall make an affidavit that he committed perjury in his testimony. If that were so, justice might be defeated in many grave cases." In a similar vein the New York Court in *People* v. *Shilitano*, 218 N. Y., 169, 180, said in substance: Recantation on the part of a witness does not necessarily entitle a respondent to a new trial, otherwise the power to give a convicted person a new trial would rest with the witnesses who testified against him.

Other courts have also recognized the great danger of accepting without rigid scrutiny this kind of evidence, or recantation of testimony given at the trial as sufficient ground for granting a new trial in criminal cases. *Lucia* v. *State*, 77 Vt., 279; *State* v. *Blanchard*, 88 Minn., 82; *People* v. *McGuire*, 2 Hun., 269.

It is not sufficient that it may be said to raise an issue of fact for the jury to determine. The question upon such a motion is, upon a review of the whole evidence new and old in the light of the surrounding circumstances, whether it appears probable that if the new evidence was heard by another jury a different verdict would probably result, and justice therefore requires that the case be again submitted to another jury, and upon these considerations the question before the Appellate Court is, was the action of the Justice below in denying the motion clearly wrong. *Parsons* v. *Railway*, 96 Maine, 503; *State* v. *Stain*, 82 Maine, 472, 491.

With this rule in mind this court has weighed carefully all the evidence, both old and new, and feels strongly that little weight should be given to the alleged recantation of the witness Farnsworth. While in direct examination upon the motion he states very readily that his testimony at the trial was false, when inquired on cross-examination as to what he testified to at the trial in April replied he did not remember; and when further inquired of as to how he could say that his testimony at the trial was false if he could not remember what he testified to, his reply was: "I *think* what I said at the April Term was false."

A jury at the April Term heard his testimony, and in the light of other testimony in the case, they thought what he *then* said was true. After giving all the evidence the careful consideration the importance of the case to the respondent and to the public seems to merit, this court, without giving the usual weight to the decision of the Justice at *nisi prius*, cannot say that another jury with all the evidence before it would be likely to arrive at a different result.

Entries will be:

Appeals dismissed.
Exceptions overruled.
Judgment for the State.

THEODORE BULLARD ET ALS. *vs.* HENRY ALLEN ET ALS.

Cumberland. Opinion February 21, 1925.

In R. S., Chap. 82, Sec. 6, Par. XIII., the essential words are: "For a purpose not authorized by law." Under Chapter 319, Public Laws, 1915, and amendments thereto, known as the Bridge Act, the Board therein provided may determine whether the proposed bridge is on a main thoroughfare.

While the action of town meetings generally conform to parliamentary procedure, it has never been held that they are governed by the strict rules of Legislative practice.

Alleged irregularities in registration of voters cannot be inquired into in proceedings instituted under R. S., Chap. 82, Sec. 6, Par. XIII.

On appeal. An action by ten inhabitants of the town of Harpswell brought under the provisions of Par. XIII. of Sec. 6 of Chap. 82, of the R. S., seeking to prevent the expenditure of the funds of the town in the construction of a bridge between Orr's Island and Bailey's Island in said town of Harpswell. The complainants contended that the Board provided under Chapter 319, Public Laws 1915, known as the Bridge Act, had no authority to determine the question whether the location of a proposed bridge is or is not on a "main thoroughfare." It was also alleged that the town meeting at which it was voted to raise and expend the money in the construction of a bridge did not conform to parliamentary procedure. A hearing was had upon the bill, answers, replications and proof and the sitting Justice entered a decree dismissing the bill with costs for defendants, and plaintiffs entered an appeal. Appeal dismissed; decree below affirmed with costs for defendants, execution to issue therefor.

The case is stated fully in the opinion.

Emery G. Wilson, for complainants.

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

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

DUNN, J. Concurring in the result.

PHILBROOK, J. R. S., Chap. 82, Sec. 6, Par. XIII. provides as follows: "When counties, cities, towns, school districts, village

or other public corporations, for a purpose not authorized by law, vote to pledge their credit, or to raise money by taxation or to exempt property therefrom, or to pay money from their treasury, or if any of their officers or agents attempt to pay out such money for such purpose, the court shall have equity jurisdiction on petition or application of not less than ten taxable inhabitants thereof, briefly setting forth the cause of complaint."

Admittedly the plaintiffs are ten taxable inhabitants of the town of Harpswell. The defendants are the municipal officers and treasurer of the same town.

The complaint, on which the plaintiffs base their petition is as follows:

"THIRD:—The said defendants, claiming to act under and by virtue of the provisions of Chapter 319 of the Private and Special Law of 1915, as amended, caused a meeting of the Board therein provided for (composed of the State Highway Commission, the County Commissioners of Cumberland County, and the Municipal Officers of said town), to be called at Orr's Island in said Town on the first day of August, A. D., 1922, to determine the necessity of building a bridge between Orr's Island and Bailey's Island in said Town, although said defendants well knew said proposed bridge was not located on any main thoroughfare.

"FOURTH:—The said Board,—without giving notice of the time and place,—met at said Orr's Island on the first day of August, A. D., 1922, and thereupon, without a hearing, voted:—(1) That this bridge is on a main thoroughfare; (2) That public convenience and necessity require the construction of this bridge; (3) To approve proposition 3 for a stone bridge with a steel draw span, estimated to cost one hundred and twelve thousand and four hundred ($112,400.00) dollars, subject to the Town authorizing the Municipal Officers to proceed and to secure the necessary funds,—although said Board well knew said proposed bridge was not located on any main thoroughfare.

"FIFTH:—At a special Town Meeting duly called and held at the Town House in said Harpswell on the fifteenth day of September, A. D., 1922, said Town refused by a vote of 261 to 254 to authorize the Municipal Officers to proceed and to secure the necessary funds.

"SIXTH:—Notwithstanding the refusal of the Town to authorize them so to do, the said defendants are proceeding to secure the necessary funds and are preparing to issue notes, bonds, or other obliga-

tions of indebtedness for the payment of money upon the credit of said Town to obtain a large sum of money, to wit:—twenty-two thousand four hundred and eighty ($22,480.00) dollars,—which said sum the said defendants propose to pay into the State Treasury as the proportional share of the estimated cost of the construction of said bridge to be paid by said Town,—all without legal authority so to do.

"SEVENTH:—The said plaintiffs are being injured and are liable to further immediate and irreparable injury and damage to their property from the acts of the said defendants."

This complaint is followed by a prayer for a decree enjoining the defendants from proceeding to secure funds, or to issue notes, bonds or other obligations of indebtedness for the payment of money on the credit of said town, and from paying said money into the State Treasury as the town's proportional share of the estimated cost of the construction of the bridge concerning which this controversy has arisen.

It is quite apparent that the plaintiffs intended to say that the defendants were claiming to act under the provisions of Chapter 319 of the Public Laws of 1915, as amended instead of Chapter 319 of the Private and Special Laws of that year, and we shall proceed to consider the case as if this clerical error were amended.

The case was heard by a single Justice who made extended findings of fact and rulings thereon. Based upon those findings and rulings the decree below was for dismissal of the bill with costs for the defendants. From this decree the plaintiffs appealed.

The essential words in the statute first above quoted are "for a purpose not authorized by law." In order to successfully bring this case within the equity jurisdiction of the court it is necessary to establish the proposition that the defendants, in their official capacity, are seeking to carry out a purpose not authorized by law.

This controversy is one of long standing and in some of its phases is not a stranger to this court. From information gathered in *Allen* v. *Hackett*, 123 Maine, 106, we learn that the town of Harpswell is composed of a section of mainland, nine and one half miles long, known as Harpswell Neck, with numerous islands on either side. With those on the west we are not concerned. On the east are three large islands, Great, Orr's and Bailey's, extending southerly toward the ocean in the order named. Highway bridges already connect

the mainland with Great Island, and the latter with Orr's Island. The proposed bridge is intended to connect Orr's with Bailey's Island. In recent years, by reason of natural scenic beauty, these islands have developed into flourishing Summer resorts.

As a background to the present controversy it may be properly observed that more than forty years ago, by Chapter 356, Private and Special Laws of 1883, legislative authority was given to lay out, construct and maintain a bridge, with a draw, over and across the tide waters separating Orr's from Bailey's Island. To the town of Harpswell were delegated all the powers relating to said bridge and its construction which are provided by law in case of town ways. By Chapter 91, Private and Special Laws of 1921 the first section of this enabling act was amended by providing that the bridge might be with or without a draw, as might be required by the proper federal authorities. The other portions of the act remained unchanged. On February 15, 1922, the municipal officers of Harpswell by due process of law laid out a way "Beginning at a point on the center line of the main traveled highway or road at the south end of Orr's Island . . . . said way to connect the main traveled way and thoroughfare on Orr's Island with the main traveled way and thoroughfare on Bailey's Island." This way was duly and legally accepted by the town of Harpswell at a meeting of the inhabitants of said town legally called, warned, and held on the sixth day of March, 1922. The language used in describing this way, which way as thus described was adopted by the town, may throw some light upon one of the contentions to which we shall refer hereinafter.

Chapter 319, Public Laws 1915, known as the Bridge Act, provides for state and county aid in the construction of highway bridges. This act was amended by Chapter 304, Public Laws 1917, Chapter 140, Public Laws 1919, Chapters 50 and 143, Public Laws 1921, and Chapter 193, Public Laws 1923. The last amendment, which struck out all of Section 1 of the act and substituted another therefor, was not in effect when the present form of the controversy arose. We are, therefore, governed by that section as it existed prior to 1923, namely in Chapter 140, Public Laws 1919. That section provides that "When public convenience and necessity require the building or rebuilding of any bridge in any town or city or unorganized township, said bridge being located on any main thoroughfare" the cost of construction, in proportions and under circumstances not

material to the present case, should be borne by the town, city or unorganized township, the county and the state. Section 2 of the Bridge Act, as it appears in Chapter 304, Public Laws, 1917, provides as follows: "When the municipal officers of any town deem that any bridge on any main thoroughfare must be built or rebuilt, and in their judgment the expense of the construction will entitle the municipality to state and county aid, as provided in section one of this act, they shall petition the commissioners of the county or counties in which said bridge is, or may be built or rebuilt, and the State Highway Commission to meet with them for the purpose of examining into and determining whether public convenience and necessity require the building or rebuilding of said bridge. . . . . The said municipal officers, together with the county commissioners and the state highway commission, shall constitute a board to determine the necessity of building or rebuilding said bridge, also the form of construction. The decision of said board, or a majority thereof is to be final and conclusive."

Under these provisions of the Bridge Act the municipal officers of Harpswell caused a meeting of the board, therein provided for, to be held at Harpswell on August first, 1922, at which time and place the board voted (1) that this bridge is on a main thoroughfare; (2) that public convenience and necessity require the construction of this bridge; (3) to approve a certain proposition as to the plan of construction, and cost, "subject to the town authorizing the Municipal Officers to proceed and secure the necessary funds." At the first meeting called for that purpose on September 15, 1922, the town refused to authorize the municipal officers to proceed and to secure the necessary funds. At a second meeting of the town, held on September 30, 1922, the municipal officers were authorized to proceed and to secure the necessary funds to construct the bridge. Thereupon this suit was instituted.

The plaintiffs attack (1) the proceedings of the joint commission known as the board provided for under the Bridge Act; (2) the proceedings of the town.

THE PROCEEDINGS OF THE JOINT COMMISSION, OR BOARD PROVIDED BY THE BRIDGE ACT. The plaintiffs claim that the proposed bridge would not be on a "main thoroughfare" which, as they claim, is a pre-requisite to the construction of the same. They further claim that the board had no authority, by its vote, to declare that "this

bridge is on a main thoroughfare," as shown by the record of the doings of the board. It is true that the ways in this State, under the provisions of R. S., Chap. 25, Sec. 5, are classified into three groups, 1st, State highways, which shall mean a system of connected main highways throughout the State; 2d, State-aid highways, which shall mean such highways not included in the system of State highways as shall be thoroughfares between principal settlements, or between settlements and their market or shipping point and in so far as practicable feeders to the State highways; 3d, third-class highways, which shall mean all other highways not included in the two classes above mentioned. The plaintiffs claim, since the term "main thoroughfare" is not used in the above classification that a main thoroughfare must come within the first two classes, if not in the first class alone, as otherwise any highway, whether open to travel or not, may become a main thoroughfare by vote of the board, or joint commission, and thereby become entitled to State and County aid in the building or rebuilding of a bridge thereon. They claim that the board is not an inferior court with power to pass upon the question whether a way is or is not a main thoroughfare, and hence its vote that the contemplated bridge is on such a way is of no force or determining power. At this point it is proper to note that under the statute above referred to, R. S., Chap. 25, Sec. 5, the State Highway Commission had declared the road on Orr's Island to be a third-class highway but had not classified the road on Bailey's Island. Finally, under the heading we are now considering, the plaintiffs complain because the decision of the board, or joint commission, was not final but on condition that the town should approve the type of bridge proposed and raise money for its construction.

Upon this branch of the plaintiffs' contention it should be conceded that the proposed bridge must be on a main thoroughfare. That proposition is too plain to admit argument. It must also be conceded that the Legislature has required the State Highway Commission to make charts and maps showing the location and mileage of all highways in the State and to classify those highways according to standards ordained by the law-making body. It also appears from the testimony in this case that the road on Orr's Island had been classified as a third-class highway, but that the road on Bailey's Island had not been classified at all. The plaintiffs claim, therefor,

that because the last named road had not been formally classified, then, of necessity, it is a third-class highway and that under no circumstances could it be a main thoroughfare.

But the Legislature has not given to any person or commission the exclusive power to define the expression "Main thoroughfare," nor is the classification of roads by the State Highway Commission declared to be conclusive, and subject to no amendment, regardless of changes in any environment caused by growth in population, or development of localities by reason of natural resources, or tourist attractions. Plainly, some tribunal must decide the question as to whether a way is a main thoroughfare before a State and County aid bridge can be built thereon. The statute requires the board, or joint commission, to determine whether public convenience and necessity require the building or rebuilding of the bridge, and the decision of said board, or a majority thereof, upon any matter within its jurisdiction, shall be final and conclusive, and the record of its findings upon all preliminary matters shall be prima facie evidence of the truth thereof. It is no stretch of reason to say that one of the elements of public convenience and necessity is whether the way, on which such bridge is to be built, is so situated and supports such an amount of travel as to make it a main thoroughfare. With all conditions open to their observation and study, at the time of their conference, who could better decide whether the way is a main thoroughfare than this board or joint commission? To whom, or to what tribunal can they go, because of any statutory provision, for a decision of the question? To us it seems too plain to admit discussion that one of the questions, interlocked with that of public convenience and necessity, which the board or joint commission may and generally must decide is whether the proposed bridge is on a main thoroughfare; that their decision is final and conclusive as to public convenience and necessity, and the record of their findings upon all preliminary matters is prima facie evidence of the truth thereof. If, as the plaintiffs claim, the question of main thoroughfare were to depend alone on the classification of highways once made by the State Highway Commission and subject to no change, then any error of judgment on the part of, or failure to act by that body might entail great hardship and inconvenience to the general travelling public because of the absence of a bridge, the construction of which could not be financed by a town of small taxable resources. It

should also be observed that although the expression "main thoroughfare" does not appear, yet the word "thoroughfare" does appear in the classification of State-aid highways wherein the Legislature was careful to say that this included those ways which are "thoroughfares" between principal settlements or between settlements and their market or shipping point. To say that a bridge upon a State-aid highway could not be built by State and County aid because the words "main thoroughfare" were not used instead of "thoroughfare" would be to press a technicality too absurd to make successful impression upon the average mind. Who, better than the board, or joint commission, could decide whether a way was between principal settlements or between settlements and their market or shipping point? Nor is there any merit in the claim made by the plaintiffs that the way on Bailey's Island could not be a main thoroughfare because it would end on that island and therefore be a cul-de-sac. This expression is well defined in *Perrin* v. *New York Cent. R. Co.*, 40 Barb., 65, where it is held that a cul-de-sac is a way in a city which is of the nature of a street but which has but one entrance and does not communicate with any street or passageway at any place except the one entrance. Nothing in the testimony supports the claim that the road on Bailey's Island does not communicate with any street, road or passageway at any place except the one entrance.

The last objection of the plaintiffs to the decision of the joint commission is that it was not final but on condition that the town should approve the type of bridge proposed and raise money for its construction. An examination of the record shows that this objection is overstated. Upon this point the testimony shows that the joint commission's conditional vote was only "subject to vote of town authorizing the municipal officers to proceed and to secure the necessary funds." This provisional vote was strictly in accordance with Public Laws, 1921, Chapter 50, Page 57, lines 25 and 26, and can avail nothing to the plaintiffs. Authorities relating to conditional acceptance by a town of a road laid out by its selectmen have no application to the case at bar.

PROCEEDINGS BY THE TOWN. The plaintiffs say that the selectmen proceeded to call a special town meeting, to be held on September 15, 1922, to vote upon the question of approval of the bridge and to raise money for its construction; that the meeting was duly held and that, at such meeting, the town refused to authorize the municipal

officers to secure the necessary funds for the construction of the bridge; that the so-called bridge adherents, claiming not to be bound by the vote of this meeting, caused a second meeting of the town to be called, to be held on September 30, 1922, to vote upon the identical articles which had been voted upon at the meeting of September 15; that on the day preceding the last meeting the selectmen were in session at their office and registered a large number of persons as voters for the express purpose of allowing such persons to vote at the meeting on the following day; that at the second meeting, without a formal vote to reconsider the vote passed at the former meeting, the town voted to approve the type of bridge proposed and to raise money for its construction; that the second meeting was improperly held and that the vote of the town at that meeting, authorizing the construction of the bridge, was illegal, because it had no authority to reverse the action of the town previously and, as plaintiffs say, finally taken.

In discussing this branch of the contentions by the plaintiffs it is necessary to call attention to the fact that they have again overstated the facts. Nothing in the record shows that at either meeting of the town was there any article in the warrant which included an approval of the proposed bridge by the town. The warrant provided for an expression of the voters upon the question of authorizing the municipal officers to provide funds for the town's share of the expense of building the bridge and nothing more. This, by the statute, the town was obliged to do before the municipal officers could proceed to raise the necessary funds.

The record quite clearly shows that there was a town meeting on September 15, 1922. Evidently the contest between pro-bridge and anti-bridge adherents was spirited. The moderator of that meeting testified that as he was about to declare the vote it was discovered that there were ten votes appearing on the table, which brought the number of ballots cast far in excess of the number of names checked on the list and he ordered a recount of the list to be sure there was no error in the number of names checked on the list, and that there was general confusion, and before that count was made there was a motion for adjournment duly made and seconded, and the meeting was adjourned without any vote being declared by the moderator. The town clerk's record of the meeting, however, shows that the

result of the ballot, as counted by the checkers, was 254 "yes" votes (in favor of raising the money) and 261 "no" votes (opposed thereto).

Thereupon a second town meeting was called, for September 30th, upon a warrant containing the same articles as those contained in the warrant for the meeting of September 15th, except an article to choose an auditor, which appeared in the earlier meeting and has no bearing upon the present controversy. Before this meeting proceeded to vote upon the question of raising money a voter present rose and said: "Mr. Moderator; I protest against this meeting as it is illegally called and held." This protest was recorded in the minutes of the meeting by order of the moderator.

The plaintiffs do not argue any irregularity in calling the second meeting but do claim (1) that the vote of September 15 was not reconsidered at the meeting of September 30; and (2) that the meeting of September 30 had no authority to reverse the action of the town previously and, as they claim, finally taken. They claim that towns are governed in their meetings by the rules of parliamentary procedure unless they have adopted special rules of procedure. They cite no authorities in support of this claim and indeed the true rule is broader than that claimed by the plaintiffs. The Massachusetts court, in *Wood* v. *Milton*, 197 Mass., 531, speaking through Mr. Justice Rugg, holds that a town meeting is not a representative body but a pure democracy where the citizens, as to matters within their jurisdiction, administer the affairs of the town in person; that the technical rules of parliamentary law, designed for the regulation of deliberative assemblies are, in some respects, ill adapted for the transaction of the affairs of a town meeting; hence, although in general the action of town meetings conforms to parliamentary procedure it has never been held that they are governed by the strict rules of legislative practice. The same court in *Hunneman* v. *Grafton*, 10 Metcalf, 454, holds that the technical rules of a legislative body, framed for its own convenient action and government, are not of binding force on towns unless such rules have been so acted upon and enforced by the town in their regular meetings as to create a law for themselves and binding on the inhabitants. In *Hill* v. *Goodwin*, 56 N. H., 441, it was held; "Nothing can be better settled than that every deliberative assembly, (and undoubtedly a town meeting is theoretically and nominally such, however, it may be in fact) is and must be the final judge of its own parliamentary law.

No doubt the ordinary rules of parliamentary law, as laid down in the manuals and books of authority, are a very convenient aid to the orderly transaction of business; but its rules are in many matters complicated and the distinctions subtle and nice;—and when the various champions of discussion engage in a game of parliamentary tactics, a town meeting would very soon find itself entangled in the complicated meshes of parliamentary rules which would effectually stop all proceedings and bar all legitimate action if they were of any binding force."

The plaintiffs' claim, that the meeting of September 30 had no authority to reverse the action of the town taken on September 15, is of no avail under the circumstances of this case. The rights of third parties or other intervening rights had not been impaired. Our own court, in *Parker* v. *Titcomb*, 82 Maine, 180, following the universal rule in such matters, has held that a town is free to act as it pleases within its legal scope. It may take action in one direction today and in another tomorrow provided it does not impair intervening rights.

As to alleged irregularities in registration of voters on the part of the municipal officers before the second meeting, it only needs to be said that such irregularities, if any existed, cannot be enquired into in this equitable proceeding designed to ascertain whether there was any attempt on the part of the town or its officers or agents to act upon a purpose not authorized by law.

In view of the conclusions which we have reached we do not deem it necessary to discuss the contentions as to whether the plaintiffs have or have not pursued the proper form of action. Assuming, but not deciding that the plaintiffs have proceeded properly, they have failed to sustain the proposition that the town or its officers or agents were attempting to raise money or pledge the credit of the town for a purpose not authorized by law and the mandate must be,

Appeal dismissed.
Decree below affirmed with additional costs for defendants and that execution issue therefor.

WALTER R. TEBBETTS *vs.* OLIVE S. TEBBETTS.

York. Opinion February 21, 1924.

In an old line life insurance policy the beneficiary has a vested interest; otherwise in fraternal insurance organizations. If the right to modify the policy, or change the beneficiary without his or her consent, is reserved in the contract, then such a policy creates a mere expectancy. When the contract is issued in a State other than that in which the insured resides at the time of its issuance, the lex loci contractus controls. The finding by a sitting Justice upon questions of fact are final unless clearly wrong. A sitting Justice not required to make a finding on questions of fact, a decree only is required.

It is well settled by the great weight of authority that in the case of an old life insurance policy there is created in the beneficiary therein named a vested interest the moment the policy is issued; but in the case of a policy issued by fraternal insurance organizations this rule does not usually obtain.

When one claims an interest in an insurance policy, not because she is a beneficiary, but because she is an assignee of the policy to secure payment of money loaned, whether such loans were made, and whether, if made, they were paid, are questions of fact to be determined by the sitting Justice, and his decision is not to be reversed on appeal unless clearly wrong.

There is no obligation resting upon the Justice who hears the case to make a finding upon the facts; a bare decree is all that our statute, or equity practice, requires. But the filing of a decree, sustaining the bill, is ipso facto a finding of fact in favor of the plaintiff upon some or all of the allegations in his bill.

On appeal. A bill in equity brought under the provisions of R. S., Chap. 66, Sec. 6, wherein the plaintiff seeks to have delivered to him by the defendant two insurance policies issued upon his life, and other personal property, all of which the plaintiff alleged belonged to him but in the possession of the defendant who refused to deliver it to him, plaintiff and defendant being husband and wife, living apart. A hearing was had upon the bill, answer, replication and proof and a decree entered ordering defendant to deliver to plaintiff the two policies, one issued by the North Western Mutual Life Insurance Company, and the other issued by the Commercial Travelers Eastern Accident Association, and upon full compliance therewith defendant

to be relieved of all further accountability to the plaintiff for all other property declared on by him in the bill. From which decree the defendant entered an appeal. Appeal dismissed. Decree below affirmed. No costs to either party.

The case is fully stated in the opinion.

Wilbur D. Spencer, for plaintiff.

E. P. Spinney, for defendant.

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

MORRILL, J., concurring in part by note.

PHILBROOK, J. This is a proceeding under the provisions of R. S., Chap. 66, Sec. 6, which allows either wife or husband to bring a bill in equity against the other for the recovery, conveyance, transfer, payment or delivery to the plaintiff of any property, real or personal, or both, exceeding one hundred dollars in value, standing in the name of the defendant, or to which the defendant has the legal title, or which is in the possession or under the control of the defendant, which in equity and good conscience belongs to the plaintiff, and which the defendant neglects or refuses to convey, transfer, pay over or deliver to the plaintiff, and, upon proper proof, may maintain the bill. This provision was enacted by Public Laws, 1913, Chapter 48, is entitled "An act conferring equity jurisdiction upon the Supreme Judicial Court to hear and determine property matters between wife and husband or husband and wife," and still stands in its original form. A leading case in which this court has been called upon to construe its terms and to declare the scope thereof is *Greenwood* v. *Greenwood*, 113 Maine, 226, which holds that where a wife received a conveyance by deed of homestead property which was not intended as a gift, and for which the only consideration was an agreement between herself and her husband as to their future method of living, which agreement was not carried out, to permit her to hold the property would be unfair, unreasonable and inequitable, that in equity and good conscience it belonged to the husband, and under the statute now under consideration he should be permitted to recover it. This opinion is a fair indication of the attitude of our court as to this statute even when the defendant had a legal title to

the property, acquired by a deed, sealed and executed, a most solemn instrument and carrying upon its face a presumption of consideration.

In the case at bar the decree from which the appeal is taken ordered the defendant wife to deliver to the plaintiff husband an insurance policy upon the life of the plaintiff, made payable to the defendant as beneficiary, together with a duly executed release of all claims to the proceeds of said policy, known in the case as the Northwestern policy; also an accident policy upon the life of the plaintiff, payable to the defendant as beneficiary, and known in the case as the Commercial Travelers' policy.

THE COMMERCIAL TRAVELERS' POLICY. The defendant claims an interest in this policy because she is named as the beneficiary therein. She claims that the moment the policy was issued it created a vested interest in her, the beneficiary therein named, and a vested interest in the money which might become due upon it, in case of the death of the insured, and that the insured could not assign nor surrender it without her assent. If this policy were an old line life insurance policy, so-called, and not an accident policy, this claim would be well founded, for in *Laughlin* v. *Norcross*, 97 Maine, 33, citing a long list of authorities, our court said: "It is settled by the great weight of authority that a policy of life insurance, the moment it is issued, creates a vested interest in the beneficiary therein named."

But *McManus* v. *Peerless Casualty Co.*, 114 Maine, 98, points out an important principle in these words: "The line of demarcation between a vested interest and a contingent interest in a life or accident policy is found in the terms of the contract. This line is also usually found in the character of the policy. The old line policies usually create a vested interest; the fraternal policies, it may be said, usually do not. If the policy reserves no right of control in itself or in the procurer, over the interest provided for the beneficiary, the policy, the moment it is issued, creates a vested interest in the beneficiary therein named. If the contract reserves the right to modify the policy or change the beneficiary without the consent of the beneficiary, then it creates a mere expectancy."

As to this policy, on the other hand, it is claimed by the plaintiff that the contract of insurance was executed at the home office of the insurance company in Boston; that the company is a Massachusetts corporation and subject to the laws of that commonwealth; that

the plaintiff was a resident of New Hampshire when he became a member of the association as shown by the policy; that lex loci contractus controls; that this is not a Maine contract; that the Maine cases cited by the defendant are inapplicable for the further reason that they apply to life policies terminated by death and not at all to accident insurance policies; that if the defendant's contention were sustainable the insured could not obtain possession of his own policy to enable him to bring suit thereon in case of partial injury where compensation might be recoverable by himself in person without cooperation of the beneficiary; that as the association was incorporated in Massachusetts it is governed primarily by the statutes of that state and not by its constitution and by-laws if they conflict with statutory provisions; and finally that the statute law of Massachusetts, in force when the policy was issued, provides "No beneficiary shall have or obtain any vested right in the said benefit until the same has become due and payable upon the death of said member." Acts 1911, Chap. 628, Sec. 6.

We are of opinion that under legal authority, and the facts borne out by the record, the plaintiff should prevail as to this policy.

THE NORTHWESTERN POLICY. The defendant makes no claim to this policy on the ground that she is the beneficiary named therein, but does claim title to it by virtue of the assignment of the same to her. (See Page 31 of defendant's brief). She claims that the assignment was for a valid consideration. This the plaintiff denies. It appears that about the year 1910 the plaintiff hired money of the defendant and for that loan gave her his note, which he claims to have fully paid with interest, and says that he never had any other loans from her. The defendant claims that the note was not fully paid and that other loans were made by her to her husband, which have never been paid, all of which other loans she says formed the consideration for the assignment. Whether the note given in 1910, or thereabouts, was paid, whether other loans were made, and if so whether they were paid, were all questions of fact to be decided by the sitting Justice. As confirming his views it is important to observe that while a note evidenced the loan of $250 or $262 yet no note given for others, no book account, no cancelled checks, no memorandum of any kind, were produced in evidence, to sustain the defendant, although, to be sure, she claimed that she once had a memorandum of the loans which she did not preserve because she considered the assignment of the policy a security for her loans.

There are no "findings" of the sitting Justice in the record although counsel have referred to such in their argument. There is no legal obligation resting upon the justice to find any statement of facts. A bare decree is all that our statute or equity practice require. *Peirce* v. *Woodbury*, 100 Maine, 17; *McKenney* v. *Wood*, 108 Maine, 335. But the filing of a decree, sustaining the bill, is ipso facto a finding of fact in favor of the plaintiff upon some or all of the allegations in his bill. *Murphy* v. *Utah Mining &c. Co.*, 114 Maine, 184. The term "finding" usually imports the ascertainment of a fact in a judicial proceeding, and commonly is applied to the result reached by a Judge, and a statement in the decision of the trial Judge termed a "finding" will ordinarily be treated as a finding of fact if it is capable of such an interpretation. *Garden Cemetery Corporation* v. *Baker*, 218 Mass., 339; Am. Ann. Cases, 1916, B. 75.

It is a well-settled doctrine that the findings of a single Justice in equity procedure, upon questions of fact necessarily involved, are not to be reversed upon appeal unless clearly wrong, and that the burden is on the appellant to satisfy the court that such is the fact, otherwise the decree appealed from must be affirmed. *Androscoggin County Savings Bank* v. *Tracy*, 115 Maine, 433; and it is equally well settled that in appeals from the decree of a sitting Justice in equity cases the vital question is whether there be sufficient legal evidence to sustain the decree below, which carries with it a presumption in its favor. *Redman* v. *Hurley*, 89 Maine, 428.

After a careful examination of the testimony, and full consideration of the extended and able arguments of counsel, we are of the opinion that the appellant has not sustained the burden of satisfying the court that the decree is clearly wrong. Under the express terms of the statute no costs are to be awarded against either party.

Appeal dismissed.
Decree below affirmed.
No costs to either party.

MORRILL, J. I concur in the opinion as to the policy issued by the Commercial Travelers Eastern Accident Association.

Fully appreciating the weight to be given to the decree of the sitting Justice, I am unable to concur in the opinion as to the policy issued by the Northwestern Mutual Life Insurance Company. I

think that the decree below should be modified so as to secure to the defendant $650 from the proceeds of that policy, which has matured since the bill was filed.

STATE *vs.* WINFIELD LAMONT.

Cumberland. Opinion March 3, 1925.

No specific number of sales are necessary, since the repeal of Sec. 14, of Chap. 225, Public Laws, 1856, to establish the offense of common seller of intoxicating liquors, nor are conclusive proof.

The elements constituting this offense may be proven without any evidence of actual sales; or one or more sales under the circumstances shown to exist may warrant a jury in finding a verdict of guilty.

In this case there was evidence in addition to and accompanying the sales actually proven, which warranted the presiding Justice in denying a motion for a directed verdict of not guilty and submitting the case to the jury under appropriate instructions, which it must be assumed were given.

On exceptions by respondent. The respondent was indicted as a common seller of intoxicating liquor, and pleaded not guilty, and at the close of the testimony at the trial filed a motion for a directed verdict of not guilty which was overruled by the presiding Justice and exceptions entered. No testimony was offered by the respondent. Counsel for the respondent contended under his exceptions that proof of four separate sales of alcohol by the respondent under the admitted circumstances without further proof of any kind was not sufficient to sustain a conviction of such an offense. Exceptions overruled: Judgment for the State.

The case appears in the opinion.

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

William B. Mahoney and William C. Eaton, for the respondent.

SITTING: CORNISH, C. J., PHILBROOK, MORRILL, WILSON, STURGIS, BARNES, JJ.

WILSON, J. The respondent was indicted as a common seller of intoxicating liquors. The evidence shows four instances of actual sales to one person, a Deputy Sheriff, within three months. The respondent moved for a directed verdict of not guilty, which was denied. The jury returned a verdict of guilty. The case is before this court on respondent's exception to the court's refusal to direct a verdict in his favor.

The respondent contends that four distinct sales to the same person, each separated by some little period of time, is not sufficient to warrant a verdict of guilty of the offense charged.

Under a former statute, Chap. 255, Public Laws, 1856, Sec. 14, any person who was proven to have made three sales of intoxicating liquor within the time laid in the indictment, or twice convicted of unlawful sales, and who should commit a third offense under the Act prohibiting the sale of intoxicating liquors within six months of the last conviction, should be deemed a common seller. The Legislature presumably adopting this arbitrary rule in view of that followed in the case of common barrators and common gamblers. Bish. Crim. Law, Vol. II., Sec. 65, 3; Bish. Statutory Crimes, Sec. 879; *Com.* v. *Tubbs*, 1 Cush., 2.

Since the repeal of the above act, however, the court has refused to follow this arbitrary rule and has held that no specific number of sales was necessary or conclusive. *State* v. *O'Connor*, 49 Maine, 595; but it was for the jury to determine from all the evidence whether the respondent could be said to be habitually and continually engaged in selling liquor in distinction from individual sales,—one who sells frequently, whenever applied to, customarily, in distinction from isolated sales.

These elements may be proven without any evidence of actual sales; or one or more sales under the surrounding or accompanying circumstances may be sufficient to warrant a jury in finding a respondent guilty of this offense.

In the case at bar, there was evidence in connection with the actual sales from which the jury might fairly have inferred that this respondent had a ready source of supply and in considerable quantity, not only of alcohol, but sometimes could obtain Scotch whiskey; that

a method of communication was agreed upon whenever the complainant should want to purchase and that the respondent was also delivering not only to the complainant, but to others; and that during the period of these sales, he did not appear to have any other regular business, if otherwise engaged at all.

We think the presiding Justice was warranted in submitting the case to the jury under appropriate instructions, which we must assume were given.

Entry will be:

Exceptions overruled.
Judgment for the State.

THERESA PELLETIER *vs.* PHILIP DUPONT.

Androscoggin. Opinion March 3, 1925.

An action on an alleged breach of warranty, that a certain loaf of bread purchased by the plaintiff of a retail dealer was wholesome and fit for human consumption and free from any foreign substances dangerous and harmful to health, will not lie against the manufacturer or baker of the bread, as there is no privity of contract between a manufacturer and a consumer who purchases the articles of a third party, or retail dealer. A consumer's remedy, if any, in such cases is not founded on a breach of a contract of implied warranty, but on a breach of duty on the part of a manufacturer to use due care in the preparation of articles intended for consumption as food, and is founded on negligence.

In the instant case no express warranty existed running from the defendant to the plaintiff by reason of any printed matter contained on the wrapper of each loaf of bread when delivered by the defendant to the retail dealer, as there was no privity between the plaintiff and defendant or any consideration for such a warranty; nor did the printed matter on the wrapper constitute such a warranty as is declared on in the plaintiff's declaration.

On exceptions. An action in assumpsit based upon an alleged breach of warranty. The plaintiff alleged that she purchased of her retail grocer several loaves of bread which was manufactured by the defendant and by him sold to the retail grocer and while eating some

of the bread a common pin concealed in the bread caught in her throat and injured her. At the conclusion of the plaintiff's testimony the presiding Justice ordered a nonsuit and the plaintiff excepted. Defendant contended that there was no privity of contract between the plaintiff and defendant hence there could be no breach of warranty. Exception overruled.

The case is sufficiently stated in the opinion.

Benjamin L. Berman, Jacob H. Berman and Edward J. Berman, for plaintiff.

Frank A. Morey, for defendant.

SITTING: CORNISH, C. J., PHILBROOK, MORRILL, WILSON, STURGIS, BARNES, JJ.

WILSON, J. The plaintiff, who lives with her husband in Lewiston, had occasion to use considerable quantities of bread to supply the needs of an immediate family of six or seven and of some score of boarders or mealers. She was accustomed to order the household supplies chiefly of a certain firm dealing in groceries and provisions, including bread.

The defendant is a baker who manufactures or bakes loaf bread for domestic consumption and known to the trade as "Dupont's Edgeworth Bread." Each loaf of defendant's bread of this brand was, before it left his bakery, wrapped in waxed paper and sealed. The manner of sealing does not appear; but from the evidence the jury might have been warranted in finding that it was so sealed as to retain the wrapper around the bread until the seals were broken, and that the common pin which it is alleged was found imbedded in a loaf of this bread, purchased by the plaintiff, in some way entered the loaf before it left the defendant's bakery.

On each wrapper appeared the following: "Purity Nutrition Cleanliness absolutely applies to Edgeworth Bread. It is made from the highest standard of flour, milled from the choicest selection of Hard Wheat, renowned for the superior quality and quantity of gluten it contains. Edgeworth Bread is the cheapest, because most nutritious. It is rich in flavor and retains its moisture for several days. It is made under the most sanitary rulings, hence the most cleanly.

The above facts are the reasons for the great popularity of this celebrated bread. It is guaranteed after thorough inspection."

On the 4th day of February, 1924, the plaintiff gave an order to the local dealer for several loaves of bread. It does not appear that she expressly ordered bread manufactured by the defendant, but there was delivered to her in the morning of that day by the grocer five loaves of "Edgeworth Bread" wrapped in wax paper, which but a short time previous, on the same day, had been left at the store by one of the delivery carts of the defendant.

Later on the same day, one of the daughters of the plaintiff removed the sealed wrapper from one of the loaves, laid the loaf upon the wrapper, spread on a shelf or board, and cut from the loaf three or more slices. One of the slices was handed to the plaintiff who began to eat it and after a few moments exclaimed that there was something in the bread which she had swallowed which proved to be a common pin.

Whereupon the plaintiff brought this action against the defendant as the manufacturer of the bread upon an alleged warranty that it was wholesome and fit for human consumption as food and was free from any foreign substances dangerous and harmful to the health of those using the bread as food, and seeks to recover for medical attendance and the pain and suffering she endured by reason of the alleged breach.

At the close of the plaintiff's case the presiding Justice directed a nonsuit, to which ruling the plaintiff duly and seasonably excepted.

The liability of the manufacturer of food products to the ultimate consumer when purchased of a retail dealer or middleman is one of novel impression in this State; but has been considered in various forms in other jurisdictions.

It may not be out of place in view of the conflicting views as to the grounds of the manufacturer's liability, to preface the discussion of the issue raised in this action with a brief statement of the law applying to sales of personal property in general and its modification and application to the sale of food products.

The general rule in the case of a sale of personal property, except as to title, is the familiar one of *caveat emptor*. Another equally well-settled principle is that a manufacturer, except when manufacturing for a specific use, and then only to the party for whom made, is not liable to a third party or a stranger to the contract of manufacturer

or sale, for any defects which may later develop in his product unless known to him and rendering the article dangerous. *Downing* v. *Dearborn*, 77 Maine, 457; *White* v. *Oakes*, 88 Maine, 367; *Lewis* v. *Terry*, 111 Cal., 39; *Berger* v. *Standard Oil Co.*, 126 Ky., 155; *Cooley on Torts*, (3d ed.), 1486-89; 24 R. C. L., 512; *Newhall* v. *Ward Baking Co.*, 240 Mass., 435, 436; *Birmingham Chero Cola Co.* v. *Clark*, 205 Ala., 678, 680.

But these rules have their exceptions. In respect to the sale of materials intended to be used as food, while there is no implied warranty where the transaction is between two dealers, or a manufacturer and a dealer, that the article is fit for consumption as food, *Howard* v. *Emerson*, 110 Mass., 320; *Giroux* v. *Stedman*, 145 Mass., 439; *Farrell* v. *Manhattan Market Co.*, 198 Mass., 271; *Swank* v. *Battaglia*, 84 Or., 159; 24 R. C. L., 197; whatever may be the liability in case of fraud or deceit or negligence in preparation; *Mazetti* v. *Armour & Co.*, 75 Wash., 622; where, however, the transaction is between a dealer and a consumer, unless the consumer assumes the risk by selecting the article himself, there is an implied warranty that it is wholesome and fit for consumption as food; Uniform Sales Act, Chap. 191, Sec. 15 (1); Public Laws, 1923; *Farrell* v. *Manhattan Market Co.*, supra; *Friend* v. *Child Dining Hall Co.*, 231 Mass., 65; *Ward* v. *Great Atlantic & Pacific Tea Co.*, 231 Mass., 93; 24 R. C. L., 195; 26 C. J., 783-84; 11 R. C. L., 1119-20; though this court has made an exception in the case of canned or tinned goods, *Bigelow* v. *M. C. R. R.*, 110 Maine, 105; *Trafton* v. *Davis*, 110 Maine, 318, 325; an exception not recognized in Massachusetts as appears in the case last cited from that jurisdiction.

The rule that a manufacturer is not liable to any one except his immediate vendee for any defects in his product, even though due to his negligence, also has its exception in case of articles of a dangerous nature or containing known defects, *Berger* v. *Standard Oil Co.*, 126 Ky., 155; *Waters Pierce Oil Co.* v. *Deselms*, 212 U. S., 159; *Wellington* v. *Downer K. Oil Co.*, 104 Mass., 64; *Tompkins* v. *Quaker Oats Co.*, 239 Mass., 149; but this liability is recognized as founded in tort and not on contract, 24 R. C. L., 514-15; 17 A. L. R., 683.

It is by analogy to this class of cases that this principle has been applied to the sale of drugs and to food products when intended for human consumption by reason of the consequences to life and health

which may flow from improperly prepared products or containing deleterious materials, if placed on the market for consumption as medicine or food. The cases recognizing this liability are too numerous for citation. They may be readily referred to in 11 R. C. L., 1122; 26 C. J., 785; 17 A. L. R., 686-88.

While the liability is generally recognized, the principle on which it rests is not agreed upon: some authorities holding there is an implied warranty by a manufacturer running to the consumer, even though he purchases of a third party or dealer; while others hold that the obligation to the consumer who purchases of a dealer, or middleman, rests entirely on negligence or failure to exercise due care in the preparation of such products, knowing them to be intended for human consumption, and there can be no warranty running to the consumer who does not purchase of the manufacturer, since there is no privity of contract between them. *Davis* v. *Van Camp Packing Co.*, 189 Iowa, 775; *Rainwater* v. *Coca Cola Bot. Co.*, 131 Miss., 315; *Tomlinson* v. *Armour & Co.*, 75 N. J. L., 748; *Freeman* v. *Shults Bread Co.*, 163 N. Y. S., 396; *Chysky* v. *Drake Bros. Co.*, 235 N. Y., 468; *Boyd* v. *Coca Cola Bottling Co.*, 132 Tenn., 23; *Watson* v. *Augusta Brewing Co.*, 124 Ga., 121; *Birmingham Chero Cola Bottling Co.* v. *Clark*, 205 Ala., 678; *Salmon* v. *Libby, McNeil & Libby*, 219 Ill., 421; *Park* v. *C. C. Yost Pie Co.*, 93 Kan., 334; *Goldman & Freeman Bottling Co.* v. *Sindell*, 140 Md., 488; *Flaccomio* v. *Eysink*, 129 Md., 367; *Meshbesher* v. *Channellene Mfg. Co.*, 107 Minn., 107; *Ketterer* v. *Armour & Co.*, 247 Fed., 921; *Drury* v. *Armour & Co.*, 140 Ark., 371; *Roberts* v. *Anheuser Busch Brewing Co.*, 211 Mass., 449; *Tonsman* v. *Greenglass*, 248 Mass., 275; *Wilson* v. *Ferguson Co.*, 214 Mass., 265.

It is at least a significant fact that in a very great majority of the reported cases the action has been based on negligence and the liability held to be founded on a duty owing to the public, and in only a few instances has any attempt been made to base the right of recovery on any contractual relations alleged to exist between the manufacturer and the ultimate consumer.

The only cases to which our attention has been called, in which this issue was actually involved, and on which it has been held that there was an implied warranty running from the manufacturer of food products to the consumer when purchased by the consumer of a third party, or retail dealer, are: *Davis* v. *Van Camp Packing Co.*,

189 Iowa, 775; *Jackson Coca Cola Bottling Co.* v. *Chapman*, 106 Miss., 865; *Rainwater* v. *Coca Cola Bottling Co.*, 131 Miss., 315; *Hurtzler* v. *Menshim*, (Mich.), 200 N. W., 155 and *Chysky* v. *Drake Bros. Co.*, 182 N. Y. S., 459; the last case, however, has been reversed by the New York Court of Appeals, 235 N. Y., 472.

This issue was not involved in *Mazette* v. *Armour & Co.*, 75 Wash., 622, which was an action by a restaurant proprietor against the manufacturer for damage to his business through furnishing him with unwholesome products; and the recognition by the court in that case of the doctrine of implied warranty running from the manufacturer to the consumer, regardless of any privity of contract between them, is mere *dicta*, as was also the statement of the court in *Ward* v. *Morehead City Sea Food Co.*, 171 N. C., 33 that there were numerous authorities holding such a doctrine, and citing *Watson* v. *Augusta Brewing Co.*, 124 Ga., 121 as a single example, which case, however, is not based on any contractual relation at all, but on a duty owing to the public; or in other words, was an action *ex delicto*.

The case of *Park* v. *C. C. Yost Pie Co.*, 93 Kan., 334 is sometimes found cited as sustaining the doctrine of an implied warranty running with food products into whomsoever hands they may finally come to be consumed; but this case, too, goes no farther than to recognize a duty to the public to use that degree of care commensurate with the consequences, that may flow from supplying to the public injurious food products or containing foreign or deleterious matter, and a liability in damages for a breach of that duty. The case is not based on, nor does it recognize any warranty by the manufacturer enuring to the consumer who purchases of a third party.

On the other hand, such a doctrine is contrary to the well-established principles, that there can be no implied warranty without privity of contract, and warranties as to personal property do not attach themselves to and run with the article sold. Williston on Sales, Sec. 244; Williston on Contracts, Vol. II., Sec. 998; *Davidson* v. *Nichols et al.*, 11 Allen, 514, 517; *Lebourdais* v. *Vitrified Wheel Co.*, 194 Mass., 341; *Roberts* v. *Anheuser Busch Brewing Co.*, 211 Mass., 449, 451; *Gearing* v. *Berkson*, 223 Mass., 257; *Chysky* v. *Drake Bros. Co.*, 235 N. Y., 468, 472; *Tonsman* v. *Greenglass*, 248 Mass., 275.

It is further overborne, we think, by the weight of authority to the contrary and sounder reasoning. *Roberts* v. *Anheuser Busch Brewing Co.*, supra; *Gearing* v. *Berkson*, supra; *Chysky* v. *Drake Bros. Co.*,

supra; *Drury* v. *Armour & Co.*, 140 Ark., 371; *Birmingham Chero Cola Bottling Co.* v. *Clark*, 205 Ala., 678; *Flaccomio* v. *Eysink*, 129 Md., 367, 379; *Goldman & Freeman Bottling Co.* v. *Sindell*, 140 Md., 488; *Crigger* v. *Coca Cola Bottling Co.*, 132 Tenn., 545; and is also recognized though not in issue in *Tomlinson* v. *Armour & Co.*, 75 N. J. L., 748.

Of the cases referred to as upholding the doctrine of an implied warranty by a manufacturer of food products and running to the consumer, even though he purchases of a third party or middleman, the case of *Davis* v. *Van Camp Packing Co.*, supra, must be regarded as the leading case and the most fully considered.

But an examination of the opinion of the court in this case discloses practically no attempt at discrimination between cases involving the liability of a manufacturer to a consumer who purchases of a dealer, and the liability of the dealer, or between those involving the liability of the manufacturer on the ground of negligence or fraud and on the ground of an implied warranty running with the products into whomsoever hands they may come. From a general review of the authorities, without apparent effort to distinguish the principles involved, the court draws the unwarranted conclusion, we think, "that from the decisions, and particularly the later decisions, ... there is an implied warranty as contended by the plaintiff, and the question as to privity is not controlling."

The only cases cited in the opinion on which its conclusion could rest are the Mississippi cases found in 106 Miss., 868; 131 Miss., 315 and a dictum in the case of *Ward* v. *Morehead City Sea Food Co.*, supra, all of which are based, in the first instance, on the case of *Watson* v. *Augusta Brewing Co.*, supra, which as before pointed out, is not an action *ex contractu* on an implied warranty, nor does it support the doctrine that an implied warranty may exist without any privity of contract.

The other cases expressly noted in the opinion are either clearly based on the ground of negligence, or like the *Minnesota Case*, 115 Minn., 172, is an action between the person furnishing the food and the person consuming it.

After a careful review of the authorities, this court, while approving the doctrine recognized in *Bigelow* v. *M. C. R. R.*, 110 Maine, 105, and *Trafton* v. *Davis*, 110 Maine, 325 that a manufacturer of food under modern conditions of preparing and dispensing such products

owes a duty to every consumer purchasing his products in the open market, finds no good reason for repudiating or modifying, even in the case of food products, however prepared, the well-established rule that in order to recover on a warranty, there must be a privity of contractual relations between the parties, which is wholly lacking in the case at bar.

It is suggested, however, that even if there were no implied warranty by the defendant in this case, on which the plaintiff may base a right of recovery, that the printed matter constituted an express warranty of its wholesomeness as food and that it was free from any foreign or deleterious substance.

This contention must also fail as a basis for recovery by the plaintiff, not only for the reason that there was no privity of contract between the parties, nor any consideration for such a warranty, but also for the further reason that the printed matter on the wrappers cannot be construed as an express warranty that by no chance, through accident or negligence, did the bread contain any foreign substance, such as a common pin.

The plaintiff's declaration is not founded on an express warranty, *in haec verba*, nor does the printed matter contained on the wrappers support the allegations.

The allegations are that the bread was warranted to be wholesome and fit for consumption as human food and to be free from harmful and dangerous substances.

The representations on the wrapper are: that Edgeworth Bread is pure nutritious and clean, which must be construed in the light of the provisions of Sec. 12 of Chap. 36, R. S., and what immediately follows on the wrapper,—in other words, that it was pure and not adulterated as defined in Sec. 12 of Chap. 36, and as to the standards set forth on the wrapper: that it was nutritious because it was made from the highest grade and choicest selection of wheat renowned for the quality and quantity of gluten it contains; and that it was clean, because as set forth, "It was made under the most sanitary rulings," and in an up-to-date and sanitary bakery.

That it was guaranteed after thorough inspection, must be construed as expressly guaranteeing it only in the above particulars, and not that it was expressly represented to be free from every possible foreign substances which did not enter into its composition as one of its ingredients as bread, and which may have found its way

into it by accident, or even by negligence,—unless the foreign substance could be considered as a breach of the guaranty that the bread was prepared in a clean and sanitary manner, of which the mere presence of an ordinary pin would be no evidence.

In other words the defendant represented his bread to be pure and nutritious as to the ingredients which entered into its composition as bread and according to the standards of quality expressly set forth on the wrapper, and clean and sanitary as to its manner of preparation and baking.

It is not contended that the bread was not pure and wholesome and fit for food so far as any ingredient that entered in its composition as bread is concerned, measured by any standard, nor is there any allegation or claim that it was not clean and sanitary as represented on the wrapper.

The presence of a foreign substance by accident or negligence, and not one of the ingredients, unless proof of insanitary methods, could not be held to be a breach of any express warranty contained on the wrappers of the defendant's bread, even if there was privity of contract between him and the plaintiff, though if present through negligence she might have a right of action whether there was privity or not. *Newhall* v. *Ward Baking Co.*, 240 Mass., 437.

In actions for deceit based upon similar representation the Massachusetts Court has recently held in the last cited case and in *Alpine* v. *Friend Bros., Inc.*, 244 Mass., 164, that such representations did not include the accidental presence in bread, otherwise fit for consumption as food, of a foreign substance like a nail or piece of tin, "not permeating the loaf, nor constituting one of its ingredients."

That the actions in these cases were based on deceit instead of express warranty, under which form of action the plaintiff would not have had the burden of proving scienter and intent to defraud, no doubt was due to the Massachusetts Court having so unequivocally held that there can be no warranty where there is no privity of contract. See *Gearing* v. *Berkson*, supra, where a husband recovered of a dealer for selling him unwholesome provisions, yet his wife could not, though she purchased the food. It being held that she was acting as her husband's agent in making the purchase, and hence there was no privity of contract between her and the dealer and therefore she could not recover on an implied warranty that the fowl, which was selected by the dealer, was fit for consumption as food.

Whether a like situation existed in the case at bar does not clearly appear. It was not shown to whom the bread was charged, or credit given, by the dealer, whether to the plaintiff or her husband, but this question is not material upon our view of the case, as there was clearly no privity of contract between the plaintiff and defendant, even though she was the actual purchaser of the bread as alleged in her declaration, there being no evidence to sustain the allegation in the first count that the dealer of whom she purchased was a mere distributing agent for the defendant.

Exception overruled.

FISHING GAZETTE PUBLISHING CO., INC.

vs.

BEALE & GANNETT COMPANY.

Washington. Opinion March 3, 1925.

Sec. 127 of Chap. 87, R. S., authorizing the use of affidavits as a mode of proof in actions of assumpsit, making such affidavits prima facie evidence only of what they contain violates no constitutional provision. The statute cannot be construed as making such affidavit conclusive proof, but in all cases it must be left to the tribunal determining the facts as to whether it is sufficient on which to base a verdict for the plaintiff. The authority of a foreign notary to administer oaths being of a statutory origin will not be presumed by this court without proof.

The statute cannot be construed as empowering foreign notaries to administer oaths in such cases. A statute will not be construed as conferring authority on any person not within the jurisdiction of the State, unless by necessary implication, which does not exist in the instant case.

Furthermore this mode of proof is permitted in courts of law in this State only by the statute, and only such affidavits as comply with the statute can be received. Affidavits under the statute can only be received that have been "made before" a domestic notary and which bear the imprint of his notarial seal.

On exceptions. An action of assumpsit on account annexed. The plaintiff offered in proof of its claim an affidavit as complying with

R. S., Chap. 87, Sec. 127, purporting to have been made by its treasurer before a notary public in the State of New York, no evidence being offered as to the official capacity or authority of the person administering the oath except the imprint of the notarial seal. The affidavit was admitted under objection and defendant excepted. Exceptions sustained.

The case appears in the opinion.

Oscar L. Whalen, for plaintiff.

E. B. Jonah and J. H. Gray, for defendant.

SITTING: CORNISH, C. J., MORRILL, WILSON, STURGIS, BARNES, JJ.

WILSON, J. An action of assumpsit in the name of the Fishing Gazette, described in the writ as a corporation located in New York, to recover on an account annexed for advertising space furnished to the defendant company.

The plaintiff at the trial, in support of its declaration, offered an affidavit subscribed and sworn to by Russell Palmer, who described himself as treasurer of the Fishing Gazette Publishing Co., Inc., of New York.

The affidavit was offered as complying with Sec. 127, Chap. 87, R. S., and the oath was administered, according to the jurat, by Ruth C. Lane, Notary Public in and for New York County, and bears the imprint of a notarial seal.

To the introduction or reception of this affidavit the defendant seasonably objected and was allowed an exception. The court ordered judgment for the plaintiff. The case is before this court only upon the defendant's exception to the admission of the affidavit.

The bill of exceptions, however, is irregular in form and insufficient under the well-established rules of this court. No grounds of the defendant's objection to the admission of the affidavit appear in the bill of exceptions; nor does it appear, except by inference, that the defendant was aggrieved by its admission, as there might have been, so far as the bill of exceptions discloses, sufficient evidence in the case outside of the affidavit, on which to base the judgment of the court, although it appears to be tacitly admitted that the affidavit is the sole basis on which the judgment rests. This court cannot be compelled to travel outside the bill of exceptions itself. It must

affirmatively appear therein that the party excepting has been aggrieved. *Jones* v. *Jones*, 101 Maine, 447; *Feltis* v. *Power Co.*, 120 Maine, 101.

However, as counsel agree upon the main issue between them, and it is one frequently occurring in practice, and no question is raised by the plaintiff as to the adequacy of the bill of exceptions, the court will consider such of the defendant's objections as the parties agree were raised in the court below.

The defendant's objection to the constitutionality of the Act has no merit. This court has already held that the kind of evidence, that may be received by the court, may be determined by the Legislature. *Mansfield* v. *Gushee*, 120 Maine, 333, 336; *State* v. *Intox. Liquors*, 80 Maine, 57; *Wade* v. *Foss*, 96 Maine, 230; *Berry* v. *Lisherness*, 50 Maine, 118; Cooley Constitutional Lim., (6th Ed.) 450-2. While the language of the statute is mandatory as to the effect and sufficiency of such affidavits as evidence, this court held in *Mansfield* v. *Gushee*, supra, that its probative force must still be for the jury, or the tribunal determining the facts.

Upon the question of misnomer or variance, it does not appear that this question was raised in the court below. Against the objection of the plaintiff, it cannot be considered here under the defendant's bill of exceptions.

A variance or question of identity between parties named in written documents and those in the writ might, if raised below, have been cured or explained by other evidence. Whether cured or not in this case it must now be treated as waived, and moreover is of no importance, in view of our construction of the statute.

The real question between the parties, and the basis of the only objection which it is agreed was raised in the court below to the introduction of the affidavit is whether it was sworn to before an official authorized to administer the oath in such cases and also whether it sufficiently appears that the person whose name is subscribed to the jurat was a duly appointed and qualified notary public.

This method of proof is wholly statutory. The use of affidavits as evidence on which to base a final judgment is not permitted in this state in actions at law unless by virtue of some statute. Only the affidavits, therefore, described by Sec. 127 of Chap. 87, R. S., and made before the magistrate therein named, i. e., "a notary public using a seal," can be received and have the probative force given to it by the statute.

This court having already held that it will not take judicial notice of the authority of notaries public in other states to administer oaths to affiants, *Holbrook* v. *Libby*, 113 Maine, 389, without proof of such authority, an affidavit sworn to before a foreign notary would have to be rejected, unless Section 127 could be construed to vest such authority in foreign notaries.

But in view of the previous decisions of this court, *Bramhall* v. *Seavey*, 28 Maine, 45, 49; *Wilkins* v. *Dingley*, 29 Maine, 73, 74; *Holbrook* v. *Libby*, supra, and the rule of construction generally observed in such cases, Black on Interpretation, Sec. 42, Page 91, Sec. 127 cannot be construed as conferring any authority on foreign notaries. On the contrary, it must be held to restrict the use of such affidavits to those made before domestic notaries alone.

The Legislature will not be presumed to intend by language without limitation to bind or confer any authority upon persons not within its jurisdiction. "It is only when the legislature of the state expressly or by necessary implication grants the authority, that persons bearing without the limits of the state an official character, can perform any official act to be effectual by the laws of this state." *Bramhall* v. *Seavey*, supra. Where authority is conferred on officials, or officials are designated in a statute, the presumption is that only domestic officials are included.

No necessary implication exists in this instance that foreign notaries are also included. There is ample scope for the operation of this act when confined to affidavits made before domestic notaries. It is a significant fact, also, that whenever the Legislature has conferred authority on officials in other states to perform acts, or authorized official acts done in other states, to be effectual in this state, it has done so in express terms, as in the case of depositions and acknowledgment of deeds, Sec. 20, Chap. 112, R. S.; Sec. 23, Chap. 78, R. S.

As remarked *supra*, this method of proof is only permitted by virtue of the statute, and only affidavits, taken as provided in the statute, can be received. The Legislature, therefore, not having expressly, nor by necessary implication, authorized the receipt of affidavits made before officials in other states, or even before any other official than a notary public in this state, only such as have been made before such official, and bearing the imprint of his official seal, can be received or have the effect prescribed by the statute.

If the Legislature deems it expedient to extend this mode of proof to affidavits "made before" officials of other states, it is solely within the province of that body to do so.

Exceptions sustained.

CHARLES L. JONES, Ex. In Equity

vs.

FRED L. WARREN, Admr.

Penobscot. Opinion March 4, 1925.

The language "to have and to hold the same to her, her heirs and assigns forever" in a will where the legatee, a wife, predeceased the testator, does not prevent a lapse of the legacy, unless other provisions in the will require that the words "to her, her heirs and assigns forever" shall be construed as meaning "to her or her heirs or assigns forever," as such language are words of limitation being descriptive merely of the nature of the estate.

In the instant case after the lapsing of the legacy the estate of the testator vested in his heirs, not by virtue of the will, but under laws of inheritance as to undevised property, for the testator did not disinherit his heirs, because his will does not in unmistakable terms or by necessary implication vest the residue in another.

On appeal. A bill in equity seeking the construction and interpretation of the will of George W. Carpenter which provided that all of his property and estate after the payment of debts, funeral expenses, expenses of administration, and for a monument, should go to his wife, Evelyn M. Carpenter. Several years before the death of testator his wife, the sole devisee and legatee, died. The question involved was as to whether the legacy, by reason of the death of the legatee before that of the testator, lapsed and the estate should go to the heirs of the testator as undevised property, or whether the estate should go to the heirs of the deceased legatee. The sitting Justice found that the bequest of personal property did not lapse, but passed to the heirs of the deceased legatee, the wife, as substi-

tuted legatees, and the heirs of the testator appealed. Appeal sustained. Decree of sitting Justice reversed, in so far as it holds that the legacy in question did not lapse.

The opinion states the case.

W. H. Mitchell, for complainant.

Robert F. Dunton and Andrews, Nelson & Gardiner, for Ruth W. Wright et al., intervening defendants and heirs at law of George W. Carpenter.

Gillin & Gillin, for Fred L. Warren, Admr. and Grace Gertrude Ayers et al., heirs of Evelyn M. Carpenter, and intervening defendants.

SITTING: CORNISH, C. J., PHILBROOK, MORRILL, WILSON, STURGIS, BARNES, JJ.

BARNES, J. A bill in equity to construe the will of George W. Carpenter, heard before a single Justice, who held that the property passed to the heirs of the wife of the testator, as substituted legatees, and before this court on appeal by the heirs of the testator.

In 1904, George W. Carpenter, a resident of Jackson, in the county of Waldo, in this state, executed a will, which upon his decease proved to be his last. The paragraphs of the will to be interpreted are worded as follows:

"THIRD. I give and bequeath to my beloved wife, Evelyn M. Carpenter, all of my personal property of every name and nature.

"FOURTH. I give and devise to my said beloved wife, Evelyn M. Carpenter, all my real property and estate, wherever situated and however and whenever found; to have and to hold the same to her, her heirs and assigns forever, with all the appurtenances, thereunto belonging.

"FIFTH. And my will is to exclude all of my heirs, kindred and relatives, and all other persons whomsoever, excepting my beloved wife, aforesaid, from taking under this my last will and testament.

"SIXTH. I give bequeath and devise to my beloved wife, Evelyn M. Carpenter, her heirs and assigns forever, all the rest, residue and remainder of my estate, real, personal and mixed, wherever and however and whenever acquired; to have and to hold the same to her, her heirs and assigns forever, with all the appurtenances thereunto belonging."

Evelyn M. Carpenter died February 29, 1916, without lineal descendants, and the testator, on November 18, 1922, more than six years subsequent to the decease of his wife, and the will, precisely as drawn eighteen years before, was duly presented for probate by the executor named therein.

By subsequent proceedings all persons who, in any event, can be said to have an interest, whether as legatees or under our statutes of descent and distribution, have been made parties to this cause. At the decease of the testator, it was found that his entire estate was personal property.

Hearing was had, upon bill, answers and proof, and after argument of counsel, representing all parties, it was decreed by the sitting Justice, that the bill be sustained; that the bequest of personal property did not lapse, but passed to Evelyn M. Carpenter's heirs at law as substituted legatees; and from this decree the intervening defendants and heirs at law of the testator appeal, urging that the bequest lapsed, and claiming, that the property left by the testator be distributed by the executor among the heirs at law of the said testator.

None of the questions at issue are novel, and all have been decided in well-considered opinions of this court.

No statute of this State, applicable to the facts in this case, having changed the rule at common law, always heretofore adhered to in Maine, the legacy expressed in the third paragraph of the will lapses. *Stetson* v. *Eastman*, 84 Maine, 366; *Farnsworth* v. *Whiting*, 102 Maine 296; *Adams* v. *Legroo*, 111 Maine, 302.

But to obviate the result inevitable under the foregoing rule, it is claimed that the testator disinherited his own heirs, by expressions contained in the fifth and sixth paragraphs, the fourth paragraph having become of no effect, because he had reduced all his holdings of property to personalty. It is true the testator used words not commonly found in wills, notably the expression, "to have and to hold the same to her, her heirs and assigns forever."

To sustain the contention of the proponents the court must hold the sixth paragraph a bequest to Evelyn M. Carpenter, and, in the event of her death, to her heirs.

Two canons of interpretation of wills, so firmly established as to have become fixed rules of law, overthrow this contention.

"To have and to hold to her, her heirs and assigns," do not express a bequest to the heirs of Mrs. Carpenter, unless the expressed words are distorted to mean, "to her *or* her heirs," etc.

The comma after the word "her," first used, is to supply the word "and"; the expression quoted above is but words of limitation and does not prevent the lapsing of the bequest, being merely descriptive of the nature of the estate, if in truth adding anything to the force and meaning of the preceding phrasing of the bequest. *Farnsworth* v. *Whiting*, 102 Maine, 296, and cases cited.

In his will, in addition to the legatee, the testator mentioned "assigns" as well as "heirs," and it is argued that the bequest is to the legatee *or* to her heirs, or assigns. Our court has considered this wording in former cases, and has held that, although courts have in some instances held that a devise to one "and" his heirs might be regarded as good to the heirs if the primary legatee dies in the lifetime of the testator, by making the word "and" read as if it were the word "or"; yet this has never been done unless the other provisions in the will require such a construction, and we can find no case where it has been permitted, if the devise runs to assigns as well as to heirs. *Keniston* v. *Adams*, 80 Maine, 290.

If the testator intended to disinherit his heirs, he failed, because his will does not in unmistakable terms or by necessary implication vest the residue in another.

It must be agreed that the natural inclination of an owner of property, as a rule, coincides with the settled law of our race, that it shall descend, unless otherwise willed, to his heirs.

For many years the testator lived with the provision in his will that, if he should predecease his wife, she should own what he left. She died before he did, and while he was in the possession of his faculties and, so far as we know, competent to change his will, had he so desired. As he left it, after the lapsing of the specific legacy his estate vests in his heirs. It could easily have been worded to a contrary intent. Such interpretation as sought by the proponents would be writing a will, not construing one presented for probate.

It may be further pertinent to suggest that by the fifth paragraph the testator expressed his will to exclude as legatees all his heirs, kindred, relatives and other persons, except his wife, and to point out that the heirs of the testator do not take by the will, but, because

the legacy lapsed under the well-established rules of law, they are taking under laws of inheritance as to undevised property.

Appeal sustained. Decree of sitting Justice in so far as it holds that the legacy in question did not lapse is reversed. The proceeds of the estate remaining in the hands of the executor must be distributed as intestate property among the legal heirs of the testator.

The costs of these proceedings, including a reasonable fee for appellant's attorneys may be included and allowed as a proper charge against the estate.

Decree in accordance with the opinion.

WALTER S. GLIDDEN ET AL., Receivers of
Lincoln County Trust Company

vs.

RICHARD T. RINES.

Lincoln. Opinion March 9, 1925.

A receiver appointed by the court to receive and preserve property or funds, is a ministerial officer of the court. He represents the court, acts under its direction, and his possession of the property or funds in litigation is the possession of the court. He has the power or right of possession of the property or funds, and nothing more. He takes no title thereto, and as to any act of his regarding the property or funds, the authority to so act must come from the court. Without that authority no act of his is valid.

To hold that a receiver, by his unauthorized act, might jeopardize the value or character of the assets in his possession would not only be a legal irregularity, but might open a door to fraud.

To hold that a receiver, even though acting in good faith, but through a mistaken idea as to his power, may not by the most expeditious legal action rectify his error and restore to the possession of the court any property or assets improperly conveyed or disposed of, would be contrary to all sense of legal authority or common justice.

On exceptions. At the time the plaintiffs were appointed receivers of Lincoln County Trust Company, the defendant had a checking

account in the bank of $487.74, and also was indebted to the bank on his note secured by a mortgage in the amount of $800. The receivers allowed the defendant a set-off of the amount of his deposit in the checking account and discharged the note and mortgage upon payment of the balance of $312.26. The note and mortgage were among the segregated assets of the bank. This action was brought to repossess the receivers of the amount allowed in the set-off, on the ground that the receivers had exceeded their authority in permitting such set-off. At the conclusion of the testimony before a jury, by agreement, the case was withdrawn by the court and it went to the Law Court on exceptions to the ruling of the presiding Justice in directing a nonsuit. The ruling directing a nonsuit was based upon the ground that an action could not be maintained until it was determined in final liquidation what dividend the defendant was entitled to, if any, on his checking deposit, which dividend, if any, should be credited on the amount allowed in set-off and the balance recovered. Exceptions sustained.

The case appears in the opinion.

Walter S. Glidden, for the plaintiffs.

Frank A. Morey, for defendant.

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

PHILBROOK, J. This is an action of assumpsit in which the plaintiffs, as receivers, seek to recover from the defendant the sum of four hundred eighty-seven dollars and seventy-four cents ($487.74) upon the common count for money had and received, with a specification of claim "that the defendant was indebted to said Lincoln County Trust Company in the sum of $800.00 upon his promissory note for said amount, dated October 29, 1915, payable in one year from the date thereof, with interest at the rate of six per cent. per annum, which note was then secured by a mortgage of certain real estate, given by the defendant to said Lincoln County Trust Company on the same day. Interest on said note was paid by the defendant from time to time up to April 29, 1923. On May 3, 1923, the defendant being then indebted to said Lincoln County Trust Company in the sum of $800.00, being the face of said note, effected a settlement of his liability to said bank on said note with one Wesley C. Day, who was then and there one of the receivers of said Lincoln County

Trust Company. The defendant on said May 3, 1923, was a depositor in said Lincoln County Trust Company, and had standing to his credit on his checking account as a demand deposit in the commercial branch of department of said Trust Company, a balance of $487.74; and the said Wesley C. Day, as receiver aforesaid, then and there allowed and permitted the defendant to take credit by way of off-set against the amount due from him to said bank for said sum of $487.74, and then and there cancelled said note and discharged said mortgage, whereby, and by reason whereof the said defendant received the sum of $487.74, to which by law he had no right or title, and has never repaid the same, but now holds the same for the plaintiffs' use."

Prior to the institution of this action the receivers made application to this court for instructions as to claims of set-off made by depositors, and it was held that the loans secured by mortgages of real estate had been legally segregated as security for the savings depositors and denied the right of set-off as previously allowed by the receivers to the defendant. *Lawrence* v. *Lincoln County Trust Company*, 123 Maine, 273. The suit at bar was then begun.

The case was opened to a jury but at the conclusion of the testimony, by agreement, it was withdrawn from those arbiters and was taken under advisement by the presiding Justice who rendered his decision in vacation pursuant to the provisions of R. S., Chap. 87, Sec. 37. The magistrate found that the receivers and the defendant had acted in good faith when they settled the question of set-off, as already stated, but ordered a nonsuit, and the plaintiffs bring the case to this court on exceptions to that order. This is the only issue technically raised by the bill of exceptions. In their brief plaintiffs say "we will also discuss all the issues in the case with a hope that the court will so decide the whole question as to give the plaintiffs, who are its officers, proper guidance for their proceedings." This we must decline to do since an opinion expressed by a court upon an issue not necessarily involved in the case lacks the force of an adjudication, it is merely obiter dictum. *American Surety Company* v. *United States*, 239 Fed., 680. *Words & Phrases*, Vol. 3, Page 2051.

The facts are not in dispute. The issue raised is a legal one. The reasons upon which the sitting Justice based his order of nonsuit are found in the following language.

"It is undoubtedly true that in the equitable distribution of the assets all creditors of the same class are to be treated alike and are

entitled to payment proportionately, and that the transaction in question was in effect a payment in full of Mr. Rines' commercial deposit. But the defendant is entitled to the same dividend which other creditors receive, and the plaintiffs at most can only be entitled to recover the difference between the amount paid and the percentage or dividend which Mr. Rines would have received if his account had been proved and dividends paid thereon in due course of liquidation. What the difference is does not appear and cannot be shown until the liquidation is completed. The segregated assets are held as security for the savings deposits; they are supposed to be carried on the books of the bank at their true value. R. S., Chap. 52, Sec. 90. Any excess above the amount required to pay the savings depositors will be available for payment of other creditors; in addition there will be the non-segregated assets and the stockholder's liability so available. . . . . The case presents a matter for accounting by the receivers. They cannot recover back the whole amount so paid and received in good faith but only the overpayment. The burden is upon the receivers to show what the difference is; it is incumbent upon them, at their peril, to have the dividend upon the creditor's claim determined. This is no great hardship upon the receivers who seek to be relieved from their own mistake. The receivers paying may prove any claim so paid in their own names, being subrogated to the rights of the creditor whose claim has been fully paid. The authorities in the analogous cases of overpayments made by administrators of insolvent estates are in point. *Morris* v. *Porter*, 87 Maine, 510, 516; *Gillen* v. *Sawyer*, 93 Maine, 151, 166. Inasmuch as plaintiffs have not shown the amount of the overpayment this action cannot be maintained."

Briefly stated, without deciding other questions of law as a reason for ordering a nonsuit, if any such exist, the sole reason for the order is that the action was prematurely brought. This, therefore, as we have already suggested, is the only issue of law to be determined in the instant case. As counsel have addressed their arguments to legal points other than the one thus prevailing in the order of nonsuit, we receive slight assistance from their briefs.

In view of the fact that the learned Justice in the court below referred to certain cases, as analogous to this, wherein the rights, duties and liabilities of executors and administrators are concerned,

we deem it important to call attention to the wide differences existing between the character, powers, duties and liabilities of such trust officers and those of receivers appointed as in this case.

In a somewhat early case, *Hathorn* v. *Eaton*, 70 Maine, 219, our court held that an executor derives all his title from the will, his interest being completely vested at the instant of the testator's death, and he may, therefore, before probate, perform almost any act belonging to his office. In a later case, *Chadwick* v. *Stilphen*, 105 Maine, 242, the rule is given in more restricted language, holding it to be a well-settled rule in this State that the power of an executor to act in the settlement of the estate of a testator is not derived solely from his nomination in the will; that his authority is not complete until there has been a compliance with all the prerequisites of R. S., Chap. 68, Sec. 8. It should not be overlooked that in some jurisdictions, contrary to the doctrine of the common law the executor derives his power and authority over the property of his decedent from the laws of the state, and not from the will itself. *Baker* v. *Cauthorn*, 23 Indiana Appeals, 611; 77 A. S. R., 443; *Calloway* v. *Doe*, 1 Blackf., 371; *Lucas* v. *Tucker*, 17 Ind., 41. In the case of an administrator the rule is different from that of an executor, it being the generally accepted view that the administrator derives his powers from his appointment by a proper tribunal and that the office is solely the creature of the statute. *Vroom* v. *Van Horne*, 10 Paige, 549, (N. Y.); 42 Am. Dec., 94; *Mount* v. *Brown*, 33 Miss., 566; 69 Am. Dec., 362; *Boyd* v. *Blankham*, 29 Cal., 19; 87 Am. Dec., 146. Although executors and administrators are not public officers, within the commonly accepted meaning of that term, yet both have been deemed to be officers appointed to settle decedents' estates, and therefore that an administrator or executor represents the deceased. *N. O. & C. R. R. Co.* v. *Kerr*, 9 Robinson, (La.), 122; 41 Am. Dec., 323; *Walsh* v. *Packard*, 165 Mass., 189; 52 Am. St. Rep., 508; *Bailey* v. *Dilworth*, 19 Smedes & Marshall, (Miss.), 404; 48 Am. Dec., 760. The language of the court in the latter case seems worthy of quotation as bearing upon the powers, duties and liabilities of an executor. "An executor or administrator represents the deceased. . . . They may compound debts, or enter into arbitrations, and these acts will be upheld, if they are fair, beneficial to the estate, and free from fraud, negligence, or misconduct. . . . . It hence results, that

if they collect debts in bank paper not strictly at par, when the best interests of the estate require it, and where nothing better can be done, their conduct will be sustained."

On the other hand a receiver is a person, indifferent between the parties to a cause, appointed by the court to receive and preserve property or funds, and is a ministerial officer of the court or, as he is sometimes called, the hand or arm of the court. He represents the court, acts under its direction, and his possession of the property or funds in litigation is the possession of the court. His authority is derived solely from the act of the court appointing him and he is subject to its order only. In *Farmer's Loan Co.* v. *Oregon Pac. R. R. Co.*, 31 Oregon, 237; 65 A. S. R., 822, the court holds that a receiver is the agent and executive officer of the court, which, by virtue of its high prerogative powers, lays its judicial hand upon the property which is the subject of controversy and controls and operates it for the use and benefit, not of either of the parties to the litigation, but for the public and whomsoever in the end it may concern. His acts and possession are the acts and possession of the court. His contracts and liabilities, in contemplation of law, are the contracts and liabilities of the court. The parties to the litigation have not the least authority over him, nor have they any right to determine what liabilities he may or may not incur. His authority is derived solely from the act of the court appointing him and he is the subject of its order only. In *Union National Bank* v. *Bank of Kansas City*, 136 U. S., 223; it is said that a receiver derives his authority from the act of the court appointing him, and not from the act of the parties at whose suggestion or by whose consent he is appointed,—the utmost effect of his appointment is to put the property from that time into his custody as an officer of the court, for the benefit of the party ultimately proved to be entitled, but not to change the title, or even the right of possession in the property.

We feel compelled to hold that the character, powers, duties and liabilities of receivers are so widely different from those of executors and administrators, that the analogy suggested by the learned Justice in the court below does not obtain, and that the authorities cited by him in his findings are not clearly applicable.

R. S., Chap. 52, Sec. 86 gives to the bank commissioner the same authority over trust and banking companies incorporated under the laws of this state (the Lincoln County Trust Company was so

incorporated) that he has over savings banks. Under the authority given by R. S., Chap. 52, Sec. 54, receivers were appointed on his bill for this trust company. They were "to take possession of its property and effects, subject to such rules and orders as are from time to time prescribed by the Supreme Judicial Court, or by any Justice thereof in vacation." This decree of sequestration confers upon the receivers the power or right of possession and nothing more. They are officers of the court, subject to its rules and orders, and even their possession is the possession by the court. They take no title to the property or assets of the trust company, and, as to any act, they receive their authority so to do solely from the court. Without that authority, given originally, or by subsequent ratification, no act of theirs is valid. To hold that a receiver might, by his unauthorized act, jeopardize the value or character of the assets in his possession, would not only be a legal irregularity but might open a door to fraud. To further hold that a receiver, even though acting in good faith, but through a mistaken idea as to his power, may not by the most expeditious legal action, rectify his error and restore to the courts possession any property or assets improperly conveyed or disposed of, would be contrary to all sense of legal authority or common Justice. Indeed the statutory provisions of his appointment impliedly require him to do so. In the case at bar the receivers are seeking to rectify their legal error with promptitude, and before the assets which they improperly allowed to pass from their possession might, through bankruptcy of the person to whom assets were conveyed, or any other cause, become irrecoverable, and it is the opinion of the court that they were not acting prematurely.

Exceptions sustained.

EARL G. HUNNEWELL *vs.* ALPHONSO J. MITCHELL.

Cumberland. Opinion March 12, 1925.

Where the owner of a pair of horses delivered them to the keeper of a sale stable to sell them for him and to pay him a stated price therefor, such owner is equitably estopped to assert title to one of the horses against a bona fide purchaser for value from the keeper of the stable, it appearing that such owner was present in the stable with the prospective purchaser, recommended the horse to him, and did not disclose any interest in the horse or any limitation upon the authority of the keeper of the stable.

On exceptions. An action of replevin to recover possession of a horse purchased in good faith by the defendant of one Albert M. Wheeler to whom the horse had been delivered by plaintiff, its owner originally. Defendant pleaded title. Plaintiff contended that he had delivered the horse to Wheeler under certain conditions but had not given him authority to sell him as his agent. While the defense insisted that the plaintiff delivered the horse to Wheeler for sale and gave him authority to dispose of him without restriction. At the conclusion of the evidence the presiding Justice directed a verdict for the defendant and plaintiff excepted. Exceptions overruled. Judgment for return.

The opinion states the case.

Harry E. Nixon and Jacob H. Berman, for plaintiff.

Frank H. Haskell, for defendant.

SITTING: CORNISH, C. J., PHILBROOK, MORRILL, WILSON, STURGIS, BARNES, JJ.

MORRILL, J. Action of replevin of a horse admittedly once the property of plaintiff, presented upon exceptions to a directed verdict for defendant. Defendant is a bona fide purchaser for a valuable consideration from one Wheeler who conducted a sale stable in Portland.

Viewing the evidence most favorably for the plaintiff (*Shackford* v. *N. E. Tel. & Tel. Co.,* 112 Maine, 204) and assuming that the jury

might have believed his version of his transactions with Wheeler, a verdict in his favor was not warranted.

The plaintiff is the only witness in his own behalf as to the transaction. Upon direct examination a reasonable inference from his testimony might lead to the conclusion that he accepted an offer from Wheeler to pay him $550 for his pair of horses, of which the horse in question was one, harnesses and cart, and delivered the property to Wheeler upon the assurances of the latter that he had a purchaser for the horses and would pay him in a few days.

Upon cross-examination, however, he testifies that he took the horses to Wheeler's stable "with the understanding that he (Wheeler) was going to sell them and pay me right off immediately."

Later, having in the meantime repeated substantially the version given on direct examination, in answer to a categorical question he testified:

"Q. Now I want to know which it was. Did you consider that you had sold those horses or that you hadn't?

"A. I considered that he was going to sell them for me, sir, and pay me $550."

Upon the brief, plaintiff's counsel contends that "plaintiff delivered the horses to Wheeler on certain conditions and at no time did he clothe the agent with any general authority." In the course of the trial he said:

"I want to show conduct of Hunnewell consistent with the theory that he never agreed to part with these horses except on certain terms and when he found where they were, he did everything in his power to right it so far as innocent persons were concerned."

Carefully considering the evidence upon the theory thus stated by counsel, and it is the only theory open to plaintiff (*Tourtellott* v. *Pollard*, 74 Maine, 418), no conclusion can be sustained other than that the plaintiff placed his horses on sale with Wheeler and clothed the latter with apparent authority to dispose of them without restriction, relying upon the latter's agreement to pay him $550. The first prospective purchaser declined to buy the pair. Both horses remained in Wheeler's stable more than a week before either was sold, the gray horse first, later the horse in question. Hunnewell frequented the stable, knew that Mitchell was there, recommended the black horse to him when he was standing "right behind the horse" looking at the animal, and did not disclose any interest in the horse

or any limitation upon Wheeler's authority. He is thus equitably estopped to assert title against Wheeler's vendee. *Lewenberg* v. *Hayes*, 91 Maine, 104. *Andover* v. *McAllister*, 119 Maine, 153. *Mitchell* v. *Canadian Realty Co.*, 121 Maine, 512.

Exceptions overruled.
Judgment for return.

ANNIE ADAMS' CASE.

Franklin. Opinion March 13, 1925.

The findings, on questions of fact, by the Chairman of the Industrial Accident Commission, in absence of fraud, are final, and not reviewable in respect to the credibility and weight of the evidence, if there is any evidence in support of the finding.

In the instant case, availing himself of all of the evidence submitted, the commissioner decided that the death was a direct result of the accidental injury, and while the court does not pass upon the question whether the husband of claimant died from typhoid fever, acquired subsequent to the accident, it does find that there is sufficient evidence in the record to justify the commissioner in his finding, and the decree of the single Justice should not be reversed.

On appeal. John Adams, husband of claimant, a dependent widow, on March 2, 1924, while in the employ of Lawrence Plywood Corporation at Carrabasset, Maine, as a carpenter, fell from a staging about fifteen feet and struck the ground in a sitting posture producing paralysis of his right leg and certain internal organs. About ten days later while in the hospital he was taken with "typhoid fever" and died on May 5, 1924. The petitioner alleged that death resulted from the injury while the respondents contended that decedent died as a result of the fever. Upon a hearing the Chairman of the Industrial Accident Commission awarded compensation and from an affirming decree the respondents appealed. Appeal dismissed, with costs. Decree affirmed.

The opinion sufficiently states the case.

Butler & Butler, for claimant.

Robert Payson, for respondents.

SITTING: CORNISH, C. J., PHILBROOK, MORRILL, WILSON, STURGIS, BARNES, JJ.

BARNES, J. This is an appeal from the decree of a single Justice, affirming the decision of the Industrial Accident Commissioner that the husband of the petitioner, while working as a carpenter in the employ of an assenting employer, received a personal injury, by accident arising out of and in the course of his employment, as a direct result of which he died.

There is no controversy over the fact of employment, nor that the employee, on March 2, 1924, fell from the level of a staging, a distance of fifteen feet, more or less, to the frozen ground, striking thereon, in a sitting posture, with such force that his legs and certain internal organs were for several days paralyzed.

He was promptly removed to a hospital, and for twelve days his recovery seemed progressing, but then a slight rise of temperature was noted; the next day his temperature rose above 103 degrees, and the malady ran its course to a fatal termination on May 5, following. The only question for solution by the Commissioner was whether or not he died as a result of the injury received from the fall upon the frozen earth; and his decision answers that question in the affirmative, as above stated.

Appellant urges that the death was caused wholly by typhoid fever, not contracted while in the course of the employment; that the the injury was not the cause of the death, and requests this court to reverse the decision of the Commissioner. But the statute governing provides that the "decision, in the absence of fraud, upon all questions of fact shall be final," though it further reads, "the law court may, after consideration, reverse or modify any decree made by a justice, based upon an erroneous ruling or finding of law." The Law Court must, therefore, review the decision of the commissioner, upon appeal, and cases wherein the field of inquiry by this court has been carefully limited are numerous and recent.

"The court will review the commissioner's reasoning but will not, in the absence of fraud, review his findings as to the credibility and weight of evidence." *Mailman's Case*, 118 Maine, 172.

"It is not for the reviewing court to say if the evidence was strong enough to justify the findings." *Williams' Case*, 122 Maine, 477.

The commissioner, "in the determination of questions of fact, is permitted to draw such inferences from the evidence and all the circumstances as a reasonable man would draw." *Sanderson's Case*, 224 Mass., 558.

The decision of the commissioner will not be reversed, when "there is some competent evidence to support it, even though slender; where a state of facts is shown more consistent with the commissioner's finding than with any other theory; and where the finding is supported by inferences which are not unnatural, and not irrational." *Mailman's Case*, supra, or where "the finding is supported by rational and natural inferences from proved facts." *Patrick* v. *Ham Co.*, 119 Maine, 510, where "there was sufficient, competent evidence on which his findings may rest." *Larrabee's Case*, 120 Maine, 242, where, "the evidence, although slight, is sufficient to make a reasonable man conclude in the claimant's favor on the vital points." *Marchavich's Case*, 123 Maine, 495, or "where some competent evidence supports the finding." *Ross' Case*, 124 Maine, 107.

"It is when the commissioner decides facts without evidence, or upon illegal or inadmissible evidence, that an error of law is committed which this court is required to correct."

Orf's Case, 122 Maine, 114; *Spiller's Case*, 122 Maine, 492; *Mailman's Case*, 118 Maine, 172.

In the case under discussion, the injured man was conveyed, by team and train, for the greater part of a day, from his employer's boarding house to a distant hospital, and he died from typhoid fever, or from infection of the mesentary and consequent septicemic complications, or from other indistinguishable cause.

There was no autopsy. The proprietor of the hospital was the only witness as to cause of death, and symptoms prior thereto. He testified to finding, at first, paralysis of the right leg, intestines and bladder, and tenderness and swelling about the hip, and extending over towards the spine, but that these disabilities were yielding to treatment, and the patient recovering during the first twelve days.

Appellant urges that the man died of typhoid fever, a disease introduced into the human system, generally, if not always, by receiving its distinctive germ through the mouth.

The rise of temperature and other evidences of presence of fever occurred well within the period of incubation of the typhoid germ. But the medical testimony is clear that there were, during the period

involved, no typhoid cases at the boarding house, nor in the hospital where the man died, and none in the village where the hospital is situated.

Much is made of the fact that on the way to the hospital a stop was made, and a mug of tea drunk by the injured man, but there is no evidence of the presence of typhoid at the source where the tea was procured. A helpful test for typhoid was applied at intervals, twice without the positive reaction, but on the third time, as read by the medical witness, the result showed the presence of typhoid,—"not strongly positive—it was beginning. I didn't bother to send the test away. I had the symptoms and everything. I knew what it was." So the hospital authority decided the sickness developing before him to be typhoid fever.

It does not, however, follow that the man died of typhoid fever, and it nowhere appears in the record that the commissioner so decided. What would have been revealed as the result of an autopsy, of exhaustive examination of the "test" the commissioner could not know. The evidence shows that the medical witness knew internal injuries would be expected to follow a fall such as the patient had suffered; that septicemic conditions would be not unusual, but he says he "had no experience in septicemia cases . . . never had one and that is why I suppose I never thought of it." He did testify that he found congestion of the lungs before his patient died; that he would expect to find septicemia as the cause of congestion of the lungs, and that the latter is not a characteristic of typhoid fever, but, on the contrary, "is rare for typhoid." Availing himself of all the evidence submitted, the commissioner decided that the death was a direct result of the accidental injury. There is sufficient evidence in the record to justify the commissioner, and the decree of the single Justice will not be reversed.

Appeal dismissed.
Decree affirmed, with costs.

WILLIAM O. LITTLEFIELD, In Equity *vs.* ELVIRA HUBBARD ET ALS.

York. Opinion March 19, 1925.

No right of way of necessity exists over land which borders on the ocean. An easement "of necessity" is sometimes recognized even though the dominant estate may be reached by some other way. A right of way must be one of strict necessity as convenience alone is not sufficient. Every right of way of necessity is founded on a presumed grant; hence none can be presumed over a stranger's land and none can be thus acquired. There is no such thing as dedication betweeen an owner of land and individuals. The public must be a party to every dedication. A way by public user cannot be established if the use is permissive.

It is a long established rule that where land borders on the ocean there exists no way of necessity, even over a grantor's land, although passage by water may not be as convenient as a passage by land, since necessity, and not convenience is the test.

The word "necessity," as applied to a way by necessity, does not mean that there must exist an absolute physical impossibility of otherwise reaching the alleged dominant estate. When a way exists, but the expense to be incurred in utilizing it is grossly in excess of the total value of the estate itself, an easement of necessity is sometimes recognized.

In the case of a dedication to public use, the intention to dedicate is the essential element. The burden of proof rests upon him who claims dedication to show by acts or declarations of the owner of the land, or by some other competent testimony, a clear and unequivocal intention to dedicate to public use.

Ways may be established by proof of public user, but mere user, without the essential characteristics of non-permissive character is not sufficient to establish a way by user.

The open, unenclosed character of the land, and the fact of its trifling value, have a tendency to show merely permissive use.

On appeal. A bill in equity seeking to restrain and perpetually enjoin defendants from trespassing upon a certain strip of land sixteen feet wide and about fifty-four feet in length located at Kennebunk Beach in the town of Kennebunk on Lord's Point, so-called.

It was admitted that plaintiff owned the fee in the land but the defendants claimed an easement or right of way over the strip of land in question either of necessity, or by dedication, or by prescription acquired by the public. Upon a hearing the sitting Justice found for

the plaintiff sustaining the bill, and ordered an injunction to issue, and defendants entered an appeal. Appeal dismissed with costs. Decree below affirmed.

The opinion fully states the case.

Willard & Ford, for plaintiff.

Emery & Waterhouse, for defendants.

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

PHILBROOK, J. This controversy arises over disputed rights regarding a strip of land sixteen feet wide and about fifty-four feet long, situated in Kennebunk, at Kennebunk Beach, so-called. In August, 1919, the plaintiff herein brought suit against this defendant, Elvira A. Hubbard, for trespass in entering upon this land and building a concrete walk thereon, over which she, and her customers and patrons, passed in reaching the buildings situated on her land. That case was before us, *Littlefield* v. *Hubbard*, 120 Maine, 226, and it was there held that the plaintiff owned the strip of land in fee simple, and whatever the defendant's right of passage over the way, if any, she had no right to build a concrete walk thereon, or otherwise disturb the soil upon the fee of the plaintiff. Whether or not the defendant had any right of passage over the land was not determined in that case. Since that case was decided the defendant Hubbard, and her tenants, customers and patrons, some of whom are defendants herein, have continued to use this way, on foot and with automobiles. The instant case is a bill in equity asking for an injunction against such use.

The defendants seek to justify their use on three grounds; *first*, because, as to the Hubbard land, this way is a way of necessity; *second*, because it is a way established by dedication; *third*, because the public had gained a right of way by prescription. At Page 228, of Volume 120, reporting the first above case, is to be found a sketch of the premises, which is hereby made part of this opinion and to which we shall refer.

The Justice who heard the case sustained the bill and ordered issuance of the injunction prayed for, from which decree the defendants appealed.

RIGHT OF WAY BECAUSE OF NECESSITY. The land on which Mrs. Hubbard's buildings stand is lot numbered four on the sketch. She derived her title, not from the plaintiff but from the Kennebunkport Sea Shore Company. Her deed describes the land conveyed to her as bounded thus; "Beginning at the southeasterly corner of a lot of land heretofore conveyed by said grantor to C. Sewall Hubbard," (in *Littlefield* v. *Hubbard*, supra, it was decided that this corner is at G) "and on the westerly side of the road leading to Lord's Point, so-called (said point not adjoining said road) thence running southwesterly by said Sewall Hubbard's land, four hundred feet to an eye bolt in a ledge in the cove, so-called, thence easterly in a straight line, about four hundred feet, to a point three feet distant from the west side of the sewer man hole, thence around the man hole, about six feet, to another point, thence northerly, fifty-two feet, to the place of beginning."

By a plan marked Exhibit 9, which the sitting Justice had an opportunity to examine but which is not before us, the Justice found it clearly to appear that lot numbered four is not adjacent nor continuous to the sixteen-foot strip in question. He also found that said lot, at the time Mrs. Hubbard bought it from the Sea Shore Company, was a narrow strip of high land, dropping down with a rocky slope to the sea, and that the westerly boundary of the lot is water. These being questions of fact his findings are conclusive, since no testimony to the contrary appears. He also finds testimony in the case that from the southeasterly corner of Mrs. Hubbard's lot its owner had access to the Lord's Point road without passing over the sixteen-foot strip of land in question. The testimony in the record sustains all these findings.

The defendants, in their argument admit the long established rule, that where land borders on the ocean, a public highway, there exists no way of necessity even over a grantor's land, although such passage by water may not be as convenient as a passage by land, since necessity and not convenience is the test. *Hildreth* v. *Googins*, 91 Maine, 227; *Kingsley* v. *Gouldsborough Land Improvement Company*, 86 Maine, 279.

But, while admitting this rule, they now ask its abrogation or modification in this case because of the great inconvenience, as they claim, attendant upon the use of ocean access to her premises. While all courts agree that there may, under some circumstances, be a

way by necessity, they are not in complete agreement as to just what necessity is required. The word "necessity," as applied to a way by necessity, has been held not to mean that there must exist an absolute physical impossibility of otherwise reaching the alleged dominant estate. When a way exists, but the expense to be incurred in utilizing it is grossly in excess of the total value of the estate itself, an easement of necessity is sometimes recognized. *Smith* v. *Griffin*, (Colorado), 23 Pac., Rep. 905; *Pettingill* v. *Porter*, 90 Mass., 1.

But convenience alone cannot give a right of way. Ann. Cas., 1913, C. Page 1112, note to *Bussmeyer* v. *Jablonsky*, where may be found a collection of cases sustaining this doctrine, from England, Canada, and from thirty-two states in our Union. In many decisions in that long collection, including *Kingsley* v. *Gouldsborough*, supra, the rule is made more restrictive by stating that the way must be one of strict necessity, and that mere convenience is not sufficient—21 R. C. L., 1214. See also *Whitehouse* v. *Cummings*, 83 Maine, 91, where it is distinctly stated as the rule of law in this State that a way of necessity must be one of strict necessity and not one of mere convenience.

Since the defendant Hubbard, as we have already said, obtained her title from the Sea Shore Company, and not from the plaintiff, it should also be observed that every right of way of necessity is founded on a presumed grant, hence none can be presumed over a stranger's land and none can be thus acquired. *Whitehouse* v. *Cummings*, supra, and many cases there cited.

Under all the circumstances we hold that the defendant cannot claim a right of way by necessity over the sixteen-foot strip.

WAY ESTABLISHED BY DEDICATION. The defendants also urge that by virtue of the ownership by Mrs. Hubbard of lot numbered four they have a right to use the sixteen-foot strip as a way dedicated to public use by the owner of the fee.

Here we depart from private rights, for dedication means an appropriation of land, by its owner, for public uses. *Barteau* v. *West*, 23 Wisconsin, 416. There is no such thing as a dedication between the owner and individuals. The public must be a party to every dedication. *Prescott* v. *Edwards*, 117 California, 298; 59 Am. St. Rep., 186. Our own court, in *Northport Campmeeting Association* v. *Andrews*, 104 Maine, 342, has given the following definition: "Dedication is the intentional appropriation of land, by the owner,

to some proper public use, reserving to himself no rights therein inconsistent with the full exercise and enjoyment of such use. The intention to dedicate is the essential principle, and whenever that intention on the part of the owner of the soil exists in fact and is clearly manifest, either by his words or acts, the dedication, so far as he is concerned, is made. If accepted and used by the public for the purpose intended it becomes complete, and the owner of the soil is precluded from asserting any ownership therein that is not entirely consistent with the use for which it was dedicated."

The intent to dedicate is the essential element. *Northport Camp-meeting* v. *Andrews*, supra. The burden of proof rests upon him who claims dedication to show by acts or declarations of the owner of the land, or by some other competent testimony, a clear and unequivocal intention to dedicate to public use, *Brown* v. *Dickey*, 106 Maine, 97. Everything depends upon the intention of the party whose dedication is claimed, and upon the character of the permission given and the use allowed; *White* v. *Bradley*; 66 Maine, 254. This intention must be unequivocally and satisfactorily proved; Washburn on Easments, Page 186, 3d Ed.

In the findings of the Justice below he expressed aptly and in harmony with the testimony in the record, the exact situation, in the following words: "The evidence does not indicate an intention to dedicate this sixteen foot strip to the public use. On the other hand it clearly disproves the existence of such an intention on the part of the grantor. The right of way was originally created, according to the record, as a private right of way for the benefit of Benjamin Watson and C. Sewall Hubbard. Its continued existence in the same character is evident by subsequent references in deed to C. Sewall Hubbard of lot No. 3, and in deed of the common grantor to the plaintiff conveying the sixteen foot strip itself. The burden of keeping in repair this right of way and the seawall protecting it was not cast upon the public, but Benjamin Watson and C. Sewall Hubbard were specifically charged therewith. There is no evidence that the municipality ever accepted the way. There is no evidence that the strip was ever plotted by the owner as a street upon any plan. There was not a platting of lots and the street, and a sale of the lots by reference to the plan, as in *Bartlett* v. *Bangor*, 67 Maine, 464. There was no representation of the platting by a plan, nor an exhibi-

tion of the plan to the purchasers, nor the selling of lots by an express reference to the plan as in *Campmeeting Association* v. *Andrews*, 104 Maine, 349."

We find no dedication of this sixteen-foot strip of land to public uses.

RIGHT OF WAY BY PRESCRIPTION GAINED BY THE PUBLIC. Here, again, we deal with public rights as a basis of any right which the defendants may claim.

A highway may be proved by long continued user. *McCann* v. *Bangor*, 58 Maine, 348. A road may be established by user. The rights of the public may be more or less extensive according to the user shown. *Hinks* v. *Hinks*, 46 Maine, 423. Ways may be established by proof of public user. *Willey* v. *Ellsworth*, 64 Maine, 57. But mere use without the essential characteristics of non-permissive character is not sufficient to establish a way by user; and the open, unenclosed character of the land and the fact of its trifling value have a tendency to show merely permissive use. *Mayberry* v. *Standish*, 56 Maine, 350. In that case our court said "The open and unenclosed condition of the land, a sandy, pitchpine, blueberry plain of trifling value, was a matter from which it might be presumed that the use was permissive."

In the case at bar it clearly appears that this tract of land, including the sixteen-foot strip, was unenclosed seashore property, uncultivated, largely barren, more or less used by hunters and others for passage to and from the seashore; that fishermen went to their boats over it; that seaweed from the shore was hauled over it; that the public passed over it at will as occasion demanded. There is no sufficient evidence that such use of the land was adverse to the possession or rights of the owner of the fee. We hold that no way over the sixteen-foot strip has been shown to be established by public user.

The appeal must be dismissed with costs for plaintiff and the decree below be affirmed.

So ordered.

ERNEST A. DOBSON'S CASE.

Cumberland. Opinion April 2, 1925.

Under the Workmen's Compensation Act, generally speaking, the question as to whether the injured party is an "employee" or an "independent contractor" is determined as to whether the employer has the right to control the work and the means and manner of its performance, if so, the other party is an employee.

In this case did the accident occur while the claimant was in the employment of the Portland Sebago Ice Company? The Commissioner must have found that stable room was furnished claimant, during his employment, as part consideration for his services, and such being the case, the preparation of the horses to enter the stable of the employer and to be there cared for in expectation of continuing the employment, in furtherance of the business of the employer, on the following day, was incidental to the main service of ice scraping, and an accidental injury, then and there suffered, was an injury arising out of and in the course of such employment.

On appeal. Claimant having worked during the day with his team in scraping and clearing an ice field for cutting ice for the Portland Sebago Ice Company, drove to the stable of the company to put up his team for the night, and while unhitching his horses, other horses approached and disturbed his horses, one of which kicked claimant injuring him severely. The question involved was as to whether the claimant was an "employee" or an "independent contractor." Compensation was awarded and respondent appealed from an affirming decree. Appeal dismissed. Decree affirmed with costs.

The case fully appears in the opinion.

Roland H. Peacock, for claimant.

Eben F. Littlefield, for respondents.

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

BARNES, J. Petitioner claimed and was awarded compensation for incapacity to work, and for medical, surgical and hospital services, incident upon an injury caused by a kick of one of his pair of horses.

while preparing to stable them, after a day's work in the service of appellant. In lieu of evidence, an "agreed statement" is submitted, and from this we are to determine:

First, whether petitioner was, at the time of the accident, within the meaning of the Workmen's Compensation Act, an employee of the appellant, or an independent contractor; and, if an employee,

Second, whether the injury was sustained in the course of such employment, and arose therefrom.

Petitioner had been personally managing and working his horses, through the day of the accident, presumably with a plow or scraper furnished by the appellant, scraping snow from the ice on Otter Pond under a contract with appellant, for the wage of 75c per hour, or $6.75 a day, and, according to the agreed statement, "in addition to the agreed price of 75c per hour, for services of said Dobson and his team the said Portland Sebago Ice Co. was to furnish, and did furnish, stable or housing accommodations for the horses of said Dobson." Further, according to the agreed statement, petitioner "was under the direct orders of Mr. Files, the team boss or superintendent at the plant or was subject to take orders from superiors if there was cause to change in the nature of his work and he was to do the work when and where directed by those men."

Appellant contends Dobson was an independent contractor. Generally speaking, it may be said that right to control the work, control not only of the result of the work, but also of the means and manner of the performance thereof, reserved to or possible of exercise in the employer, establishes and maintains the relation of master and servant, and negatives that of proprietor and independent contractor.

"If subject to the control of the person for whom the work is done, and as to what should be done and how," the employee is a servant and not an independent contractor.

Messmer v. *Bell, etc. Co.*, 133 Ky., 19; 19 Ann. Cases, 1.

What is important is whether the contractor or the employer has the power to dictate the particular manner in which the appliances shall be used and laborers do their work.

"The driver of a coal wagon, who owned the team and the running-gear of the wagon, and whose service it was to load coal upon the wagon, deliver it as directed by the coal company, and collect the money therefor, and who received a fixed sum per load, was not an

independent contractor, but a servant of the company whose coal he delivered." *Waters* v. *Pioneer Fuel Co.*, 52 Minn., 474, 38 A. S. R., 564, and cases cited in note, 19 A. L. R., 230.

In *Messmer* v. *Bell, etc. Co.*, supra, the court say: "An independent contractor is one who is independent of his employer in the doing of his work, and may work when and how he prefers. A servant is one who is employed by another and is subject to the control of his employer."

"In determining whether the relation is that of master and servant or that of proprietor and independent contractor, the mode of payment is not the decisive test; the test lies in the question whether the contract reserves to the proprietor the power of control over the employee." 1 Thompson on Negligence, Section 629.

"If work is done under a general employment and is to be performed for a reasonable compensation or for a stipulated price, the employer remains liable, because he retains the right and power of directing and controlling the time and manner of executing the work or of refraining from doing it if he deems it necessary or expedient." *Brackett* v. *Lubke*, 4 Allen, 138.

The later cases do not make either the mode of payment or the right to discharge the decisive test, but look to the broader question, whether the employee is in fact independent or subject to the control of the person for whom the work is done, as to what should be done and how it should be done. It is not easy to frame a definition of the term "independent contractor" that will happily classify each laborer, in the multifold conditions of the modern laborer's life.

In a discussion of the English Employers' Liability Act, Sir Henry Jackson, upon this point, said: "The relation of master and servant exists where the master can not only order the work, but how it shall be done. When the person to do the work may do it as he pleases, then such person is not a servant."

In a Federal Case: "The relation of master and servant exists whenever the employer retains the right to direct the manner in which the business shall be done, as well as the result to be accomplished; or, in other words, not only what shall be done, but how it shall be done." *Singer Mfg. Co.* v. *Rahn*, 133 U. S., 518.

"A master is one who not only prescribes the end, but directs, or at any time may direct, the means and methods of doing the work.

If he merely prescribes the end and contracts with another to accomplish the end by such means and methods as such other may in his discretion employ, the latter is as to such means and methods not a servant but a master." *Bailey* v. *Troy & B. R. Co.*, 57 Vt., 252.

"The question in these cases whether the relation be that of master and servant or not is determined by ascertaining from the contract of employment whether the employer retains the power of directing and controlling the work, or has given it to the contractor. *Forsyth* v. *Hooper*, 11 Allen, 419; *Morgan* v. *Smith*, 159 Mass., 570; *McAllister's Case*, 229 Mass., 193; *Goff's Case*, 234 Mass., 116; *Chisholm's Case*, 238 Mass., 412.

In an action for compensation for the pecuniary injuries resulting in the death of a laborer in a lime rock quarry, where one of the defenses was that laborer was an independent contractor: "Upon the general averments in the declaration and in the absence of the particular allegations hereinbefore specified, the operations in the quarry from which the injury resulted must be deemed the work of an independent contractor, who represented the will of the owner only as to the result of his work and not as to the manner of conducting it, or the means by which the result is to be accomplished; and in such a case it is settled law that, as the contractor is not the agent or servant of his employer in relation to anything but the specific results which he undertakes to produce, the employer is not responsible for the contractor's negligence." *Boardman* v. *Creighton*, 95 Maine, 154.

"The determination of this question depends upon who had the right to direct and control the work of the claimant. Was he a law unto himself, responsible only for the results, or was he subject to the dictation of the superintendent of the quarry? Clearly the latter. Under the well-settled principles of law he could not be regarded as an independent contractor." *Mitchell's Case*, 121 Maine, 455.

As each new case arises, it must be disposed of by looking to and reasoning from the particular facts which it presents.

Appellant contends that the reasoning in two recent Massachusetts cases, *Centrello's Case* and *Winslow's Case*, apply and should govern the decision in this case. But we think those cases are clearly distinguishable herefrom. In each of the cases referred to, the claimant was a man engaged in and making a business of teaming, Centrello with his three teams, and Winslow, a stable-keeper, engaged

in the business of teaming and jobbing; while in the case before us there is nothing to show that Dobson was a man of any distinctive business. He is classed by the astute counsel for appellant merely as "a native," and well may be but a farmer of the vicinity or a day laborer.

As to the burden of proof; as a general proposition, no presumption exists that an employee is either a servant or an independent contractor, and the burden is upon the party having the affirmative of the issue to show the relation to be such as to entitle him to recovery. *Prairie State L. & T. Co.* v. *Doig*, 70 Ill., 52; *Arasmith* v. *Temple*, 11 Ill., App. 39; *Dutton* v. *Amesbury Natl. Bank*, 181 Mass., 154; *Midgette* v. *Braming Mfg. Co.*, 15 N. C., 333, 64 S. E. 5; *Hunt* v. *Penn. R. Co.*, 51 Pa. St., 475.

But in an action against an employer for injuries, a presumption arises that a person working on the defendant's premises and performing work for the benefit of the defendant was a mere servant, and if the defendant seeks to avoid liability on the ground that such person was an independent contractor, the burden is on him to show the independence of the employee. *Anderson* v. *Moore*, 108 Ill., App. 106; *Perry* v. *Ford*, 17 Mo. App., 212, *Midgette* v. *Braming Mfg. Co.*, supra; *Foster* v. *Natl. Steel Co.*, 216 Pa. St., 279, 65 Atl., 618; *Taylor, etc. R. Co.* v. *Warner*, 88 Tex., 642, 32 S. W., 868; *McCamus* v. *Citizen's Gas Light Co.*, 50 Barb., (N. Y.), 380.

Upon reason, substantiated by the decisions cited, it appears that claimant in this case was properly found by the commissioner to have been an employee of appellant, and not an independent contractor.

Upon the second point; the stable of appellant, where "housing accommodation" was furnished for petitioner's horses, in addition to wages, and for other horses of appellant, or their workmen, was at Sebago Lake, and was reached by driving, a part at least of the distance of one mile, as stated in appellant's brief, upon a highway.

After the day's work upon the ice was ended, petitioner drove to this stable, and while he was busied unhitching his horses from the sled, near said stable, again quoting from the agreed statement, "another team drove up alongside of the Dobson horses and the horses nipped each other;" whereupon one of the Dobson horses kicked petitioner, causing the injuries complained of. Here was an accident arising

out of petitioner's occupation as teamster. Did it occur while the teamster was in the employment of the appellant?

Had the petitioner, at the close of his day's work, driven a mile or more toward his own stable, or to one of a third party, to put up his horses for the night, and been injured while caring for them, the decision may very well have been different.

True, the agreed statement, in its last paragraph, recites the following: "The Portland Sebago Ice Co., when it has room always allows the natives to stable their horses, free, in this stable as in this case and it was no part of the consideration for hire."

How this statement crept in, and what was the purpose of its insertion, in the light of the solemnly expressed "consideration," hereinbefore quoted, is not for us to determine. The commissioner must have found that stable room was furnished petitioner, during his employment, as part consideration for his services, and, such being the case, the preparation of the horses to enter the stable of appellant and to be there cared for in expectation of continuing the employment, in furtherance of the business of appellant, on the following day is incidental to the service as ice scraper; and an accidental injury, then and there suffered, is an injury arising out of and in the course of such employment. As matter of law, therefore, the decree of the sitting Justice must be upheld.

Appeal dismissed.
Decree affirmed, with costs for the petitioner.

CORNISH, C. J. sat at arguments and participated in consultation, but, owing to retirement, does not join in the opinion.

HARVEY D. EATON ET ALS. *vs.* FREDERICK C. THAYER ET ALS.

Kennebec. Opinion April 9, 1925.

Plenary power is given to the Public Utilities Commission to inquire into any neglect or violation of the laws of the State by any public utility, and it is made obligatory upon the Commission to report all violations of law to the Attorney General, who is directed to institute all necessary proceedings for the enforcement of the laws of the State.

The Kennebec Water District is a public utility, subject to the jurisdiction, control and regulation of the Public Utilities Commission, and its accounts are subject to examination and audit by the commission. Although declared to be a quasi-municipal corporation within the meaning of R. S., 1883, Chap. 46, Sec. 55, thereby subjecting the property of the inhabitants to liability to be taken to pay any debt due from the district, it is a public trust, and the chief executive officers are aptly called Trustees.

Its revenues are raised solely by rates paid by individual consumers for water actually used by them, and by its charter such rates are to be fixed upon a cost-of-service basis, as near as may be.

While the right of citizens and taxpayers to apply to the court for preventive relief in the case of threatened unlawful action by municipal officers is and should be upheld, the practice of entertaining bills by citizens and rate payers should not be extended to organizations like the Kennebec Water District, for remedial relief by way of restitution after the commission of an alleged illegal act which affects the entire community, and is not a special wrong to particular individuals.

In the instant case if the Trustees of the District have acted in violation of law in passing the votes alleged to be unwarranted, and in acting under them, proceedings to protect the administration of the trust, and for restitution of funds paid out by virtue of such votes, should be instituted by the Attorney General upon his own initiative, or upon report of the Public Utilities Commission, against all the Trustees.

On report. A bill in equity brought by fourteen citizens and property owners of the Kennebec Water District against one of the trustees, a former trustee, and a former superintendent of said district, the district itself also being a party defendant, seeking restitution to the treasury of the district certain sums of money paid to the individual defendants severally in accordance with votes of

the trustees, which payments plaintiffs allege were illegally made and contrary to the provisions of the act creating the district. The defendants raised the question of jurisdiction. At the conclusion of the evidence on a hearing by agreement of the parties the cause was reported to the Law Court for final determination. The court holds that it has full jurisdiction in equity over the corporation and its trustees, but that the proceeding should be instituted by the Attorney General, not by individual rate payers. Bill dismissed.

The case fully appears in the opinion.

Harvey D. Eaton and George M. Chapman, for plaintiffs.

Pattangall, Locke & Perkins, for defendants.

SITTING: WILSON, C. J., PHILBROOK, MORRILL, STURGIS, BARNES, JJ.

MORRILL, J. The Kennebec Water District comprising the territory and people constituting the city of Waterville and the Fairfield Village Corporation, was organized under Chapter 200 of the Private and Special Laws of Maine of the year 1899, for the purpose of supplying the inhabitants of said district and of the towns of Benton and Winslow and all said municipalities with pure water for domestic and municipal purposes. By Section 5 of said act "all the affairs of said water district shall be managed by a board of trustees composed of five members;" they were directed to organize by the election of a president and clerk, and were authorized when necessary to choose "a treasurer and all other needful officers and agents for the proper conduct and management of the affairs of said district." They were also empowered to "ordain and establish such By-laws as are necessary for their own convenience and the proper management of the district's affairs," and to "incur such expenses as may be necessary."

The district was granted very comprehensive power to take and hold for its purposes "sufficient water," and real estate "necessary for erecting dams, power, reservoirs or for preserving purity of the water and water shed, and for laying and maintaining aqueducts." It was granted the right of eminent domain, the right to use streets and highways for its pipe lines, and elaborate provision was made for the appraisal and acquisition of the property of the Maine Water Company.

The trustees were authorized to issue bonds to an amount sufficient to pay expenses incurred in the acquisition and purchase of the property of Maine Water Company, and to secure a new source of supply. The duty was imposed upon the trustees of establishing rates, uniform in their application within the district, and so established as to provide revenue: (1) To pay the current running expenses for maintaining the water system and provide for such extensions and renewals as might become necessary: (2) To provide for payment of interest on the indebtedness of the district: (3) To provide for a sinking fund by annual contributions: (4) Any surplus remaining at the end of the year is to be divided between the municipalities composing the district in the same proportions as each contribute to the gross earnings of the district's water system.

Although by Section 10 of said act said district is "declared to be a quasi municipal corporation within the meaning of section fifty five, chapter forty six of the revised statutes" of 1883, thereby subjecting the property of the inhabitants to liability to be taken to pay any debt due from the district, it is evident upon examination of the act that the Kennebec Water District widely differs from the ordinary municipal corporation. No power of taxation exists; its revenues are raised solely by rates paid by individual consumers for water actually used by them; the water rates do not create a lien on the property supplied with water. The inhabitants do not have direct voice in the management of the affairs of the district; no meetings of the inhabitants are provided for; the trustees are chosen, two by the municipal officers of Waterville, two by the municipal officers of the Fairfield Village Corporation, and one is appointed by the County Commissioners of Kennebec County from outside the district. The Kennebec Water District is a corporate organization for the administration and financial management of a water supply for the inhabitants of the territory included therein and of the towns of Benton and Winslow, said in the brief for the plaintiffs to number twenty thousand people. While declared to be a quasi municipal corporation, it is a public trust and the chief executive officers are very aptly called Trustees. It is a public utility, and is subject to the jurisdiction, control and regulation of the Public Utilities Commission, R. S., Chap. 55, Sec. 15. Its accounts are subject to examination and audit by the Commission. R. S., Chap. 55, Sec. 23, 24, and by its charter its rates are to be fixed upon a cost-of-service basis, as near as may be.

The present bill is filed by fourteen citizens living and owning property in the district and paying water rates therein, "in behalf of themselves and all others similarly situated," against one of the present board of trustees, who has held that office since the organization of the district, a former trustee, and a former superintendent, who has deceased since the bill was filed. The district is also made a party defendant.

The bill seeks to compel the restitution to the treasury of the district of certain sums of money paid to the individual defendants severally in accordance with votes of the trustees, which plaintiffs allege are contrary to law and to the express provisions of the organic act of the district. It is alleged in the bill, and admitted by answer, "that on the 19th day of May, A. D., 1921, one of the plaintiffs made demand in writing upon the Trustees to recover and return to the treasury of the District all said sums thus illegally paid out," and that the Trustees declined to take such action.

The defendants at once challenge the jurisdiction of this court to grant the relief sought, upon the bill of individual rate payers, and very soundly maintain that this court has no jurisdiction of the cause under R. S., 1916, Chap. 82, Sec. 6, Par. XIII., and they urge that the authority of the court to act is limited by that statute. In 1874, however, this court was granted full equity jurisdiction, according to the usage and practice of courts of equity in all other cases where there is not a plain, adequate and complete remedy at law. Since this enlargement of the equity powers of the court, its jurisdiction to grant preventive relief has been regarded as not limited as by Paragraph XIII. *Blood* v. *Beal*, 100 Maine, 30.

But this bill does not seek preventive relief against anticipated or threatened unauthorized action by the Trustees. It seeks remedial action only after the commission of an alleged illegal act.

We think that this court has full jurisdiction in equity over this corporation and its trustees, but that the proceeding should be instituted by the Attorney General, not by individual rate payers. "In respect of property or funds held by municipal corporations in trust or clothed with public duties, equity, in virtue of its jurisdiction in respect of trusts and property, has always asserted its power to see that the trusts were observed and their public duties in respect of such property discharged. In England, and probably also in this country, the bill may in such cases be filed against the municipal

corporation and its officers by the Attorney General on his own motion or on behalf of the corporators, taxpayers or persons interested." 4 Dillon on Mun. Corp., 5th Ed., Sec. 1574. The leading English authorities are cited on brief of plaintiffs' counsel: *Attorney General* v. *Dublin*, 1 Bligh N. S., 312. *Attorney General* v. *Liverpool*, 1 Mylne & Cr., 343; 13 Eng. Ch. 343. *Attorney General* v. *Poole*, 4 Mylne & Cr. 17. *Attorney General* v. *Wilson*, 9 Simons 30, affirmed 1 Cr. & Ph. 1.

In this country, according to Judge Dillon (Section 1577) "the weight of authority seems to be that the Attorney General of a State, or its other public law officer, has by virtue of his office the right in his name, or in the name of the State, upon the relation of persons interested, to bring in cases which are properly of equitable cognizance and which affect the public, a bill in equity to prevent municipal corporations from exceeding the line of their lawful authority, or to have their illegal acts set aside or corrected." *Attorney General* v. *Detroit*, 26 Mich., 263, in which Mr. Justice Cooley (Page 266) defines at length the kind and degree of abuse of corporate power which will justify action by the Attorney General. *Attorney General* v. *Boston*, 123 Mass., 460, 478. *Davis* v. *New York*, 2 Duer, 663.

The act establishing the Kennebec Water District was the first of a series of acts in this State, creating organizations for the public ownership and control of the water supply of communities, which would not be obnoxious or subject to the constitutional limitation of municipal indebtedness. In that respect the act was held to be valid in *Kennebec Water District* v. *Waterville*, 96 Maine, 234. During the next seven sessions of the Legislature twenty-four similar acts were passed and such organizations have been successfully put into operation in many communities large and small, notably in Augusta, Portland, Gardiner, Bath, Brunswick; these later acts may differ from the Kennebec act in some details; in some the Trustees are chosen by the qualified voters of the district, who otherwise have no direct voice in the management of its affairs. The distinguishing feature of all is the creation of a corporate organization in the nature of a public trust for the acquisition, financing and administration of the water supply of the several communities, managed by officials known as Trustees, financed not by taxation but by the rates paid by individual consumers for the water used by them.

Some of the most prominent citizens and experienced business men of the communities have acted upon the boards of trustees. Many hundred thousand dollars in securities have been issued to finance these undertakings, and, presumably attributable to wise management, not a single default on the securities has occurred.

In the twenty-five years which have elapsed the instant case is the first to come before the court in which misappropriation of the funds of a district by the Trustees has been charged. We therefore, feel at liberty, and that it is the duty of the court to adopt a rule of procedure which will insure the preservation and efficient management of these essential elements of community life, and at the same time protect public spirited citizens, who may be disposed to serve as Trustees, from vexatious litigation.

We are aware of a line of cases in this country, holding that individual taxpayers may maintain a bill in their own names to compel restitution of funds illegally received by municipal and county officials in disregard of statutory provisions, either as payments for alleged services or under contracts prohibited by law. Some of the most familiar of these cases are: *Walker* v. *Village of Dillonvale*, 82 Ohio St., 145; 92 N. E., 222; 19 Ann. Cas., 773. *Quaw* v. *Paff*, 98 Wis., 586; 74 N. W., 369. *Land, Log & Lumber Co.* v. *McIntyre*, 100 Wis., 245; 75 N. W., 964; 69 Am. St., 915. *Johnson* v. *Black*, 103 Va., 484; 49 S. E., 635; 106 Am. St., 890. *Stone* v. *Bevans*, 88 Minn., 127; 92 N. W., 520; 97 Am. St., 506. *Zuelly* v. *Casper*, 160 Ind., 455; 67 N. E., 103; 63 L. R. A., 133. *Griffin* v. *Drennen*, 145 Ala., 128; 40 So., 1016. *Independent Sch. Dist. No. 5* v. *Collins*, 15 Idaho, 535; 98 Pac., 857; 128 Am. St., 76. *McKenna* v. *McHaley*, 62 Ore., 1; 123 Pac., 1069. In some of these cases the position of taxpayers as parties plaintiff rests upon the theory that they in common with other property holders of the municipality may be subjected to increased taxes; *Crampton* v. *Zabriskie*, 101 U. S., 601, 25 L. Ed., 1070, although it is a case of preventive relief by injunction, is cited. *Walker* v. *Dillonvale*, supra. Other cases rely upon the analogy of suits by stockholders of private corporations. *Quaw* v. *Paff*, supra. *Zuelly* v. *Casper*, supra. In others the want of other remedy is the basis of the jurisdiction, the corporation being joined as a party defendant. *Land, Log & Lumber Co.* v. *McIntyre*, supra. In some cases where an injunction has been granted to restrain future misappropriation, a decree for restitution has been made as incidental

to the relief by injunction. *Frederick* v. *Douglass Co.*, 96 Wis., 411, 425. *Webster* v. *Douglass Co.*, 102 Wis., 181.

In *Attorney General* v. *Detroit*, supra, Mr. Justice Cooley speaks of the practice of entertaining such bills as "carried to an unwarranted extent," and restricted in that State by the decision in *Miller* v. *Grundy*, 13 Mich., 540. In *Cathers* v. *Moores*, 78 Neb., 17; 113 N. W., 119; 14 L. R. A., (N. S.) 298, it is said that "the courts have gone to extreme lengths in entertaining suits by taxpayers against local boards and officials."

Confining our decision to the facts and to the type of quasi municipal corporate organization presented by this case, we hold that the doctrine of the cases above cited sustaining proceedings by individual taxpayers, should not be extended to this case. In our view such a proceeding by individuals is inappropriate when the violation of a franchise to exercise a public trust of this character for the public welfare is charged, and remedial relief after the commission of the alleged illegal act is alone sought; the element of speedy action where preventive relief is sought, is not present; the direct personal interest of the rate payer, as distinguished from the municipal taxpayer, is negligible where the revenues are raised, not by taxation, but by rates paid by individual consumers for water used by them, and where the rates, service and issue of securities are under the jurisdiction of the Public Utilities Commission.

An examination of the bill before us confirms this view. The only charge of fraudulent action in terms to be found in the bill was abandoned on the day of hearing before the single Justice; it related to a payment of five dollars each to Messrs. Thayer and Nye for attendance at an adjourned meeting of the Board of Trustees, the record of which, it is charged, "was made solely for the fraudulent purpose of enabling the trustees to draw pay as for attending a meeting when in truth and in fact they were rendering service for which the law provides that they shall receive no compensation." This serious charge, although the amount is trivial, made against the entire board of trustees, was abandoned at hearing. The payments to Mr. Hall for which recovery is sought were made to him for salary as Assistant Superintendent under a vote of the Trustees passed March 22, 1921. The record fails to disclose anything unwarranted in these payments. The payments of importance in the case were made to Dr. Thayer, one for $3,000 under a vote of the Trustees

passed November 30, 1920, and payments for salary as General Manager at the rate of $100 per month under a vote of the Trustees passed January 4, 1921; the regularity of these meetings has not been questioned. All of these payments, it is charged "were utterly unwarranted, and in each instance constituted a misappropriation by the Board of Trustees of the Water District."

The importance of this case is forcibly stressed in the brief filed in behalf of the plaintiffs. "Financially," it is said, "the case is of trifling importance to any individual. The plaintiffs of course have no personal interest except as citizens and rate payers of the District. . . . . But the importance of the case from the standpoint of common honesty and good government is transcendent." Inferentially, at least, from reading the brief the case in the view of counsel is comparable with notorious cases of official corruption. After a careful consideration of the evidence we state frankly the conviction that the record discloses nothing to impeach the honesty of the Trustees in these transactions; their actions were taken after due deliberation; instead of making "a handsome present to their oldest associate out of the public funds," we are convinced that they acted honestly, and with the conviction that the payment was justly due to Dr. Thayer. It may be that their action cannot be justified under the terms of the Act relating to compensation of the Trustees. Upon that question we express no opinion. But any charges of dishonesty or venality are unfounded.

It is evident, also, from this record that if this action can be entertained, the same or another set of citizens and rate payers, or any one citizen and rate payer, may bring a similar bill against Mr. Warren, and against any other Trustee who has received payments for any services to the District in excess of the allowance for attendance at meetings granted by the act. Such opportunity for multiplicity of suits is not for the public interest. *Cathers* v. *Moores*, supra. While upholding to the full extent the right of citizens and taxpayers to apply to the court for preventive relief in the case of threatened unlawful action by municipal officers, we think that the practice should not be extended to organizations like the Kennebec Water District, for remedial relief by way of restitution after the commission of an illegal act which affects the entire community, and is not a special wrong to particular individuals.

By R. S., Chap. 55, Sec. 5, plenary power is given to the Public Utilities Commission to inquire into any neglect or violation of the laws of the State by any public utility doing business therein, or by its officers, agents or employees, and it is made obligatory upon the commission to report all violations of law to the Attorney General, who is directed to institute all necessary actions or proceedings for the enforcement of the laws of the State.

If the Board of Trustees has erred in its interpretation of the organic act of the District, in passing the votes alleged to be unwarranted, its action is in violation of law, and we hold that proceedings to protect the administration of the trust, and for restitution of funds paid out by virtue of votes passed in violation of law, should be instituted by the Attorney General upon his own initiative, or upon report of the Public Utilities Commission, against all the Trustees. Proceedings against loan and building associations, (*Ulmer* v. *Loan and Building Association,* 93 Maine, 302) and against trust companies (*Craughwell* v. *Trust Company,* 113 Maine, 531) present analogous cases. It may be that cases will arise in which the Attorney General may proceed upon the relation of interested parties, but such cases must necessarily be exceptional, based upon want of other remedy, and we express no opinion on the subject. The language of the court in *Ulmer* v. *Loan and Building Association,* supra, is pertinent: "It is to be observed that these institutions possess a public character, and it is for the interest of the public, not only that they shall be subjected to judicial investigation when they ought to be, but also that they shall not be so subjected when they ought not to be." It cannot be presumed that the Commission and the Attorney General will fail to act in a proper case.

We, therefore, hold that the plaintiffs have no standing in court to maintain this bill in their own names.

Bill dismissed.

JOSEPH SANDY *vs.* A. W. BUSHEY.

Kennebec. Opinion April 18, 1925.

Owners or keepers of domestic animals are not liable for damages resulting from injury done by them in a place where they have a right to be unless the animals in fact and to the owner's knowledge are vicious. If, however, a person keeps a vicious or dangerous animal which he knows is accustomed to attack and injure persons, he assumes the obligation of an insurer against injury by such animal, and no measure of care in its keeping will excuse him. His liability is founded upon the keeping of such an animal when he has knowledge of its vicious propensities, and his care or negligence is immaterial. Negligence is not the ground of liability and need not be alleged or proved.

In the instant case that the defendant's horse was vicious and that the defendant had knowledge of such fact is fairly established and supported by the evidence.

Contributory negligence is not a defense to this action. In order to relieve the keeper of a known vicious animal from his liability as an insurer, the fact must be established that the injury is attributable not to the keeping of the animal but to the injured party unnecessarily and voluntarily putting himself in a way to be injured, knowing the probable consequences of his act, so that he may fairly be deemed to have brought the injury upon himself.

On motion. An action to recover damages for personal injuries suffered by plaintiff resulting from being kicked by a horse owned and kept by defendant, it being alleged by plaintiff that the horse was ugly and vicious and that the defendant knew of such propensities, yet permitted such horse to run at large in a pasture where the injury occurred, the plaintiff having entered the pasture for the purpose of giving grain to one of his horses which were pastured in the same pasture. A verdict of $1,008.42 was rendered for the plaintiff and defendant filed a general motion for a new trial. Motion overruled.

The case fully appears in the opinion.

McGillicudy & Morey, for plaintiff.

F. Harold Dubord and Mark Bartlett, for defendant.

SITTING: CORNISH, C. J., PHILBROOK, MORRILL, WILSON, STURGIS, BARNES, JJ.

STURGIS, J. In the summer of 1923, the plaintiff turned his mare and colt out in the pasture of a neighbor. Other horses occupied the pasture during the season, including the defendant's three-year old colt. On July 14, 1923, the plaintiff went to the pasture to grain his mare and while so doing, was kicked by the defendant's horse and seriously injured. This action on the case is brought to recover damages for such injuries and, after verdict for the plaintiff, is before this court on a general motion.

By the common law the owners or keepers of domestic animals are not answerable for an injury done by them in a place where they have a right to be, unless the animals in fact, and to the owner's knowledge, are vicious. If, however, a person keeps a vicious or dangerous animal which he knows is accustomed to attack and injure mankind, he assumes the obligation of an insurer against injury by such animal, and no measure of care in its keeping will excuse him. His liability is founded upon the keeping of such an animal when he has knowledge of its vicious propensities and his care or negligence is immaterial. In an action for an injury caused by such an animal, the plaintiff has only to allege and prove the keeping, the vicious propensities, and the scienter. Negligence is not the ground of liability, and need not be alleged or proved. This rule of liability of keepers of domestic animals finds its origin in the ancient common law and, except as modified by statute in case of injuries by dogs, is retained as the rule of law in this class of cases in this State. *Hussey* v. *King*, 83 Maine, 568; *Decker* v. *Gammon*, 44 Maine, 328.

A careful consideration of the evidence discloses facts which fairly tend to establish that the defendant's horse had exhibited a vicious and ugly disposition at various times prior to the day on which the plaintiff was injured and notice of the animal's vicious propensities had been brought home to the defendant. Upon these issues the jury's verdict in favor of the plaintiff was fully warranted.

The defendant, however, says that the plaintiff was guilty of contributory negligence and cannot, therefore, recover in this action. We are unable to sustain this contention under the rule of liability adopted by this court. In those jurisdictions which have departed from the ancient common law rule and declared negligence to be the

ground of liability in actions for injuries by animals, the defense of contributory negligence has been recognized and the injured party's failure to exercise due care will defeat his action. 1 R. C. L., 1090; 3 Corpus Juris, 108 and cases there cited. In this State, however, the negligence doctrine has not been accepted and contributory negligence in the strict sense of that term cannot be held to constitute a defense to the action. Exclusion of negligence as the basis of liability forbids the inclusion of contributory negligence as a defense. Something more than slight negligence or want of due care on the part of the injured party must be shown in order to relieve the keeper of a vicious domestic animal known to be such from his liability as an insurer.

In *Muller* v. *McKesson*, 73 N. Y., 195, which may be fairly accepted as the leading case in this country upon the question of contributory negligence as a defense to an action of this character, Church, C. J., in stating the opinion of the court says: "If a person with full knowledge of the evil propensities of an animal wantonly excites him, or voluntarily and unnecessarily puts himself in the way of such an animal, he would be adjudged to have brought the injury upon himself, and ought not to be entitled to recover. In such a case, it cannot be said, in a legal sense, that the keeping of the animal, which is the gravamen of the offense, produced the injury. But, as the owner is held to a rigorous rule of liability on account of the danger to human life and limb by harboring and keeping such animals, it follows that he ought not to be relieved from it by slight negligence or want of ordinary care. To enable an owner of such an animal to interpose this defense, acts should be proved, with notice of the character of the animal, which would establish that the person injured voluntarily brought the calamity upon himself."

Later decisions of the New York court affirm this rule. *Lynch* v. *McNally*, 73 N. Y., 347; *Molloy* v. *Starin*, 191 N. Y., 21, 16 L. R. A., (N. S.), 445; *Ervin* v. *Woodruff*, 103 N. Y. S., 1051; *Guzzi* v. *New York Zoological Soc.*, 182 N. Y. S., 257. The same rule of liability is approved in *Peck* v. *Williams*, 24 R. I., 583. The New York rule is adopted in *Fye* v. *Chapin*, 121 Mich., 675. In *Woolf* v. *Chalker*, 31 Conn., 121, the defense of contributory negligence is denied and the principle laid down in *Muller* v. *McKesson*, 73 N. Y., 195 is accepted.

In *Kelley* v. *Killourey*, 81 Conn., 321, we find this statement of the rule: "The principle is that, when one's conduct toward a dog or other animal is knowingly such as is calculated to incite or provoke it to acts of damage, its naturally resulting action, in so far as it involves consequences to the inciter or provoker, is to be regarded in law as his and not having reference to the animal in such manner as to be chargeable to its owner or keeper."

We are convinced that the principle announced by Chief Justice Church correctly defines the degree of responsibility which must be fixed upon the injured party in order to relieve the keeper of a known vicious animal from his liability as an insurer with which he is charged in this State. The fact must be established that the injury is attributable, not to the keeping of the animal but to the injured party's unnecessarily and voluntarily putting himself in a way to be hurt knowing the probable consequences of his act, so that he may fairly be deemed to have brought the injury upon himself.

Applying this rule to the facts in the case before us, we are of the opinion that the prima facie case against the defendant, established by the evidence, is not rebutted by the plaintiff's acts or omissions. The plaintiff led his mare away from the other horses in the pasture and started to grain her when the defendant's horse approached in a threatening manner. The plaintiff drove him away and turned to continue feeding the mare. The colt's return was silent and swift and his attack unexpected. It cannot be said that the plaintiff voluntarily put himself in a way to be injured by the defendant's horse, knowing the probable consequences of his act. The defendant is liable, as found by the jury.

Motion overruled.

CORNISH, C. J. sat at argument and participated in consultation, but, owing to retirement, does not join in the opinion.

M. J. MARSHALL *vs.* FRED E. WHEELER.

Oxford. Opinion April 23, 1925.

At common law a shed connecting the dwelling-house and barn and all other buildings used in connection with the dwelling was deemed a part of the owner's "castle" and was protected from invasion against his will, except by the State in search of violators of the law or by virtue of certain civil processes of which a writ of attachment is not one, and the common law rule still remains in force in this State.

The "castle" at common law was practically co-extensive with dwelling-house and the dwelling-house embraced the entire aggregation of buildings used for the abode.

In the instant case the fact that the title to the premises was in the plaintiff's wife, or that he and his wife were away in the woods for several months prior to the forcible invasion of the premises by the defendant, does not affect the plaintiff's rights. He clearly intended to return, having left his live stock there in charge of a neighbor, and as the head of the household, the dwelling-house and the buildings connected and used therewith, though belonging to his wife, was his "castle" and immune from forcible invasion under the circumstances of the case.

On exceptions. An action of trover to recover the value of an auto truck which was stored in a barn on the home premises of the plaintiff, the title to which premises was in plaintiff's wife. The defendant, a deputy sheriff, having been given a writ against the plaintiff and requested to attach the auto truck, went to the premises where the truck was stored, and finding the plaintiff and his wife away and the buildings locked, went to a neighbor, who, while the plaintiff and his wife were away for a few months, had the care of the premises and the live stock of the plaintiff, and demanded admission to the barn where the auto was stored for the purpose of attaching the auto under his precept and on being refused went to the shed connecting the house and barn and removed the lock thereon and entered the barn through the shed and removed the truck. At the trial of the case, there being no dispute about the facts, for the purpose of raising the issue as to whether the defendant had the right to remove the lock from the shed door under his precept, the presiding Justice directed a verdict

for the defendant and exceptions to the ruling were taken by plaintiff. Exceptions sustained. Judgment for the plaintiff for the sum of $1,000.00.

The case fully appears in the opinion.

Matthew McCarthy, for plaintiff.

Alton C. Wheeler, for defendant.

SITTING: WILSON, C. J., PHILBROOK, MORRILL, STURGIS, BARNES, JJ.

WILSON, C. J. The defendant, a deputy sheriff, upon receiving a writ directed against the plaintiff in this action and to attach an auto truck which was stored in a barn belonging to the plaintiff's wife, went to the home of the plaintiff, who, with his wife, had for several months been in the woods engaged in a lumbering operation, and finding the door to the barn locked, went to the house of a neighbor, who, in the absence of the plaintiff, was taking care of his live stock and had the keys to a shed opening into the barn and demanded admission for the purpose of attaching the truck under his precept.

Upon being refused admission, the defendant returned to the home of the plaintiff and removed a lock from the door of the shed connecting the house and barn, and, through the shed, entered the barn and took and removed the truck, whereupon the plaintiff brought this action of trover to recover the value of the truck.

The issue at *nisi prius* was whether, under the conditions shown to exist, the officer in removing the lock from the shed door was protected by his process. The presiding Justice to raise the issue, it never having been judicially passed upon in this State, directed a verdict for the defendant. The case comes before this court on exceptions to this ruling.

The fact that the title to the premises was in the plaintiff's wife would make no difference. As the head of the household, occupying the dwelling-house, it was in law the castle of the plaintiff, from which he might repel all intruders, if necessary to protect his home and family.

Nor did his absence with his wife for several months in the woods make it any less his dwelling-house and castle. His household goods were still there and his live stock in the barn. Obviously he intended

to return as soon as his work in the woods was completed. Bish. Statutory Crimes, Sec. 279; Nutbrown's Case, 2 East P. C., 496; *Rex* v. *Westwood*, Russ. & Ry., 495.

The evidence discloses that the buildings consisted of a house, barn, and a connecting shed. From the shed one could enter either the barn or the house. The shed contained the usual toilet or closet found in country homes, and was also used as a convenient place for the storage of wood, the ordinary laundry articles, a refrigerator and other articles frequently used in the kitchen which it adjoined.

It is not in dispute that the ancient right at common law of immu nity from interference with the privacy of one's home has come down to us. A man's dwelling-house is still his castle which may not be invaded against his will except by the State in search of violators of the law or upon certain processes of which a writ of attachment is not one. Bish. Crim. Law, Col. 1, Sec. 858; Bish. Crim. Pro., Vol. 1, Sec. 195; 1 Hale P. C., 458; *Kelley* v. *Schuyler*, 20 R. I., 432; *State ex rel McPherson* v. *Bechner*, 132 Ind., 371; *Bailey* v. *Wright*, 39 Mich., 96; *Palmer et al.* v. *King*, 41 App., D. C., 419; L. R. A., 1916 D. 278; *Ilsley* v. *Nichols*, 12 Pick., 270.

The first question to be determined, then, is: what buildings are included within the "castle"? It is urged by the defendant that the ancient conception of the castle, which included all the buildings used as a part of or in connection with the house in which the occupant slept or dwelt, and permitted the occupants to exclude all intruders from its outer walls, has been modified in keeping with changed conditions and modes of living. The reason for the dwelling-house be ing in fact a castle for the purposes of defense, it is true, no longer exists, but the principle of law ensuring privacy in one's home and giving to every man the right to repel intruders by force, if necessary, and which is usually expressed in the familiar maxim, "Every man's house is his castle," still remains in full force and vigor and is recognized in both our State and Federal Constitutions. Cons. of Maine, Art. I., Sec. 5. Art. IV. of the Amendments to the Federal Constitution. The reason for maintaining the privacy of the home is just as strong today as it was in the time of Chas. II., when it was held that a sheriff might not even enter a barn by force by virtue of a writ of *fieri facias*, if it was a part of the mansion house. *Pento* v. *Brown*, 1 Keble's Rep., 698.

At common law, the term "castle" appears to have been practically co-extensive with dwelling-house. It included not only the house or building in which the owner or tenant slept or lived in the ordinary sense of the term, but all that cluster of buildings connected or used with it. 4 Blackstone's Com., *224, *225. Bish. Statutory Crimes, Sec. 278, 290.

As the last named authority puts it: "One need not so constitute his habitation that all the rooms will be under one roof. Therefore the word 'dwellinghouse' embraces the entire congregation of buildings, main and auxiliary used for abode. 'It includes,' says Hale, 'The privy, barn, stable, cowhouse and dairy houses, if they are part of the messuage, though they are not under the same roof or joining, or contiguous to it'."

Again, in his work on Criminal Law, Vol. II., Sec. 104, P. 2, the same author says: "The term 'dwelling house' also includes the entire cluster of buildings not separated by a public way which are used for purposes connected with the habitation."

And in his Crim. Procedure, Vol. I., Sec. 194, he further says: "Any building other than that technically termed the castle or dwelling house, which consists of the cluster of buildings used for habitation and its collateral purposes . . . . may even in civil cases be broken open to make an arrest."

The above definition of the term, castle or dwelling-house, is substantially adopted by the court in the following jurisdictions; *State* v. *McCall*, 4 Ala., 643; *State* v. *South*, 136 Mo., 673, 677, 38 S. W., 716; *Pitcher* v. *People*, 16 Mich., 142, 147; *Mitchell* v. *Com.*, 88 Ky., 349, 352, 11 S. W., 209.

This question of what is included within the term dwelling-house has more frequently arisen in the reported cases in connection with the crime of burglary and indictments for that offense.

However, such authorities are entitled to weight in determining what is included within that term when it comes to an invasion of the privacy of one's home by virtue of a civil process, since the crime of burglary is an invasion of the privacy of a man's habitation with an intent to steal; and at common law the crime consisted solely in the breaking and entering of the dwelling-house. Bish. Crim. Law., Vol. II., Sec. 104.

In this connection, Mr. Bishop says, Statutory Crimes, Section 290, "The habitation often termed the castle of the occupant,

which he may defend against the intruder to the taking of life and which only under limitation can be broken into to make an arrest is probably commensurate, or nearly so, with the dwelling house in burglary."

The law has thrown its protecting arm around the dwelling place of every man because it is the place of family repose. "It is, therefore, proper" said the court in *Mitchell* v. *Com.*, supra, "to secure not only the quiet and peace of the house in which they sleep, but also of any and all outbuildings which are properly appurtenant thereto and which as a whole contribute directly to their comfort and convenience of the place as a habitation."

From the authorities above cited, it appears clear that at common law a shed, connected with the house and used for the household purposes for which the shed in the case at bar was generally used, as disclosed by the evidence, would be considered a part of the dwelling-house, which an officer may not enter by force or against the will of the owner or tenant to serve a civil process like a writ of replevin.

No authority has been called to our attention indicating that in this State the common law has been modified in this respect, although in some jurisdictions it has been by statute. *Rentschler* v. *Fox*, 130 Mich., 498; *Howe* v. *Oyer*, 50 Hun., 559; 3 N. Y. S., 726; *State* v. *McPherson*, 132 Ind., 371. On the contrary, substantially the same definition of the term, dwelling-house, has been given legislative sanction in this State, at least, in cases of criminal invasion of the privacy of one's habitation, Sec. 8, Chap. 121, R. S.

If the rule at common law is too broad and instead of a shield and protection of the family repose and privacy, may become through the machinations of the unscrupulous a means of perpetrating fraud, the modifications must, as it has in other jurisdictions, come from the legislative branch of the government.

According to the stipulation of parties, the entries will be:

Exceptions sustained.
Judgment for the plaintiff for sum of $1,000.00.

PORTLAND MOTOR SALES CO., INC. *vs.* E. D. MILLETT.

Cumberland. Opinion April 23, 1925.

A party to a written contract, no element of fraud being present, is estopped to deny knowledge of the terms of the contract, or of a provision requiring the written approval of an officer of the corporation before it is binding upon the corporation.

An oral contract entered into with an agent having apparent general authority will bind his principal, the other party to the contract having no actual knowledge of any limitation upon the agent's authority, or of facts putting him upon his inquiry.

If a written contract containing a notice that it is not binding, unless also countersigned by an officer of the corporation, be fully executed, but afterward abandoned, and a new oral contract be entered into with an agent of the corporation, having apparent general authority, but without the knowledge of any other officer of the corporation, the corporation will be bound, unless it appears that the other party had actual knowledge of the limitation upon the agent's authority or of facts sufficient to put him upon his inquiry.

A ratification of a contract after suit begun, if relied upon as a bar to the suit, must be pleaded.

In the instant case, since the verdict of the jury may have been based upon a finding that the agreement for the second exchange of cars was never put in writing, that the defendant had no actual knowledge of any limitation upon the apparent general authority of the plaintiff's agent, and that the first agreement was mutually abandoned and was not the foundation of the defense, the defendant was not estopped to deny knowledge of any limitation of authority on the part of the agent, and the title to the car was properly held to have passed to the defendant.

On motion. An action of replevin to recover the possession of an automobile. The general issue was pleaded and under a brief statement the issue of title was raised. The jury returned a verdict for defendant and the plaintiff filed a general motion for a new trial. Motion overruled.

The case is fully stated in the opinion.

Harry C. Libby, for plaintiff.

Henry Cleaves Sullivan, for defendant.

SITTING: WILSON, C. J., PHILBROOK, MORRILL; STURGIS, BARNES, JJ.

WILSON, J. An action of replevin to recover possession of an automobile. The defendant pleaded the general issue and in a brief statement raised the issue of title. The jury found for the defendant and the case is here on a general motion for a new trial on the usual grounds.

One of the directors of the plaintiff company, who was also employed as a salesman, entered into an agreement with the defendant to exchange on equal terms a second hand Hupmobile Touring Car, for a second hand car, known as a Hudson Speedster, belonging to the defendant.

The agreement was incorporated in a printed form furnished by the plaintiff Company for use by its salesmen in the sale of cars, which form had printed in clear type just above the line on which the purchaser signed, a notice that the order was not valid until countersigned by an officer of the plaintiff Company. The agreement for the exchange of cars was signed by the defendant and by the agent describing himself as "salesman," but was never countersigned by any other officer for the Company.

The cars were delivered in pursuance of the agreement between the salesman and the defendant, but the Hudson car was at the same time turned over by the salesman to the son of the defendant for resale, he having a prospective customer in view, and having on several occasions sold cars on commission for the plaintiff Company.

About two weeks later the salesman making the exchange came to the defendant and stated that it had just come to his knowledge that the car delivered to the defendant was in some way covered by a prior sales agreement, but that he had another car of the same type which he would exchange for the defendant's Hudson car.

After a later conference at the garage of the plaintiff, the defendant took home another car of the same type, as he says, in exchange for his Hudson car, and with the addition of a spare tire, on equal terms. At the same time he took home another agreement prepared in duplicate, according to the terms of which he agreed, if and when executed, to exchange his Hudson car for a Hupmobile Touring Car and pay in addition three hundred and fifty dollars at the rate of thirty-five dollars per month. This agreement, however, was never signed by the defendant.

It is largely by reason of the conflicting testimony as to what took place at this conference that the issues in this case have arisen.

The plaintiff's agent, the salesman, claims that having come to the conclusion that the defendant's car, which he did not see at the time of the exchange, and had not since seen, was not worth as much as it was represented to him by the defendant, and that the exchange upon equal terms would not be satisfactory to the other officers of the Company who would have to approve the sale, and having learned of the prior sales agreement upon the car first delivered in the exchange, finally prevailed upon the defendant to accept another and somewhat better car, but with the understanding that the defendant would sign the new agreements to exchange cars and pay a difference in cash of three hundred and fifty dollars, at the rate of thirty-five dollars per month, of which sum, however, the salesman testified he assured the defendant he personally would pay at least one half, because of the trouble to which the defendant had been put by reason of the defective title to the first car.

The case is here, however, on a motion for a new trial and it must be determined upon the basis of what the members of the jury, whose special prerogative it is to determine the credibility of witnesses, may have found the facts to be.

Assuming then that the jury may have believed the defendant and his witnesses, their story being no more inherently improbable than that of the salesman, and found that the second car with the additional spare tire was delivered to the defendant in exchange for his Hudson car on equal terms, and that the new agreement taken home by him, as he claimed, related to a proposed trade for a new car of the same make, but of another type, and for which the proposal, was, that in addition to turning over his Hudson car, he would also pay in cash the sum of three hundred and fifty dollars, that not being able to read he never knew that the car he was to receive under the new agreement was described therein as a "touring car," but assuming that the agreements related to a new car, since he had decided to keep the used car, they were never signed by him.

It is not questioned that the title to the first car delivered to the defendant did not pass; and in any event it was voluntarily surrendered up by the defendant and the car now involved in this action accepted by the defendant in exchange for his Hudson car.

It is true, that the jury might have found that there was no meeting of minds in the second transaction, but in order to arrive at their verdict they must have found the facts as claimed by the defendant.

The plaintiff, however, contends that even so, the defendant is bound by the notice of the limitation upon the salesman's authority contained in the printed agreement notwithstanding the defendant cannot read and the jury may have found that his attention was not called to it. *Gilman* v. *Stock,* 95 Maine, 359; *Kelleher* v. *Fong,* 108 Maine, 181.

This, we think, would be true if the plaintiff in prosecuting his action, or the defendant in defending, were relying upon the first agreement. He would then be estopped to deny knowledge of its contents. *Mattocks* v. *Young,* 66 Maine, 459, 464. Such is not the case. We must assume, we think, that the jury were instructed that if the first contract was still in force and the second car was merely substituted for the former in the original contract, the defendant would be estopped to deny knowledge of the necessity of the signature of another officer of the company as a *sine qua non* to its validity, and his title would be bad unless the contract was later ratified.

Both parties, however, appear to be in accord that the second car was delivered under a new agreement, either oral or upon an agreement which was never executed. The jury, therefore, must have found, and we cannot say upon the evidence that such a finding was clearly wrong, that the second transaction was under an oral agreement between the defendant and an agent of the plaintiff with apparent general authority, and that the defendant had no actual knowledge of any limitation upon it. Not having any actual knowledge, he was not estopped from denying knowledge because of his having signed the agreement as to the first exchange, such agreement having by mutual consent been cancelled and having no binding effect upon him.

Under such conditions the plaintiff is bound by the acts of its agent, who it admits, had general authority to sell and dispose of its used, or second hand cars, though subject to the approval of its officers. *Stickney* v. *Munroe,* 44 Maine, 195, 203-4; 31 Cyc., 1340.

It is argued by the defendant's counsel that there was a ratification by the plaintiff of the second transaction, but if so, it was after this action was begun, and if relied upon as a bar to further maintenance

of the action, it should have been pleaded. *Fiske* v. *Holmes*, 41 Maine, 441, 444; *Rowell* v. *Hayden*, 40 Maine, 582, 585.

But since the verdict of the jury may have been based upon a finding that the agreement for the second exchange was never put in writing, and the defendant not having actual knowledge of any limitation upon the agent's general authority, and the original agreement no longer controlling either party, the title to the car now in question passed to the defendant.

If injury has resulted from unauthorized acts of the plaintiff's agent, the evidence also warranting a finding by the jury that the Hudson car had finally come into the possession of the plaintiff, the loss, if any, should fall on the plaintiff and not on another who had no knowledge of the agent's lack of authority.

Motion overruled.
Judgment for return.

STATE *vs.* WILLIAM A. HOLLAND.

Cumberland. Opinion April 24, 1925.

It is not exceptional error to admit the testimony of an officer, offered by the State, for the sole purpose of corroborating the testimony of another officer who had testified that he had held a conversation by telephone with the respondent, whose voice he recognized, that such conversation took place.

If evidence is admissible for any purpose, exceptions to its admission will not be sustained unless it affirmatively appears that it was admitted for an unauthorized purpose.

On exceptions. Respondent was indicted as a common seller of intoxicating liquors and found guilty by a jury. During the trial an officer testified that he held a certain telephone conversation with the respondent, whose voice he well recognized, and another officer, who did not know respondent's voice, was so placed as to hear both parties to the conversation, and the latter officer was permitted to testify to what was said, and exceptions were entered by respondent. Exceptions overruled. Judgment for the State.

The opinion states the case.

Ralph M. Ingalls, County Attorney, for the State.

William C. Eaton, for respondent.

SITTING: WILSON, C. J., PHILBROOK, DUNN, MORRILL, DEASY, STURGIS, BARNES, JJ.

DEASY, J., concurring in result.

PHILBROOK, J. Exceptions to the admission of certain testimony offered by the State in the trial of the respondent upon an indictment charging him with being a common seller of intoxicating liquor.

Harold B. Stanley, a Deputy Sheriff, testified that upon a certain occasion he held a telephone conversation with the respondent; that Ray Goss, another Deputy Sheriff, was near the telephone; that the receiver of the instrument was so held that Goss could hear the conversation from Stanley through the transmitter and the replies from the other person through the receiver.

Against the objection of the respondent, Goss testified that he was present and heard the party on the other end of the line respond to Stanley's questions but did not recognize the voice of that party. Subject to further objection, in answer to what conversation he heard, he testified as follows: "A man's voice came over the wire. Mr. Stanley says, 'Hello, is that you Bill?' It says 'yes.' 'Did you get your money for that stuff I got the other night; the stuff is all right, and I want to make sure, because I might want some more soon.' He says, 'yes, I got my money all right'."

In argument the respondent's counsel says that the precise question before this court is whether the witness Goss should have been allowed, against respondent's exception, to testify to the text of a telephone conversation which he claimed to overhear between the witness Stanley and some other person whom he, Goss, could in no way identify.

It appears from the record that Goss had been excluded from the court room while Stanley was testifying and therefore had no means of knowing Stanley's testimony as to what the conversation was. The respondent does not deny that Stanley was properly allowed to testify as to the conversation because he identified the respondent by his voice, but that Goss could not testify to the text of the conversation because he had no means of identifying the person on the other end of the wire.

The State claims that the testimony of Goss, thus objected to, was not offered to prove what the conversation was, in fact, but to

corroborate Stanley's testimony that a conversation was held; and, since Goss had been excluded from the court room when Stanley testified, that Goss should be permitted to repeat the conversation which he heard, in order that it might be made plain to the jury as to what conversation he referred to as being the conversation claimed by Stanley to have taken place. In other words the State claims that the testimony objected to was offered simply as corroboration of the testimony of Stanley that the conversation took place. Upon this ground the court admitted the testimony and, as we hold, in so doing was clearly correct.

If a party excepts to the admission of testimony, and it is apparent that it was admissible for any purpose, the excepting party has no ground of complaint if his exceptions are overruled unless he shows affirmatively that it was in fact admitted for an unauthorized purpose, and this should appear upon the face of the exceptions. *Dennen* v. *Haskell*, 45 Maine, 430. If evidence is admissible for any purpose, exceptions to its admission will not be sustained unless it affirmatively appears that it was admitted for an unauthorized purpose. *Booth Bros.* v. *Granite Company*, 115 Maine, 89.

Exceptions overruled.
Judgment for the State.

JOHN R. WEED *vs.* BOSTON & MAINE RAILROAD.

Aroostook. Opinion April 25, 1925.

An action against a terminal railroad for misdelivery of a carload of potatoes shipped by a person in his own name, where an "on arrival" draft with bill of lading indorsed in blank attached for the invoiced value of the potatoes, drawn by the shipper to the order of his bank on the expected buyer and deposited by the drawer in the bank to his credit, not for collection, was dishonored by the drawee and charged back by the bank to the drawer and the papers returned by the bank to the drawer by manual delivery only, thus retransferring the title to the potatoes to and reinvesting it in the drawer, will not lie under the statute in this State unless the assignment of the chose in action for the misdelivery of the potatoes is in writing.

Where the assignment is not in writing the action is maintainable only in the name of the assignor.

In the instant case the drawer-shipper sued the terminal railroad, in his own name without reference to the assignment, for misdelivery of the potatoes, counting on facts which, accepting the proof thereof, in the attitude of the parties, as sufficient of conversion, show the conversion to have been while the transaction at the bank still stood but to the credit of the depositor in his account, and the bank had title to the property that the bill of lading described and of which it was universally symbolic.

Passing back the papers by the bank to its customer operated to retransfer the title to the potatoes from the bank and to reinvest it in the drawer of the draft. It operated too as an assignment of the chose in action for the misdelivery of the potatoes, but under the law as the Legislature has made it, the assignment of the chose being without writing, action thereon in the name of the assignee will not lie.

On report. An action of trover to recover the value of a carload of potatoes. On June 20, 1916, the plaintiff shipped a carload of potatoes from Monticello in his own name to Nashua, New Hampshire, Holbrook, Marshall Co., being the prospective buyer. On June 21, he drew a draft on Holbrook, Marshall Co. for the price of the potatoes payable to the Farmers National Bank, indorsed in blank the bill of lading, and delivered the draft with the bill of lading attached to the bank. The bank credited the plaintiff's account with the amount of the draft less charges. On June 26 the plaintiff learning that the car had not been accepted went to

Nashua and found the car on the siding at the warehouse of Holbrook, Marshall Co., with the doors open and some of the potatoes removed. On July 12, the draft, having been dishonored by the drawee, was charged back to the plaintiff by the bank, and the draft and bill of lading returned to him by the bank. At the conclusion of the evidence, by agreement of the parties, the cause was reported to the Law Court. Plaintiff nonsuit.

The case fully appears in the opinion.

Charles P. Barnes and Nathaniel Tompkins, for plaintiff.

Cook, Hutchinson & Pierce, for defendant.

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

DUNN, J. On report. Trover against the terminal road for the misdelivery of merchandise. The case antedates both the Negotiable Instruments and the Uniform Bills of Lading Acts.

The action must fail. At the time of the asserted taking and conversion, the plaintiff was without property and possession in the personalty, having conveyed the same to his bank. These are the facts of the story:

An Aroostook county dealer consigned from his home station to himself at Nashua, New Hampshire, on June 20, 1916, one carload of potatoes, under direction that his prospective purchaser, the concern of Holbrook, Marshall & Company, be notified when the consignment was arrived.

Next, the shipper drew his "on arrival" draft on the Holbrook company, payable to the order of the bank in which the drawer was of the regular customers, for the amount of $970.47, the invoiced value of the potatoes. The bill of lading which the initial carrier had issued was indorsed by the plaintiff, in blank, and attached to his draft. Then the draft, with the bill attached, was deposited to the credit of the plaintiff at the bank. The deposit was not treated as a collection item, but as unconditionally as if the credit of $968.00 extended therefor, were cash. The credit was available at once to the depositor's check.

Eventually the freight was at Nashua, whither plaintiff went on being informed that the "notify consignee" had refused the shipment. Plaintiff found the car on the siding at the warehouse of the aforesaid

Holbrook, Marshall & Company, where the common carrier had set it. The seals were broken, the doors of the car open, and some of the potatoes missing. Who took or what was done with the missing or the rest of the potatoes is not directly in the record.

Sixteen days afterward the bank charged back the draft to its depositor, such practice being customary on dishonor by a drawee, as the drawer-depositor all along knew. From time to time during the interval between the crediting and the debiting of the draft, the depositor checked against his bank account, but the balance in his favor was never less than the amount of the deposit, though he was at liberty to have withdrawn all. Claim for damages was made within the time limitation of the bill of lading, that is, within four months of the relied-on delivery of the property, and little less than six years from that delivery the instant action was begun.

If the proof be accepted as sufficient of conversion, and the defendant argues on the premise that wrongful dominion was exercised by it over the property, though it does not concede and the court is not deciding the rather narrow question of fact, then there are defensive aspects of the case which stand forth in bold relief, whereof but a single one need occupy attention.

Trover is a possessory action wherein the plaintiff must show that he has either a general or special property in the thing converted and the right to its possession at the time of the alleged conversion. *Jones* v. *Cobb*, 84 Maine, 153; *Weeks* v. *Hackett*, 104 Maine, 264; *Gilpatrick* v. *Chamberlain*, 121 Maine, 561; 26 R. C. L., 1131; 38 Cyc. 2044. This statement is more or less elemental. It is but generalization. And generalizations do not get anywhere. The strength of any proposition lies in its application.

When the bill of lading was indorsed and delivered to the bank, the title to the property that the bill described and of which it was universally symbolic, passed to the transferee quite as completely as it could have been passed by deed and delivery of the potatoes themselves. *Winslow* v. *Norton*, 29 Maine, 419; *Robinson* v. *Stuart*, 68 Maine, 61. Of course, in any case of this kind, the real character of the transaction shall govern. And the chief criterion for determining the substantive nature is the true intention of the parties. Of controlling consequence, however, is how the dealing was and not how it might have been. In the absence of evidence manifesting an intention to the contrary, as the situation is here, the effect of the

indorsement and delivery of the bill was that of making the bank the rightful owner of the potatoes. *Weyand* v. *Atchison, T. & S. F. R. Co.*, (Iowa), 39 N. W. 899, 1 L. R. A., 650.

And when, at the same time, and without distinguishing the matter from the usual and ordinary one with any depositor, the bank took for deposit the obligation of the draft and the depositor had the right, once the credit entry was carried to his account, to draw the whole, or any part thereof, without awaiting payment of the draft, the doing was consistent with and indicative of a sale and purchase, in which as with money so deposited, the draft became the property of the bank, as a holder for value in due course. The bank could have sold the draft, or might have lost it, or neglected collection, or otherwise done with it as it chose, without violating any right of the depositor, under its absolute contract with him to pay his checks to the extent of the credit. Had the draft been wrongfully converted the bank could have maintained an action for the value; or it might have replevied it; had the draft been stolen the theft would have been of the property of the bank; if the bank had refused payment of the depositor's check it would have been liable; it would have been chargeable in trustee process had the fund been attached, and had the affairs of the bank become involved the negotiation would not have been rescindable.

No dissent from the general doctrine that the passing of title to negotiable paper upon a transfer thereof to a bank by which upon deposit it is credited to the depositor's account, or is to be credited when the proceeds are collected, rests fundamentally in intent, is intended. But the design and meaning of the parties must, in some measure, in every case as to the true purpose of the business, be determined on the circumstances. The theory is that the accustomed relation between a bank and its customer, where there is no definite understanding as to the ownership of paper whereof the depositor has credit with the right to check, is that of debtor and creditor rather than of principal and agent, or trustee and beneficiary under a trust. And hence, the physical thing becomes the property of the bank, impressed with no trust, and which it may dispose of at its pleasure, bound only to pay an equivalent sum to the depositor upon his demand or order. Thus was it that Massachusetts reasoned and concluded. *Taft* v. *Quinsigamond Nat. Bank*, 172 Mass., 362. And New York so decided, *Craigie* v. *Hadley*, 99 N. Y., 131; Illinois,

American Trust & Savings Bank v. *Gueder & P. Mfg. Co.*, 37 N. E., 227; California, *Gonyer* v. *Williams*, 143 Pac., 736; Kansas, *Scott* v. *McIntyre Co.*, 144 Pac., 1002; Maryland, *Auto & Accessories Co.* v. *Merchants Bank*, 81 Atl., 294; Vermont, *Walker* v. *Randlett Co.*, 89 Vt., 71, 93 Atl., 1054; Washington, *Nat. Bank* v. *Hines*, 192 Pac., 899; Wisconsin, *Aebi* v. *Bank of Evansville*, 102 N. W., 329. And adjudications elsewhere second decision, too.

Legal saliency is patent in the Virginia case of *Fourth Nat. Bank* v. *Bragg*, of report in 102 S. E., 649, and informingly annotated in 11 A. L. R., 1034. It was there held, to borrow the phrascology of the annotator's headnote, that a bank which credits the amount of a draft to a depositor, and permits him immediately to draw against it, becomes the owner of it and the bill of lading which is attached to it, although it reserves the right to charge back the amount in case the draft is not paid. *Walsh, Boyle & Company* v. *First Nat. Bank*, (Ill.), 81 N. E., 1067, is authority for the statement that the indorsement and delivery by a shipper of a bill of lading to a shipment of flour, with sight draft attached, to a bank, who credited the shipper's account with the amount of the draft, operated as a symbolical delivery of the flour, and vested the title in the bank.

The threads of fact given ascendancy in the majority-rule cases are not all the same, nor are the decisions the result of one method of reasoning. Some of the cases stress the right to draw upon the account. *Ditch* v. *Western Nat. Bank*, 29 Atl., 72, 23 L. R. A., 164; *Security Bank* v. *Northwestern Fuel Co.*, (Minn.), 59 N. W., 987. In the Ditch Case much relevancy is in the observation, to paraphrase slightly the opinion, if the bank had paid to the depositor the full amount of the check in coin or currency, there would have been no question about the nature and effect of the transaction. But the bank gave the depositor what was preferred to the coin or currency. It gave the depositor the unconditional right to get the coin or currency at any time he might see fit to call or send for it.

Other cases emphasize that the depositor checked on the credit. *Walker* v. *Randlett Co.*, supra; *Williams* v. *Cox*, (Tenn.), 37 S. W., 282; *Sanders* v. *Worthen Co.*, (Ark.), 182 S. W., 549. Again, the exhaustion of the account weighs essentially. *Scott* v. *McIntyre Co.*, supra.

That the bank is payee of the paper is accented in some cases. *Auto & Accessories Co.* v. *Nat. Bank*, supra; *First Nat. Bank* v.

McMillan, (Ga.), 83 S. E., 149. And no point is made thereof in other cases. *Walker* v. *Randlett Co.*, supra; *Howe Grain etc. Co.* v. *Crouch Grain Co.* (Texas), 211 S. W., 946. And still other cases, as noticed at the outset, stand upon and apply the principle that title passes to the bank, where the transaction is the everyday one of deposit, credit, and the right immediately to withdraw—of transfer and sale and of purchase, and the other and valuable consideration of the right to check instanter. *Burton* v. *United States*, 196 U. S., 283, 49 Law Ed., 482.

Usages of business obtaining in a locality may color a particular procedure. Perhaps, in the case now under consideration, consistent with a habit pertaining to Aroostook, it was purposed that the bank be in the class of a vendee of property bought conditionally, the proviso going to the honoring of the draft, and the credit being in mere convenience. If once the transaction was that, it would so continue, the condition remaining unfulfilled. But, pressed to the strongest, this is not in the record.

That the contingency of charging back was contemplated does not vary the general rule. The bank had this right irrespective of the customer's expectation, or of custom. The contract of the drawer of a bill of exchange is to pay if the one drawn on refuses. *Nat. Bank* v. *Gooding*, 87 Maine, 337. The dishonor of the seasonably presented draft permitted the bank, upon due notice, or the excusing of it, to charge its depositor as a drawer, as a matter of law. That such right had recognition does not go to the title to the draft. *Burton* v. *United States*, supra; *Ditch* v. *Western Nat. Bank*, supra; *Fourth Nat. Bank* v. *Bragg*, supra; *Heinrich* v. *First Natl. Bank*, 219 N. Y., 1. The bank merely employed this method to reimburse itself for the credit which it had given.

On charging back the credit, the fair inference reassured by the arguments is, that the draft and the accompanying bill of lading were retransferred by the bank to its customer, by simple manual tradition or delivery.

A bill of lading is a contract, in every sense of the term, and the assignment of the special bill, in the nature of things, carried with it all rights incident thereto. Of these was the cause of action for the conversion of the potatoes. That cause was capable of being assigned. *Rogers* v. *Portland & B. St. R. Co.*, 100 Maine, 86; *Metropolitan Ins. Co.* v. *Day*, 119 Maine, 380. And, without further remark, that cause was then and thereby assigned.

But in what manner to be enforced? A bill of lading is non-negotiable. Likewise is the chose in action which the plaintiff has sued as of his original right in his own name. The suit is without parent or even relation in the common law. In that law the assignee of a chose in action is required to sue in the name of his assignor. In the statute book is the law which permits an assignee to name himself as plaintiff, but with his writ must be the assignment, or a copy thereof. R. S., Chap. 87, Sec. 152. The permission vouchsafed is coupled with positive command. True enough, if one sue as assignee and do not file the assignment or copy, the failure must be availed timely, else it will be regarded as waived. But this case is not that. The genesis of the plaintiff's right is the assignment of the cause of action. 'Twas the bank's; 'tis his. Plaintiff sued without reference to the assignment, in his own name, on a cause set out as primeval in himself.

Notwithstanding the statute, an assignee if he chooses may still sue in his assignor's name, and suing in such a manner, need not supply the assignment. *Rogers* v. *Brown*, 103 Maine, 478; *Hall* v. *Hall*, 112 Maine, 234. But to maintain an action in his own name, save as he may be excused by a defendant, an assignee must come within and follow the statute. *Harvey* v. *Roberts*, 123 Maine, 174. Thus is the law as the Legislature has made it.

The declaration in the writ in this action sets out one thing; the proof is of another.

Let the entry be,

Plaintiff nonsuit.

CORNISH, C. J. sat at argument and participated in consultation, but, owing to retirement, does not join in the opinion.

MARY A. WHITE'S CASE.

Aroostook. Opinion May 5, 1925.

Under the Workmen's Compensation Act, an employer, conducting a saw mill and also (to supply logs for his mill) a lumbering operation, may become an assenting employer as to the mill without assenting as to the logging operation. Or he may become an assenting employer as to both operations. It is only necessary to make his meaning clear in simple English language.

In the instant case the defendant's assent was thus expressed: "Location of business (in Maine) Mill located in E. Plantation Robinson and elsewhere in Maine—Kind of business included in the assent, long lumber." This language does not necessarily exclude the logging operation.

The insurance policy filed by the employer under the heading "Classification o Operations" contains the words "Portable Saw Mill." The business is not otherwise described in the policy. But section six of the policy says that the business described "shall include all operations necessary incident or appurtenant thereto, or connected therewith whether such operations are conducted at the places defined and described in in said declarations, or elsewhere in connection with, or in relation to such work places." The phrase "Portable Saw Mill" thus qualified may include a logging operation carried on to supply logs to the mill.

On appeal. Claimant is a dependent widow of Everett D. White, who, while in the employ of W. E. Robinson & Son in a lumbering and mill operation, received an injury resulting in his death. Decedent, at the time of the injury, was working with other men cutting lumber to be hauled a distance of four miles to a portable saw mill operated by his employer. The question involved was as to whether the written assent filed by the employer embraced the cutting of the logs as well as the operation of the portable saw mill. Compensation was awarded and respondents appealed from an affirming decree. Appeal dismissed. Decree affirmed.

The opinion states the case.

J. Frederic Burns, for petitioner.

Robert Payson, for respondents.

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

DEASY, J. Under the Workmen's Compensation Law an employer engaged in more than one kind of business, may become an assenting employer as to all or any. In assenting he must specify the business or businesses "concerning which he desires to come under the provisions" of the law. Public Acts of 1919, Chap. 238, Sec. 3.

In the instant case the employer carried on a saw mill business and to provide logs for the mill conducted, about four miles from the mill, a woods operation. While employed as a chopper in the woods, the petitioner's husband accidentally sustained a fatal injury.

An employer, circumstanced as was the defendant, may become an assenting employer as to the mill without assenting as to the logging operation. *Paper Co.* v. *Thayer*, 122 Maine, 201. Or he may become an assenting employer as to both operations. It is only necessary for him to make his meaning clear in simple English language.

In the defendant's assent his business is described thus: "Location of business (in Maine) Mill located in E. Plantation, Robinson and elsewhere in Maine. Kind of business included in assent, Long lumber."

The defendants contend that by the language above quoted they in effect specified the sawing of lumber at the mill as the "business concerning which they desired to come under the (Laws) provisions" and impliedly excluded the cutting and hauling of logs.

They argue that the use of the word "mill" fixes the location of the business included in their assent. This depends upon whether the phrase "and elsewhere in Maine" refers to and qualifies the word "mill" or the words "location of business." The language used may mean "a mill located in E. Plantation or (located) elsewhere." But it is equally susceptible of the meaning—"a business carried on at the mill and elsewhere."

Technical language is not required. 28 R. C. L., 735. But the meaning should be made reasonably clear. The language is that of the employers and being ambiguous must be taken most strongly against them. 6 R. C. L., 854.

But the employers urge further that in stating the kind of business to be "long lumber" they impliedly specified the manufacturing of long lumber at a mill as the business covered by their assent.

The word lumber has two well recognized meanings. Its more precise and restricted meaning is as the defendants claim, manufactured lumber. But it is also used as meaning logs. In common parlance, cutting and hauling logs in the woods is called "lumbering."

In the defendant's petition for decree in this case the phrase "lumbering operation" is used three times in describing the business in connection with which the petitioner's husband was employed. In the language of legislation the term lumber includes logs: "Logs or other lumber" R. S., Chap. 78, Sec. 1 and Chap. 129, Sec. 14.

"The statutes of the state recognize different kinds of lumber—There are logs, masts, spars and other lumber."

Appleton, C. J., in *Haynes* v. *Hayward*, 40 Maine, 147.

"The word lumber in its broadest sense includes both the manufactured and unmanufactured product."

Cornish, J., in *Mitchell* v. *Page*, 107 Maine, 390.

In view of these authorities we cannot say that necessarily and as a matter of law the word "lumber" even when qualified by the word "long" signifies a mill operation only, and excludes the cutting and hauling of logs.

As reinforcing his argument the petitioner's counsel calls attention to a clause in the defendant's approved insurance policy reading thus: "The employer is conducting no other business operations at this or any other location not herein disclosed—except as herein stated." No exception is set forth.

It is urged that whatever they may now say, the defendants in filing this policy with their assent must have then regarded the woods work as a part of their mill business. But the defendant's counsel says that within the purview of the statute a lumbering operation is not a business. His clients seem to think otherwise. In answer to a question O. B. Robinson, one of the defendants, says: "The logging business ends at the landing." Mr. Robinson used the word business correctly. It fairly includes a lumbering operation.

Counsel for the defendant also relies upon the policy as sustaining his contention. Under the heading "Classification of Operations" are the words "Portable Saw Mill." The business is not otherwise described in the policy. It is argued that the operation of a portable saw mill cannot be held to include logging. True perhaps if unquali-

fied. But as explained and qualified by paragraph six of the policy the term may well be held to include a logging operation conducted for the purpose of supplying logs for the mill.

Paragraph six:—"This agreement shall apply to such injuries so sustained by reason of the business operations described in said Declarations which, for the purpose of this insurance, shall include all operations necessary, incident or appurtenant thereto, or connected therewith, whether such operations are conducted at the work places defined and described in said Declarations or elsewhere in connection with, or in relation to, such work places."

If logging was not a part of the mill business it was incident to and connected with it. *Durand's Case,* 124 Maine, 59.

Our attention has been called to two cases decided by this court wherein a mill owner's assent was held not to cover the cutting and hauling of logs.

Fournier's Case, 120 Maine, 191.

In this case the location of the business was stated to be "Milford and Oldtown Maine." Held not to cover a logging operation at a distant place in another County.

Cormier's Case, 124 Maine, 237.

The kind of business was stated to be "Veneer Mfg." The policy filed with the assent reads—"This policy does not cover woods operations."

The wide distinction betweeen these cases and that now under consideration is obvious.

Appeal dismissed.
Decree affirmed.

E. DANA PERKINS *vs.* NEHEMIAH P. M. JACOBS

(2 cases)

York. Opinion May 8, 1925.

When a plan is referred to as a part of the description in a deed, such plan is made a material and essential part of the conveyance with the same force and effect as if copied into the deed, and is subject to no other explanations by extraneous evidence than if all the particulars of the description had been actually inserted in the body of the grant or deed.

Want of record of the plan makes no difference; it is sufficient to prove the plan and its contents.

It is well settled that what are the boundaries of land conveyed by a deed, is a question of law: where the boundaries are, is a question of fact. An existing line of an adjoining tract may as well be a monument as any other object.

When one accepts a deed bounding him by another's land, the land referred to becomes a monument which will control distances.

In the instant cases the Easterly line of lot twenty-four, owned by the plaintiff, on the plan referred to in the title deeds of both parties is the defendant's Westerly monument or boundary, as the plaintiff rightly contends; beyond that line the defendant cannot go Westerly.

The question of fact presented by the record is, *where* on the face of the earth is that line as shown on the plan, being the boundary or monument between the lands of the parties.

In deciding this question of fact, the case being presented on report, the court exercises the functions of a jury.

A careful examination of the undisputed testimony of the surveyor who made the plan leads to but one conclusion—that the Easterly line of lot twenty-four as shown on the plan referred to, which is the boundary or monument between the lands of the parties, is a prolongation Southerly of the line of a fence which marked the Westerly boundary of the "schoolhouse lot," so called, when the plan was made, and the land in dispute is within the boundaries of defendant's deed.

Whether the shortage caused by overestimating, in making the plan, the amount of land West of the defendant's lot, is to be shared between the plaintiff and the owner of the lots adjoining his lots on the West, the court has no occasion now to determine; it cannot be imposed upon the defendant in disregard of the Easterly and Westerly boundaries of his lot.

On report. Two actions, one a real action to determine the location of the divisional line between two adjoining lots, one of which is owned

by plaintiff and the other by defendant, and the second action is an action of trespass quare clausum fregit. Both parties claim under warranty deeds given by the same grantors. A certain plan was referred to in each deed and made a part of the description in each. In the first action the general issue was pleaded and under a brief statement a disclaimer was filed. In the second action the general issue was pleaded. At the conclusion of the evidence by agreement of the parties the cases were reported to the Law Court. Judgment for the defendant in each case.

The opinion fully states both cases.

E. P. Spinney, for plaintiff.

Robert B. Seidel, for defendant.

SITTING: CORNISH, C. J., PHILBROOK, MORRILL, WILSON, STURGIS, BARNES, JJ.

MORRILL, J. The first case is a real action; the second is an action of trespass quare clausum fregit. The parties own adjoining lots in the Village of Ogunquit, in the town of Wells, the Easterly line of plaintiff's lot being the Westerly line of defendant's property. As is usual in such cases, the location of that dividing line is in dispute, and by the pleadings the title to a lot of land 25.2 feet wide on a street and 101.96 feet deep on the disputed line, is in issue.

Both parties claim under warranty deeds from the same grantors, George H. Littlefield and Lester C. Littlefield, hereinafter for brevity referred to as "the Littlefields." The plaintiff's deed is dated October 27, 1919 and conveys

"Lots twenty two (22), twenty three (23) and twenty four (24) as shown upon Plan of Property of George H. Littlefield & Son in said Wells, in the Village of Ogunquit, so called, made by R. W. Libby, Eng. April 1913 which lots are bounded as follows, to wit: On the North for 210 feet by a Reserved Street; on the East for 101.96 feet by land of said Grantors; on the South by land of N. P. M. Jacobs; on the West for 97.64 feet by lot numbered twenty one."

The defendant's deed is dated October 22, 1921 and conveys

"A certain lot of land in said town of Wells, in the Village of Ogunquit, so called, the same as shown on a certain Plan made by R. W. Libby, April 1913 for said George H. Littlefield & Son and bounded on the North for 165 feet by a Reserved Street; on the East by Jacobs,

Weare et als; on the South for 165 feet, more or less by land of said Grantee; on the West for 101.96 feet by lot No. 24 now owned by E. Dana Perkins."

No question arises as to recording of the deeds, or as to the identity of the plan referred to in both deeds and made a part of the description in each deed. A blue-print copy of the original plan, which has been lost or destroyed, was introduced in evidence without question, and is made a part of the case. By reference as a part of the description in each deed, the plan is made a material and essential part of each conveyance with the same force and effect as if copied into each deed, and is subject to no other explanations by extraneous evidence than if all the particulars of the description had been actually inserted in the body of the grant or deed. *McElwee* v. *Mahlman*, 117 Maine, 402, 406. *Bradstreet* v. *Winter*, 119 Maine, 30, 38. *Erskine* v. *Moulton*, 66 Maine, 276, 280. Nor does it make any difference that the plan is not recorded; it is sufficient to prove the plan and its contents. *Danforth* v. *Bangor*, 85 Maine, 423, 428. In the instant case it is conceded that a blue-print copy of the plan was given to Mr. Perkins by the Littlefields when he bought his lots.

It is obvious upon reading the deeds that the defendant took title to all the land South of the Reserved Street mentioned in the deed, from land of Jacobs, Weare & als. on the East to lot No. 24 owned by the plaintiff on the West. The Easterly line of lot twenty-four is the defendant's Westerly monument or boundary; beyond that line he cannot go Westerly. The plaintiff so contends and is unquestionably right in that contention.

It has often been said that *what* are the boundaries of land conveyed by a deed, is a question of *law;* where the boundaries are, is a question of *fact.* An existing line of an adjoining tract may as well be a monument as any other object. *Abbott* v. *Abbott*, 51 Maine, 575, 581. *Murray* v. *Munsey*, 120 Maine, 148, 150. When one accepts a deed bounding him by another's land, the land referred to becomes a monument which will control distances. *Bryant* v. *Railroad Company*, 79 Maine, 312.

The Easterly line of lot twenty-four being the boundary or monument between the lands of the parties, the question of fact presented is *where* on the face of the earth is that line as shown on the plan. In deciding this question of fact, the case being here on report, we exercise the functions of a jury. A careful examination of the undisputed

testimony of the surveyor who made the plan, leads to but one conclusion,—that the Easterly line of lot twenty-four as shown on the plan is a prolongation Southerly of the line of a fence which marked the Westerly boundary of the "school house lot," so called, when the plan was made, and the land in dispute is within the boundaries of defendant's deed. The testimony leaves no doubt that the surveyor used that fence as a monument from which to plot the "school house lot," and the Easterly and Westerly lines of the lot later sold to the defendant. There is absolutely no evidence that the fence in question did not mark the Westerly boundary of the schoolhouse lot.

Examination of the record will demonstrate the correctness of this conclusion, and that the confusion has arisen solely through an error of the surveyor in marking on the plan the supposed width of the nine lots, including lot twenty-four, plotted Westerly of the lot later sold to the defendant.

By deed dated May 16, 1912 the Littlefields took title to a tract of land of which the lots of the parties are a part; this tract must at sometime have been carefully surveyed because it is described in the deed by courses, distances and bounds; on its South line, its Southeasterly corner was marked by a stone bound; another stone bound was at the Northeasterly corner adjoining land of Lincoln C. Littlefield, at the Northeasterly corner of lot twenty-seven as shown on the plan; iron hubs or posts marked other angles of the tract conveyed; these stone bounds, iron hubs and posts are mentioned in the deed.

In May, 1905 a former owner of the large tract had conveyed therefrom to the Town of Wells a rectangular lot one hundred sixty-five feet square, with a "right of way" twenty-five feet wide, along the Northerly side, leading to Main Street; the corners of this lot were described in the deed to the Town as marked by stones, and the courses of the lines were given. In the deed of May 16, 1912 this "school house lot" was carefully excluded and the bounds at the Southeasterly, Southwesterly and Northwesterly corners were given as bounds of the lot then conveyed; the length of the Southerly and Westerly sides was given as one hundred sixty-five feet each, and the description began at a point on the Northerly side of the right of way, opposite the Northwest corner of the schoolhouse lot. In the deed to the Littlefields an iron hub in the Easterly line of the School house lot, forty-nine and one half ($49\frac{1}{2}$) feet Northerly from the Southeasterly corner thereof is also given as a bound of the land conveyed.

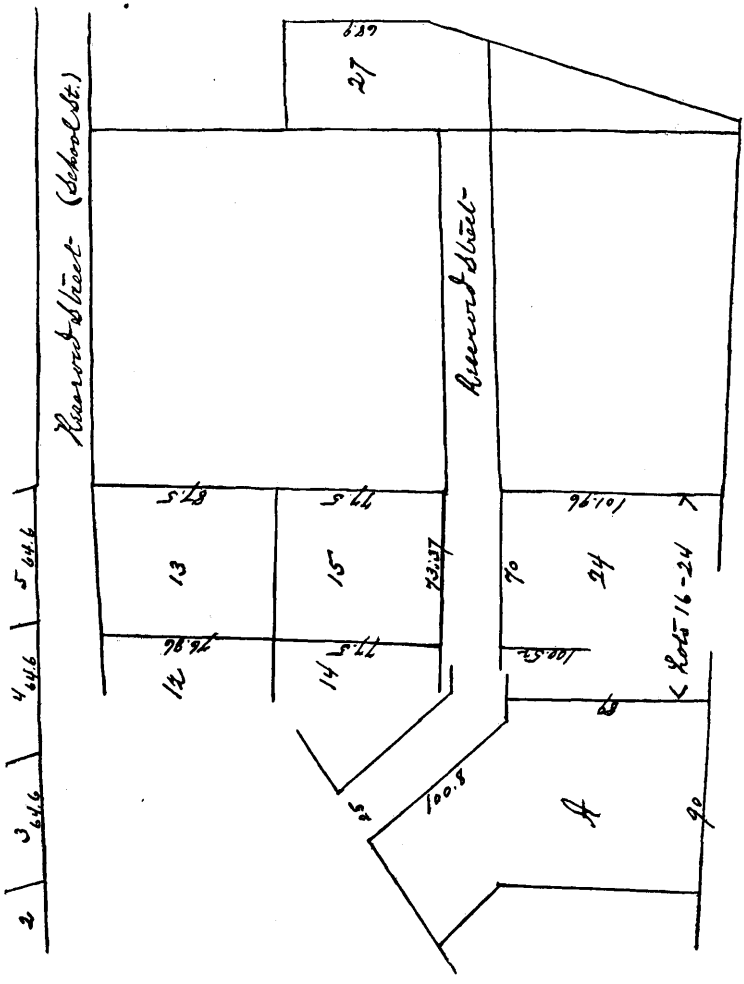
These details so carefully observed in the deed of May 16, 1912 show conclusively that the location of the schoolhouse lot was clearly defined and marked on the face of the earth, and the iron hubs along the Northerly side of the tract North of the right of way, are located with reference to its Northwesterly corner.

In April of the following year, 1913, the Littlefields employed R. W. Libby to make a plan of their land and divide it into lots. At that time Mr. Libby ran two lines and made two measurements; he found a fence along the Westerly side of the schoolhouse lot; beginning at the Northerly end of that fence, on the Southerly line of the "right of way," he ran a line in a straight course Westerly to the post road to Portsmouth, and measured the distance; this gave him data for plotting the Northerly reserved street, called in the record School Street. He then began at the Southerly corner of the schoolhouse lot marked by the fence and ran the Northerly line of the Southerly reserved street in a direct course to the Portsmouth post road, without making the angle shown on the plan at the Westerly end, and measured the distance; this gave him data for plotting the Southerly reserved street; these streets are not parallel but converge as they run Westerly; this convergence necessarily makes an angle to the North in the Southerly reserved street at the Southerly corner of the schoolhouse lot.

With the data so obtained, and with the Littlefields' deed in his hands, Mr. Libby made in his office the plan in the case which is conceded to be the plan mentioned in all the deeds. It is obvious that without the Littlefields' deed he did not have sufficient data from which to make his plan. Before the plan was completed the Littlefields conveyed to one Mary A. Littlefield by deed dated April 11, 1913, the lot marked A on the plan. Mr. Libby located the corners of this lot and marked them with iron rods. The course of the Westerly end of the Southerly reserved street was accordingly changed by an angle to the North.

Upon examination of the plan it will be found to follow accurately the description of the deed of May 16, 1912 to the Littlefields, with two minor exceptions not material to this issue. The Easterly and Westerly lines of the schoolhouse lot were extended Southerly forming the lot later conveyed to the defendant, and Easterly of the latter lot an irregular lot is shown, which was conveyed to one Butler by deed dated July 31, 1915, referring to the plan and describing the Westerly

line as in "the same course as the line dividing the school house lot and said lot No. 27." A copy of the material portions of the plan is inserted below. In dividing the land between the Westerly line of the schoolhouse lot projected Southerly and lot A, into nine lots the surveyor erroneously marked the width of those lots on the reserved street as seventy (70) feet. No other survey was made until ten years later; in the meantime lots were sold with reference to the plan of April, 1913.



In the Fall of 1923 Mr. Libby for the first time made a survey of the lower tier of lots, but not of the Jacob's lot, and ran the Southerly line to the stone bound; he found the length of that line to be but four feet less than the distance stated in the Littlefields' deed which he had in his hands when he made the plan. He then measured out the nine lots giving each the indicated width of seventy feet, with the result that the Easterly line of lot twenty-four (24) is carried twenty-five and two tenths (25.2) feet Easterly of the Westerly line of the schoolhouse lot projected Southerly; the Jacobs' lot is moved Easterly to make a corner at the stone bound, thus including in the Jacobs' lot the lot conveyed to Butler six years before Jacobs received his deed, and making the length of his lot one hundred and eighty feet, instead of about one hundred sixty-five feet; the schoolhouse lot instead of being a rectangle, 165 feet by 165 feet, is shown as an irregular quadrilateral with no two sides parallel, and the reserved street is widened at its Easterly end to nearly double its width as shown on the plan.

In explanation of these discrepancies it is suggested that the surveyor must have made a mistake in measuring one or the other of the lines from the schoolhouse fence to the post road, which he did not discover until 1922. Even so, that error, if it existed, would not alter the location of the schoolhouse lot on the face of the earth; that was fixed by monuments, and the external lines of the tract, North of School Street, are fixed with reference to the Northwesterly corner. The discovery of this alleged mistake in measurement simply shows that there is actually less land than the surveyor supposed and plotted, betweeen the schoolhouse lot and the post road. By adding the distances given on the plan, the adjoining lots thirteen and fifteen cannot be made to overlap the fixed boundaries of the schoolhouse lot.

The only error shown, affecting this issue, was in giving on the plan a width of seventy feet to each of the nine lots in the Southerly tier, or a total distance of 630 feet from lot A to the Easterly line of lot twenty-four, as shown on said plan. This distance must yield to said Easterly line of lot twenty-four as a monument, (*Bryant* v. *Railroad Co.*, supra) the location of which on the face of the earth is fixed as in line with the fence on the Westerly line of the schoolhouse lot.

The cases of *Baldwin* v. *Shannon*, 43 N. J. L., 596, and *Barrett* v. *Perkins*, 113 Minn., 480, relied upon by plaintiff, are not applicable;

the lot of defendant is not a remnant, left after plotting the other lots; its bounds on the East and West were first fixed with reference to the bounds of the schoolhouse lot, and the shortage occurred, according to the explanation of the surveyor, in overestimating the amount of land West of defendant's lot. Whether that shortage is to be shared between the plaintiff, who owns six lots, and the owner of the other three, we have no occasion to determine here; it cannot be imposed upon the defendant in disregard of the Easterly and Westerly boundaries of his lot.

In both cases the entry must be

Judgment for defendant.

CORNISH, C. J., sat at argument and participated in consultation, but, owing to retirement, does not join in the opinion.

FRUIT DISPATCH COMPANY *vs.* FRANK WOLMAN.

Kennebec. Opinion May 8, 1925.

A written and signed statement of resources and liabilities, addressed and given by a dealer to a wholesaler, stating that it is submitted "for the purpose of obtaining credit now and hereafter for goods purchased," should have the construction placed upon it, which the parties intended it to have at the time it was executed.

Such statement, further providing for the termination of any credit and the immediate maturity of any indebtedness thereafter incurred upon failure or insolvency, must mean credit for more than one transaction—that the statement was submitted for the purpose of obtaining a line of credit.

A further assertion in such statement, "and (the subscribers) will immediately notify you of any material change in their financial condition," cannot be construed as an independent promise only, and capable of separation from what precedes and follows. The entire statement reaches forward in point of time and covers the future financial condition of the maker, unless notice of change is given, as well as future transactions between the parties.

In the instant case as presented the court cannot, and does not, express any opinion as to whether there was any limit of time, indicated by usages and conditions of the fruit trade, the relations of the parties, or otherwise, during which the parties may have intended the representation to be operative.

It is for the jury to decide whether the credits given were induced by the representations.

On exceptions. An action for alleged false representations and deceit. The defendant, a retail fruit dealer, gave to plaintiff, a wholesale dealer in fruits, a written statement of his financial condition signed by him for the purpose of obtaining credit then and thereafter for the purchase of goods and under the terms of the written statement defendant was to immediately notify the plaintiff of any material change in his financial condition. Subsequently defendant borrowed money and gave mortgages on his property and largely increased his liabilities without notifying the plaintiff of his changed financial condition, and purchased goods of plaintiff after he had thus increased his liabilities until finally in September, 1923, about sixteen months after he gave the said statement, he was petitioned into

bankruptcy. At the trial the plaintiff offered evidence that defendant, after the giving of the statement and before the sale in question, had encumbered his property and largely increased his liabilities, which was excluded, and plaintiff entered exceptions. Exceptions sustained.

The case is fully stated in the opinion.

James L. Boyle, for plaintiff.

Maurice E. Rosen, for defendant.

SITTING: CORNISH, C. J., PHILBROOK, MORRILL, WILSON, STURGIS, BARNES, JJ.

MORRILL, J. The bill of exceptions states that this case is an action for alleged false representations and deceit. The plaintiff is a wholesale dealer of fruit in Boston; until about September 1, 1923, the defendant was a dealer in fruit in Waterville. About that date the defendant ceased to do business, and upon proceedings in bankruptcy later instituted against him, his liabilities were scheduled at approximately thirty-four thousand dollars, including an indebtedness to plaintiff for merchandise sold in August, 1923.

On May 8, 1922, the defendant gave to the plaintiff a written statement of his assets and liabilities, signed by him. The part of this statement material to the present discussion is as follows:

"PROPERTY STATEMENT BLANK.

"To FRUIT DISPATCH COMPANY, New York

"For the purpose of obtaining credit now and hereafter for goods purchased, the undersigned herewith submit to you the following statement of their resources and liabilities, and will immediately notify you of any material change in their financial condition.

"In consideration of your granting them credit, the undersigned agree that in case of their failure or insolvency, or in case they shall make any assignment for the benefit of creditors, bill of sale, mortgage or other transfer of their property, or shall have their stock attached, receiver appointed, or should any judgment be entered against them, then all and every one of the claims which you may have against them shall at your option become immediately due and payable, even though the term of credit has not expired. All goods hereafter purchased from you shall be taken to be purchased subject to the foregoing conditions as a part of the terms of sale."

Then follows a detailed statement of "Active Business Assets" and "Business Liabilities," including particulars as to assessed valuation of real estate owned, and amount of incumbrances thereon. The plaintiff alleged that in selling the defendant the merchandise aforesaid it relied upon the statement given on May 8, 1922, as a continuing representation of the defendant's financial standing; that the defendant misrepresented the value of his assets and the amount of his liabilities at the time the statement was given; that he did not notify the plaintiff of material changes in his financial condition thereafter, to wit, a mortgage to Ticonic National Bank of Waterville, a mortgage to one Rubin on March 10, 1923, for $6,500, and a conveyance of certain real estate to one Louis Wolman, Jr.; that, having no knowledge of these changes in defendant's financial condition after May 8, 1922, and relying upon the representations of the statement, the plaintiff sold merchandise to the defendant in August, 1923, at a time when, as the bill of exceptions states, the defendant knew that he could not pay for it, and was deceived by said statement.

Thus construing the statement, the plaintiff offered evidence of a mortgage loan by Ticonic National Bank to defendant after May 8, 1922, and before the sale in question. The evidence was excluded. The plaintiff also offered evidence of other transfers of property by defendant during the same period; this evidence was also excluded. The presiding Justice stated his ruling applicable to both offers as follows:

"Of course you may show anything which will tend to disprove his statement made to the creditor, and some of the evidence which has gone in was admitted for that purpose. I am firmly convinced that the agreement which he entered into as part of the statement that he would immediately notify of any material change in his financial condition, is a promise only, and that evidence showing his financial condition, changes in his financial condition, after the date of the credit, would not, even if proven, be a matter of fraud under this contract, under those representations. In other words, I hold that that stipulation in the paper which he signed representing his financial condition, that he would report any material change, was a promise only on his part, and that it did not constitute a continuing representation as to his financial condition."

The only question before the court is the correctness of this ruling and the construction to be given to the statement of May 8. That

statement should have the construction placed upon it which the parties intended it to have at the time it was executed. It plainly states that it was submitted "for the purpose of obtaining credit now and hereafter for goods purchased," and the second paragraph provides for the termination of any credit and the immediate maturity of any indebtedness upon failure or insolvency; this provision is expressly made applicable to all goods thereafter purchased. The language so employed must mean credit for more than one transaction—that the statement was submitted for the purpose of obtaining a line of credit. The closing clause of the opening sentence, "and will immediately notify you of any material change in their financial condition," must be construed as a representation to the party to whom the communication was addressed, that it might rely upon the statement as a true statement of financial standing, not only in the present but for the future, unless notice of change was given. It would be unreasonable to limit the scope of the statement strictly to the time it was made, when in terms it refers both to present and future dealings. The undertaking to give notice of any material change in financial condition cannot be construed as an independent promise only, and capable of separation from what precedes and follows. The entire statement reaches forward in point of time and covers the future financial condition of defendant, as well as future transactions between the parties. *Atlas Shoe Co.* v. *Bechard*, 102 Maine, 197, 10 L. R. A., (N. S.), 245, and note. Counsel would distinguish the instant case from the case cited. While the language of the statement now before the court is not so precise as in the Bechard Case, the construction which the parties intended both statements to have, and the objects they had in view are the same, and the language used fairly so indicates. Both cases involve something more than representations true at the time, and mere failures to notify of a change of conditions. *Ragan, Malone & Co.* v. *Cotton*, 200 Fed., 546, presents a similar statement.

The statement was made May 8, 1922; the merchandise in question was sold in August, 1923, and the bankruptcy followed in September. The case does not disclose the dealings of the parties between May 8, 1922 and August, 1923, whether continuous, or seasonal with intervals of greater or less length between certain seasons. We are therefore, not in a position to express, and do not express, any opinion as to whether there was any limit of time, indicated by the usages and

conditions of the fruit trade, the relations of the parties, or otherwise, during which the parties may have intended the representation to be operative. It is for the jury to decide whether the credits given in August, 1923 were induced by the representations. *Zabriskie* v. *Smith*, 13 N. Y., 322, 332; 64 Am. Dec., 551, 554.

Exceptions sustained.

CORNISH, C. J., sat at argument and participated in consultation, but, owing to retirement does not join in the opinion.

STATE *vs.* NAPOLEON E. MARTEL.

Androscoggin. Opinion May 23, 1925.

An indictment based upon a charge of unlawfully and carnally knowing and abusing a female child under fourteen years of age, under R. S., Chap. 120, Sec. 16, charging that the offense was committed on "the fourth day of November in the year of our Lord one thousand nine hundred and twenty-three and on divers other days and times between that day and the day of the finding of this indictment" is sufficient.

In the instant case the crime alleged is not a continuing offense, and the continuando may be treated as surplusage and rejected, since a single offense is charged as committed on a day certain and the continuando in itself being insufficient as an allegation of a separate offense creates neither duplicity nor repugnancy.

Furthermore, even if the indictment were defective because of duplicity, that objection cannot be raised by motion in arrest of judgment.

On exceptions. Respondent was indicted for assault upon a female under fourteen years of age, and found guilty by a jury, and, before judgment, filed a motion in arrest of judgment, basing his motion upon the grounds that the indictment did not set forth any offense known to the law in any legal or sufficient manner, and that

further it was bad for duplicity. The motion was overruled and exceptions taken by respondent. Exceptions overruled. Judgment for the State.

The opinion states the case.

Clement F. Robinson, Deputy Attorney General and James A. Pulsifer, County Attorney, for the State.

Frank T. Powers, for the respondent.

SITTING: CORNISH, C. J., PHILBROOK, MORRILL, WILSON, STURGIS, BARNES, JJ.

STURGIS, J. The respondent was convicted of unlawfully and carnally knowing and abusing a female child under fourteen years of age, contrary to R. S., Chap. 120, Sec. 16. His motion in arrest of judgment having been overruled by the trial Judge, his exceptions to that ruling are before this court.

The indictment charges the offense as having been committed on "the fourth day of November in the year of our Lord one thousand nine hundred and twenty-three and on divers other days and times between that day and the day of the finding of this indictment." It is to the inclusion of this continuando that the respondent addresses his attack upon the indictment.

The crime charged is not a continuing offense. Each perpetration of the act is a distinct and separate offense, and the inclusion of a continuando in the statement of the charge is neither necessary nor in accord with proper pleading. Such inclusion, however, is not fatal to the indictment. A single offense is sufficiently charged as committed on the 4th day of November, 1923. The continuando then added, since it does not state any particular day on which an offense was committed, is insufficient as an allegation of a separate offense. *State* v. *O'Donnell*, 81 Maine, 271; *State* v. *Beaton*, 79 Maine, 314. Hence, there is no duplicity or repugnancy, and by the weight of authority, the continuando may be treated as surplusage and rejected, leaving the offense stated with that degree of certainty which the law requires. *Dansey* v. *State*, 23 Fla., 316; *Cook* v. *State*, 11 Ga., 53; *State* v. *Briggs*, 68 Ia., 416; *State* v. *Nichols*, 58 N. H., 41; *People* v. *Adams*, 17 Wend, (N. Y.), 475; *State* v. *Thompson*, 31 Utah, 228; 1 Bishops New Criminal Procedure, Sec. 388, 31 C. J., 747.

Duplicity as a ground of arrest, even were it tenable, is not now open to the respondent. His objection that this indictment is bad for duplicity cannot be made by motion in arrest of judgment. *State* v. *Derry*, 118 Maine, 431.

Exceptions overruled.
Judgment for the State.

CORNISH, C. J., sat at argument and participated in consultation, but, owing to retirement, does not join in the opinion.

ARTHUR W. ANDREWS *vs.* RICHARD KING.

York. Opinion June 4, 1925.

While the Colonial Ordinance of 1641-47 vested the property of flats in the owner of the adjoining upland in fee, in the nature of a grant, such title to the flats was held subject to a general right of the public for navigation until the flats were built upon or enclosed.

Such right of navigation so reserved is not simply the right to sail over the flats, when covered with water, to the houses and lands of other men than the owner of the flats; but includes the right of mooring on the flats, of unloading the cargo upon the flats and of transporting it to other men's lands and houses.

On report on agreed statement of facts. An action of trespass quare clausum fregit brought by plaintiff, owner of land on Saco River, against defendant, owner of a small power boat, in which plaintiff contended that defendant had no right to land passengers from his boat in transporting them for hire from one side of the river to the other, on flats between high and low water marks contiguous to land of plaintiff. The construction of the Colonial Ordinance of 1641-7 is the question involved. The cause was reported to the Law Court on an agreed statement of facts. Plaintiff nonsuit.

The opinion states the case.

Leroy Haley, for plaintiff.

Robert B. Seidel, for defendant.

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

MORRILL, J. This is an action of trespass quare clausum fregit, submitted upon an agreed statement of facts.

The plaintiff is the owner of certain land on the Saco River, where the tide ebbs and flows, with the flats contiguous thereto and lying in front thereof, to ordinary low water mark which is less than one hundred rods from high water mark. The Saco River is a public highway, and the acts complained of were committed between high and low water mark. The parties agree in their statement as follows:

"That the shore of said river both above and below the premises of the plaintiff is of the same general character as that of the plaintiff's shore, except that the plaintiff's shore at the point where the acts complained of were committed, is at certain stages of the tide the most convenient landing place in the vicinity. That at the point where the acts complained of were committed the public has uninterruptedly used the flats now the property of the plaintiff as a landing place for fifty years next prior to the time of the acts complained of in plaintiff's writ.

"Defendant is the owner of a small power boat and at the time mentioned in plaintiff's writ made use of said boat to transport passengers for hire from one side of said river to the other. That the acts complained of consist of defendant's landing on plaintiff's flats and receiving and discharging passengers therefrom. That such passengers were obliged to travel on plaintiff's flats in order to obtain ingress and egress to defendant's boat. That such passengers were obliged to pass over plaintiff's flats to and from premises other than the premises of the plaintiff to arrive at or leaving a public highway other than said river or land of persons other than the plaintiff. Defendant used said flats as hereinbefore stated and for no other purpose."

Conceding that his title to the flats adjoining the upland owned by him is subject to the public right declared by the Colonial Ordinance of 1641-47, plaintiff thus states his contention upon the brief:

"Plaintiff does not contend that the public have no right to pass and repass over the flats when not covered by water for the purposes reserved by the ordinance, but we do contend that that reservation is limited to 'passage of boats or other vessels to other men's houses and lands,' or for the purposes of fishing and fowling."

If we understand his contention aright, the passage of boats or other vessels over defendant's flats must, in his view, be by boats or other vessels whose destination is "other men's houses and lands." Counsel say in argument:

"The navigation, if such it may be called, in which he (defendant) was engaged consisted only in making plaintiff's land a starting point or destination for his boat and its passengers. He adopted plaintiff's flats as a landing place for his boat, not for passengers navigating to other men's houses and lands, but for the termination of his voyage or for the beginning of another one."

We think this contention unsound. The well-settled construction of the Colonial Ordinance, consistently adhered to by the courts of this State and Massachusetts, is this:

"That it vested the property of the flats in the owner of the upland in fee, in the nature of a grant, but that it was to be held subject to a general right of the public for navigation until built upon or inclosed, and subject also to the reservation that it should not be built upon or inclosed in such manner as to impede the public right of way over it for boats and vessels." *Com.* v. *Alger*, 7 Cush., 53, 79. *Snow* v. *Mt. Desert, etc. Co.*, 84 Maine, 14, 17. *Dyer* v. *Curtis*, 72 Maine, 181, 184. The right of navigation so reserved is not simply the right to sail over the flats, when covered with water, to the houses and lands of other men than the owner of the flats; but includes the right of mooring on the flats, of unloading the cargo upon the flats and of transporting it to other men's lands and houses.

In *Marshall* v. *Walker*, 93 Maine, 532, 536, Mr. Justice HASKELL thus summarized the extent of the public right: "He (the owner) has the right of entry and the right of possession, if he chooses to exercise it. Until he does, the jus publicum remains. Others may sail over them, may moor their craft upon them, may allow their vessels to rest upon the soil when bare, may land and walk upon them, may ride or skate over them when covered with water bearing ice, may fish in the water over them, may dig shell fish in them," except, we may add, when the taking of shell fish is restricted by legislative enactment. *Moulton* v. *Libby*, 37 Maine, 472. *State* v. *Leavitt*, 105 Maine, 76.

So in *State* v. *Wilson*, 42 Maine, 9, 24, it was held that by the proviso in the Colonial Ordinance persons had a right to use the shore of Penobscot River, i. e., between ordinary high and low water mark,

(*Montgomery* v. *Reed*, 69 Maine, 514), in the town of Brewer, where the tide ebbs and flows, including the right of mooring their vessels thereon, and of discharging and taking in their cargoes. And the establishment of a ferry was neither a restriction nor an enlargement of this right. It did not profess to give to the ferryman or his passengers rights which all did not possess before, in the use of the space denominated the shore of the river. The public, however, has no right to deposit upon the upland, without the consent of the owner, the cargoes which may be unloaded from vessels on the flats. *Littlefield* v. *Maxwell*, 31 Maine, 134.

Also in *Deering* v. *Proprs. of Long Wharf*, 25 Maine, 51, 65, it was held that so long as the flats remain open, there is reserved for all the right to pass freely to the lands and houses of others besides the owners of the flats, and that this includes the right of mooring their vessels thereon, and of discharging and taking in their cargoes. The owner of the flats has no power to take away or restrict this right, while the space is unoccupied.

These cases are decisive of the rights of the public and justify the use as a landing place, which has been made of the plaintiff's flats for fifty years. In the pursuit of his private affairs, of business as well as pleasure, the defendant had the right to land on the flats.

Plaintiff nonsuit

LEVI C. SMALL ET AL.

vs.

REUBEN A. WALLACE ET ALS.

Washington. Opinion June 11, 1925.

Under the common law all citizens of the State have a free right of fishery in all its rivers where the tide ebbs and flows as well as in the sea, and such right is in no way effected by the ownership of the soil where it is being exercised, but such right must be exercised with due regard for the rights of others.

In the instant case the plaintiffs' right to recover, if there be such, does not arise from their alleged ownership of the soil from which they set their nets, but from their right to share in the common right of fishery reserved to the public. Hence evidence as to their title to the shore is entirely immaterial and was properly excluded.

Fish swimming in tidal water as well above as below low water mark are the property of the first taker regardless of the ownership of the soil under the water where they were taken.

On exceptions and motion. An action on the case to recover damages which plaintiffs alleged they suffered in fishing for smelts with nets in the tide waters of Narraguagus River by having their rights interfered with by defendants who also set nets near those of plaintiffs. Plaintiffs contended that they had the exclusive right to fish at the place where the nets were set by reason of the ownership of the shores, and further contended that they had the right to fish under the common law rules without molestation by defendants. The jury found for the defendants and the plaintiffs entered exceptions to the exclusion of evidence and filed a motion for a new trial. Exceptions overruled. Motion overruled.

The case is fully stated in the opinion.

Gray & Sawyer, for plaintiffs.

J. W. Sawyer and B. W. Blanchard, for defendants.

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

STURGIS, J. This is an action on the case for an alleged interference with the plaintiffs' smelt fishing rights in the Narraguagus River in the town of Milbridge, the river at the locus in question being an arm of the sea where the tide ebbs and flows. The plaintiffs, who were in possession under claim of title of certain land adjoining the river on the west, in January, 1923, began their season's smelt fishing, setting out from their shore three nets, dropped down through the ice with the tails of the nets drawn back up stream. Approximately two hundred feet down river the defendants set a line of similar nets out from the opposite shore of the river of which at that point they were the owners. The plaintiffs concede that the defendants set two nets and began fishing before the plaintiffs set any nets, but complain that after their three nets had been set the defendants increased the number of their nets and extended them far out into the river toward the western shore, in effect overlapping the plaintiffs' nets and closing the open passage for fish to such an extent that practically all smelts were diverted from the plaintiffs' nets and their catch was substantially reduced. The verdict was for the defendants and the case comes before this court on the plaintiffs' exceptions and motion for a new trial.

EXCEPTIONS.

The exceptions are not in proper form. The first exception is to "so much of the charge of the presiding justice as excludes from the consideration of the jury all claims of the plaintiffs under the statute declared on." The second exception is to "the exclusion of evidence as to title to the shore." To be sure the entire charge and the transcript of the evidence are made a part of the exceptions, but this form of stating exceptions has received the repeated disapproval of this court. It meets neither the requirements of the statute nor the decisions based thereon. The portion of the charge complained of is not stated. The questions asked and the evidence excluded do not appear. It is not a "summary" bill. R. S., Chap. 82, Sec. 55; *McKown* v. *Powers*, 86 Maine, 291; *Dennis* v. *Packing Co.*, 113 Maine, 159; *State* v. *Howard*, 117 Maine, 69. However, in view of the

importance of the questions raised we shall waive these technical objections and consider the exceptions.

The evidence indicates that the nets used by both parties were bag-nets as defined by Webster and recognized and authorized for use "in the winter fishery for smelts" by R. S., Chap. 45, Sec. 78. Neither breadth of construction of the statute nor precedent offered or found includes these nets within the terms "weirs" or "traps," the erection of which is prohibited in tide waters below low water mark in front of the shore or flats of another without the owner's consent by R. S., Chap. 4, Sec. 125. There was no error in excluding this statute and the plaintiffs' claims under it from the consideration of the jury.

The plaintiffs' right to recover in this action, if there be such, does not arise from their alleged ownership of the shore from which they set their nets. None of the parties acquired any advantage or superior right to the fish that swam the river by virtue of their riparian proprietorship. While, since the Colonial Ordinance of 1641 flats not exceeding one hundred rods in width are the property of the owner of the adjacent upland or his grantee, that title is held subject to the right of the public to fish in the waters upon them. The riparian proprietors, by reason of the location of their property and the exclusive right to use their land in connection with fishing have certain advantages not common to other citizens, but their right to fish arises not out of their ownership of the soil but from their right to share in the common right of fishery reserved to the public. *Duncan* v. *Sylvester*, 24 Maine, 482, 486; *Matthews* v. *Treat*, 75 Maine, 594. No infringement of the private rights of the plaintiffs as alleged owners of property on the west shore of the river is shown. In fact both plaintiffs and defendants set their inner nets below low water mark. The presiding Justice properly excluded as immaterial, evidence as to the title to the land held by the plaintiffs.

MOTION.

The rights and duties of the parties are to be determined by the common law rules of the free right of fishery which is common to all citizens of this State and extends to all rivers where the tide ebbs and flows as well as in the sea. Both the plaintiffs and the defendants had the right to take fish from the tidal waters of the Narraguagus

River, not only in the deep water or channel but also in shore wherever the water flowed at flood tide, for the fish swimming in tidal water as well above as below low water mark are the property of the first taker, regardless of the ownership of the soil under the water where they were taken. *Parker* v. *The Cutler Milldam Company*, 20 Maine, 353; *Matthews* v. *Treat*, 75 Maine, 594, 597. This right of free fishing in tide water being open to all the people in common must be exercised by each person with due regard to the rights of others, that is, without abuse of the right or unnecessary interference with or injury to the other in the reasonable exercise of the same right. *Duncan* v. *Sylvester*, supra, 26 C. J., 604.

The plaintiffs' contentions that the defendants interfered with and injured their free right of fishing for smelts were sharply controverted by the defendants, and much evidence was presented on the one side and the other bearing upon the number and character of nets set by the defendants, their location in the river and the incidents and uncertainties of winter smelt fishing. Upon all the evidence the jury found for the defendants. A careful examination and consideration of the testimony does not convince us that the verdict was manifestly wrong, and the entry must be

Exceptions overruled.
Motion overruled.

HECTOR DUBE *vs.* GUSTAVE SIMARD.

Androscoggin. Opinion June 13, 1925.

When a laborer has adequate cause to justify an omission to fulfill his contract, such omission cannot be regarded as his fault and he has a right to refuse to continue his employment. Whether or not adequate cause for such omission exists is a question of fact for the jury.

If a contract of employment is abandoned temporarily, it does not necessarily follow that the contract thereby becomes finally terminated. The failure to perform may be waived by the party not in fault and the contract continued regardless of such breach, and such waiver applies to sealed instruments.

In the instant case no reason is found for setting aside the verdict for the plaintiff, which, of necessity, was based upon a finding that plaintiff was justified in his temporary abandonment of the contract or, his abandonment being unjustified, was expressly or impliedly waived by defendant.

Evidence that, prior to the plaintiff's discharge, the defendant hired another baker at a substantially reduced wage was incapable of affording any reasonable presumption or inference as to the facts in dispute and was not admissible. Its admission, however, is deemed harmless.

On motion and exceptions. An action of covenant broken brought by plaintiff, a baker, who alleges that defendant hired him for a term of two years and discharged him without cause, or if there was cause defendant had waived it. The jury found for the plaintiff and defendant excepted to the admission of certain evidence and also filed a motion for a new trial. Motion overruled. Exceptions overruled.

The opinion states the case.

Benjamin L. Berman, Jacob H. Berman and Edward J. Berman, for plaintiff.

Carroll & Callahan, for defendant.

SITTING: CORNISH, C. J., PHILBROOK, MORRILL, WILSON, STURGIS, BARNES, JJ.

STURGIS, J. The defendant, who is the proprietor of the Simard Bakery in the city of Lewiston, by a written contract under seal

dated December 2, 1922, hired the plaintiff as a baker for the term of two years at wages of sixty-five dollars per week. January 23, 1924, the plaintiff was discharged without cause and brings this action of covenant broken. The defendant pleads and in argument contends that the original contract of employment was terminated because of its abandonment by the plaintiff on December 10, 1922, and that at the time of his discharge, the plaintiff was working under a new and substituted oral contract of hiring for an indefinite period. The evidence clearly establishes a temporary abandonment of the contract by the plaintiff on December 10, 1922, which he justifies on the ground that he was required to perform duties outside of the terms of his employment and says that even if his abandonment of the contract was not justified, it was waived by the defendant and the original contract thereafter was mutually recognized and treated as in full force and effect. The case is before this court on a general motion and exceptions.

THE MOTION.

When a laborer has adequate cause to justify an omission to fulfill his contract, such omission cannot be regarded as his fault, and he has a right to refuse to continue his employment. Whether or not adequate cause for such omission exists is a question of fact to be determined by the jury. *Lakeman* v. *Pollard et als.*, 43 Maine, 467. In the instant case, upon the evidence the jury could have found that the plaintiff was required to perform duties outside of his contract and had adequate cause to justify his refusal to continue his employment, but that, after conferences with the defendant, at which he was assured he would not be required to perform the objectionable duties, the plaintiff waived his right to abandon the contract and by mutual agreement the parties resumed their relations and continued them under the original contract.

Assuming, however, that the plaintiff's abandonment of the contract was found by the jury to be unjustified, it does not necessarily follow that the contract thereby became finally terminated. If one party abandons a contract and refuses to abide by it, that refusal will undoubtedly authorize the other party to rescind the contract and refuse longer to be bound by it. *Simpson* v. *Emmons*, 116 Maine,

14. But the failure to perform may be waived by the party not in fault and the contract continued regardless of such breach. *Lowell* v. *Wheeler's Estate*, 95 Vt., 113; *Gould* v. *Banks*, 8 Wend., (N. Y.), 563; *Grabtree* v. *Hagenbaugh*, 25 Ill., 214; 6 R. C. L., 1022, Par. 383; 26 Cyc., 994. The fact that the contract is under seal does not change the rule. While, by the strict rule of the common law, the performance of the conditions of a contract under seal could not be waived by a parole executory agreement, the tendency of the decisions of the United States has been to apply the same rule as to waiver to sealed instruments as to simple contracts and this tendency has been recognized by this court. *Stachowitz* v. *Anderson Co.*, 123 Maine, 336; *Hilton* v. *Hanson*, 101 Maine, 21; *Copeland* v. *Hewett*, 96 Maine, 525; *Adams* v. *MacFarland*, 65 Maine, 143. To the same effect see *Becker* v. *Becker*, 250 Ill., 117; *New York* v. *Butler*, 1 Barb., 325, 338; *Platte Land Co.* v. *Hubbard*, 30 Col., 40; 13 C. J., 672.

Waiver is essentially a matter of intention, yet such intention need not necessarily be proved by express declarations. It may be inferred from the acts and conduct of the party. Acts and declarations manifesting an intent and purpose not to claim the supposed advantage or a course of acts and conduct or neglect and failure to act, such as to induce a belief that it was the intention and purpose to waive, will establish a waiver. *Holt* v. *N. E. Tel. & Tel. Co.*, 110 Maine, 10; *Burnham* v. *Austin*, 105 Maine, 196. Adhering to his contention that his temporary abandonment of his contract was justified, the plaintiff urges that if the abandonment be found to be unjustified, nevertheless it was expressly waived by the defendant, and again he says that if there was no express waiver, the acts and declarations of the defendant at the time of the abandonment and thereafter until the plaintiff was discharged were sufficient to constitute a waiver under the foregoing rule. The jury returned a verdict for the plaintiff and of necessity either found that the plaintiff was justified in his temporary abandonment of the contract on December 10, 1922, or the abandonment being unjustified, the defendant did not elect to rescind the contract because of the breach, but expressly or impliedly waived the plaintiff's failure to perform. The discharge of the plaintiff being admitted, and no justification being shown, we find no reason to set aside the verdict.

THE EXCEPTIONS.

In cross-examination of the defendant, the plaintiff was permitted to bring into evidence the fact that prior to the plaintiff's discharge the defendant hired another baker to do the same work which the plaintiff was performing, but at a substantially reduced wage. To the admission of this testimony the defendant reserved an exception.

The reasons for the plaintiff's discharge or the motives which prompted it were not in issue. The real question to be determined was whether the plaintiff's employment at the time of his discharge was under the original contract and for a fixed term which had not expired or was for an indefinite term which justified his discharge as and when made. Upon this issue, the testimony objected to, we think, was incapable of affording any reasonable presumption or inference as to the facts in dispute and was not admissible. *Provencher* v. *Moore*, 105 Maine, 89. We think, however, that it was harmless and worked no prejudice to the defendant's cause and for that reason this exception must be overruled. *Bessey* v. *Herring*, 121 Maine, 539, 541; *Pierce* v. *Cole*, 110 Maine, 134, 138.

Neither can we sustain the other exceptions reserved by the plaintiff. Taken in connection with other parts of the charge, the instruction of the court upon the question of waiver of a breach of the contract presents no error, and the requested instructions were properly refused. The latter present theories of law entirely inconsistent with the principles to which we have already expressed our adherence in this opinion, and to have given them as requested would have been manifest error.

Motion overruled.
Exceptions overruled.

CORNISH, C. J., sat at argument and participated in consultation, but owing to retirement, does not join in the opinion.

JOHN GROVES CO., INC.

vs.

BANGOR & AROOSTOOK RAILROAD COMPANY.

Aroostook. July 10, 1925.

When a carrier stipulates in the bill of lading, accepted by the shipper, of perishable goods shipped in lined or refrigerator cars heated by the shipper or in charge of a caretaker furnished by the shipper, that it will not be liable for loss or damage of such goods, except in case of negligence, the shipper must, in case of loss by fire in one of a connecting carrier's yards, devoted solely to the classification of cars and the makeup of trains for transhipment, prove that the loss or damage was due to some neglect or lack of ordinary care on the part of the carrier or its connecting carrier.

While a carrier is not required to furnish every possible means or the latest devices for extinguishing fires or provide a fully equipped crew or force for instant response in case of fire in one of its yards, ordinary care does require, where as in this case a large number of cars are assembled, loaded, it may be, with more or less inflammable material, within the more or less restricted area of a railroad yard, to furnish reasonably adequate protection to all shipments while in transit and standing in its yards against loss by fire from any hazard arising from such condition or from receiving into its yards cars heated by stoves temporarily installed as the car in this case was heated.

Its obligation in this respect, however, does not go so far as to require it to provide facilities or equipment, that would be adequate to protect against loss, shipments contained in and surrounded by the extra-hazardous conditions created by a car heated by a stove temporarily erected therein, though it would be bound to exercise reasonable care and diligence in the use of such equipment as it was bound to provide in protecting shipper's goods from loss by fire, even if the hazard was of the shipper's own creation, where, as in this case, it was with the consent and knowledge of the carrier.

In the case at bar, it is held that the defendant's connecting carrier did furnish reasonably adequate protection against all risks of its own creation within its yards; and, further, that it is obvious from the verdict that the jury must have misunderstood the obligation resting on the defendant's connecting carrier, since in no event could it be liable for the full value of the shipment, as some loss would necessarily result before the fire was discovered and could have been extinguished, however, complete the protection provided, and that their verdict, being for the full value of the shipment, was clearly the result of mistake or bias and furthermore, was not warranted by the evidence.

On motion for a new trial. An action to recover damages for the loss of a car of potatoes destroyed by fire in Rigby yard of the Portland Terminal Company being en route from Perham to Vandemere, N. C., the car being furnished with lining, stove, and a caretaker. Plaintiff alleged negligence on the part of the Portland Terminal Company, a connecting carrier, in not providing suitable fire protection for cars loaded with potatoes necessarily in the yard en route to points of destination. The jury returned a verdict of $725 for plaintiff and defendant filed a general motion for a new trial. Motion sustained. New trial granted.

The case fully appears in the opinion.

Ransford W. Shaw, for plaintiff.

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

SITTING: WILSON, C. J., PHILBROOK, MORRILL, DEASY, BARNES, BASSETT, JJ.

WILSON, C. J. An action to recover damages for the loss by fire of a carload of potatoes in the yard of a connecting carrier, the Portland Terminal Co., at South Portland in this State.

The bill of lading, issued to and accepted by the plaintiff, stipulated in substance that, in case of shipments of a perishable nature in lined or refrigerator cars and heated by the shipper, or in charge of a caretaker furnished by the shipper, the defendant or a connecting carrier would not be liable for the loss of or damage to such shipments, unless such loss or damage was due to the negligence of the defendant or a connecting carrier.

It is admitted that the potatoes in this case were shipped in a lined car, were in charge of a caretaker furnished by the plaintiff and that the car was heated by the plaintiff, and, therefore, it must show negligence on the part of the defendant or a connecting carrier in order to recover.

The plaintiff contended at *nisi prius* that the Portland Terminal Co., failed to furnish adequate fire protection for the plaintiff's shipment while standing in its yard set apart for receiving, shifting, and classifying freight cars, and the making up of trains for transhipment, and did not exercise due diligence in using such equipment as it did furnish; and as a result of its neglect in these particulars, the plaintiff's shipment was destroyed by fire.

The defendant contended that a carrier is under no duty to furnish any protection in its yards against loss of shipments while in transit by fire or at least only against such risks as were of its own creation and that its equipment for extinguishing fires was reasonably adequate to meet its obligations in this respect; and that it exercised due diligence under the circumstances shown to exist in this case in the use of the equipment it provided.

Upon these issues the case was submitted to a jury under, as we must assume, appropriate instructions, which awarded the plaintiff the sum of seven hundred and twenty-five dollars, which, according to the allegations in the plaintiff's declaration and the evidence, was the full value of the shipment. The case is before this court on a general motion for a new trial on the usual grounds.

While this court does not go so far, as urged by the defendant, as to hold that no obligation rests upon a common carrier to provide any protection against loss by fire to shipments in transit while standing in its yards awaiting transhipment over other and connecting lines, especially yards of the size of that of the Portland Terminal Co.; on the other hand, neither does it hold that a common carrier, relieved by its contract with the shipper of exercising other than ordinary or reasonable care, is required to furnish every possible means, or the latest devices for extinguishing fires, or provide a fully equipped force for instant response in case of fire.

However, by reason of its assembling so many cars, loaded, it may be, with more or less inflammable material, and so much valuable property within the limits or the more or less restricted area of a railroad yard and holding it there for longer or shorter periods for its own convenience, as well as for the benefit of the shipper in fulfilling its general obligation to forward all shipments without unreasonable delay, ordinary care requires a carrier to furnish reasonably adequate protection to all shipments while in transit and standing in its yard against loss by fire from any hazard arising from such conditions or from receiving into its yard cars, heated as the car containing the plaintiff's shipment was heated; and while it is not required to provide equipment that would be adequate to protect against loss, shipments contained in and surrounded by the extra-hazardous conditions created by a car heated by a stove temporarily erected therein, it would be bound to exercise reasonable care and diligence in the use of such equipment as it was bound to provide

in protecting a shipper's goods from destruction by fire, though the hazard was of the shipper's voluntary creation, it being with the carrier's consent.

It is clear that the jury must have failed to appreciate the limits of the obligations imposed upon the defendant and its connecting carrier by its contract of shipment. Upon no basis, under its bill of lading, could the defendant have been liable for the full value of the plaintiff's shipment. It is not claimed that the defendant was in any way responsible for the fire or in any way liable, except for failure to furnish adequate equipment and exercise due diligence in its use. It could only be liable, if it was found that the connecting carrier was negligent in not providing reasonably adequate equipment or not exercising due diligence in its use, for such part of the shipment, if any, as might have been saved after the fire was discovered, if reasonably adequate protection had been furnished and due diligence exercised in its use. Some loss to such a shipment was inevitable under the conditions existing on the night of this fire, with a high wind blowing, after the fire had gained so much headway before it was discovered.

Furthermore, this court is of the opinion from the undisputed testimony that the Portland Terminal Co., had provided reasonably adequate protection to all property within its yard against all risks of its own creation and used on this occasion proper effort and due diligence, commensurate with the safety of the large amount of other valuable property in its care and exposed to the same danger, to save the plaintiff's shipment after the fire was discovered.

It appears that there were located within its yard five or six hydrants on the same water supply as the fire service of the cities of Portland and South Portland, and at one entrance to the yard was one of the public hydrants of the city of South Portland. It is true that all but one of the Portland Terminal Company's hydrants was in what is termed the east yard, with only one in the west yard so-called, in which the plaintiff's car was located; but east and west yards are only terms to designate the part of an entire yard lying east of the main or through traffic tracks and that part lying on the west; and that adequate fire hose was kept within the yard to reach all parts, whether lying easterly or westerly of the main tracks, from the hydrants thus located, traffic on the through tracks being held up by the usual danger signals, whenever, as in this case, it was necessary to lay the hose across the main tracks.

Chemical fire extinguishers were also kept on hand in the yard, and one was located within two or three hundred feet of the location of the car when the fire was discovered, and the nearest hydrant was only four hundred feet away.

It further appears that immediately upon the discovery of the fire, the man in charge of the yard was notified by telephone, who ordered the fire hose out, and telephoned the fire department of the city of South Portland; a train crew at once proceeded to uncouple the car on fire from the train with which it was connected and remove the others from the source of danger; within a few minutes a chemical extinguisher was brought and a hose connected with the nearest hydrant and water turned on the burning car, but with the high wind blowing, the fire had gained too much headway for use of the chemical, and only the platform of the car was saved by the use of the hose.

To require a carrier under the burden only of ordinary care to keep chemical extinguishers in such numbers in its yards as to have one available on the instant a fire was discovered in cars in transit while standing in its yards, or a fire company on duty at all times with hose in readiness to meet every emergency, or to always arrange cars and trains so that access to its hydrants would be entirely unobstructed would obviously be unreasonable.

From the evidence in the case at bar this court is of the opinion that the jury must have misunderstood the obligation resting upon the connecting carrier with respect to furnishing fire protection, as the amount of their verdict clearly shows, and that their verdict was clearly the result of mistake or bias.

The entry must, therefore, be:

Motion sustained.
New trial granted.

STATE *vs.* GEORGE PAPAZIAN.

York. Opinion August 24, 1925.

In determining an appeal of one convicted of an assault with intent to kill, the only question presented is whether, in view of all the testimony in the case the jury were warranted in believing beyond a reasonable doubt, that the respondent was guilty of the crime charged against him.

In the present case, a fair trial was accorded the respondent, the jury heard both versions of the story, saw the witnesses, and considered the evidence, without haste, and concluded that, beyond reasonable doubt, the respondent is guilty as charged, and it is not for this Court to say that the evidence for the State was not the more weighty and convincing, and to the degree of dispelling any reasonable doubt.

On appeal. Respondent was indicted for assault with intent to kill, at the May Term, 1924, Supreme Judicial Court, York County; tried, found guilty, and filed motions for a new trial addressed to the presiding Justice, which were overruled, and an appeal taken. The only ground urged and relied upon by the respondent was that the conviction was unwarranted on the evidence. Appeal denied. Judgment for the State.

The case fully appears in the opinion.

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

John P. Deering, for the respondent.

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

DUNN, MORRILL, DEASY, JJ., concurring in the result.

BARNES, J. In the city of Biddeford, in our county of York, during the season of 1923—1924, a strike of the workmen of a corporation employing foundrymen and iron moulders and persistent effort to break the strike and keep a crew at work were in progress. Among the agents employed by the manufacturer was the respondent, George Papazian, an intelligent, industrious, Armenian-born American

citizen, twenty-nine years of age, who by virtue of his education and ability so to serve had for several years, to and including the day of the assault for which he was indicted, been employed by different manufacturing concerns, in New England and New York, to obtain laborers, as needed; and in the city of Biddeford, at the time of the assault, to procure strike breakers, at times to serve as interpreter for them, and to conduct a boarding house, on Main Street, where such laborers were lodged and boarded.

In the course of his employment respondent was entrusted with and carried on his person large sums of money, and for a time prior to the day of the assault had been authorized by the police of Biddeford to carry a revolver. As stated in the brief of respondent's counsel: "Many people in Biddeford were taking sides in the matter. The feelings of the parties were intensely hostile to each other. Times were bad in Biddeford at that time. Five deputy sheriffs were present in Biddeford besides the regular police officers to protect the interests of the various parties and to preserve the peace. The courts had their share of injunction proceedings, contempt proceedings, assaults and batteries, assaults with intent to kill, and indictments for accessories before and after the fact. The records of the courts indicate that there was serious strife in Biddeford."

On the night before the assault which occasioned the indictment in this case, after an altercation in the city street between respondent and three men, strangers to this case, the revolver was taken from respondent by the authorities, and his permit to carry one revoked.

Charles Manoogin, the man who was stabbed, is also an Armenian-born American citizen, who had known respondent before coming to Maine, and who arrived in Biddeford in the Fall of 1923, whether procured by respondent or not being in dispute, and worked as a moulder's helper for the strike-affected company from October 2 until December 22, when the shop closed for ten days. Manoogin then left Biddeford for a time, but returned to that city and his former employment the last of the month, and was discharged on January 2, the day of the assault. During his last stay in Biddeford Manoogin did not live at respondent's hotel. He is represented as a powerfully built man, of slow motion and slow of speech.

The stabbing was done in the early evening, almost directly in front of respondent's hotel. The victim was clothed, above the waist, in shirts, vest, coat, overcoat and muffler: the respondent was lightly

clad, wearing no overcoat, but he had armed himself with a knife, which was identified and exhibited to the jury, and by the justice in his charge termed "a dangerous weapon."

There was a vicious, personal encounter, ending as respondent thrust his knife into Manoogin's neck, and fled,—to Portland and Dover, where he was arrested and returned to Biddeford.

He was tried, convicted, and he appealed. In determining his appeal from the overruling of the motion for a new trial, addressed to the presiding Justice, urging that the verdict is against the evidence, and the weight thereof, this court has to decide only the single question, whether after maturely and fairly considering the weight and sufficiency of the evidence, with all the circumstances attending, the jury were warranted in believing beyond a reasonable doubt, and therefore in declaring by their verdict, that the respondent was guilty of the crime charged against him. *State* v. *Lambert,* 97 Maine, 51; *State* v. *Albanes,* 109 Maine, 199; *State* v. *Mulkerrin,* 112 Maine, 544; *State* v. *Priest,* 117 Maine, 223; *State* v. *Pietrantonio,* 119 Maine, 18, and *State* v. *Dodge,* 124 Maine, 243.

Manoogin could present to the jury no eyewitnesses of the affray, for, as he testified, it took place on the sidewalk in front of respondent's hotel, and there was nobody by except an accomplice of respondent.

The respondent and his witnesses represent Manoogin as a dull, moody fellow, brooding over his failure to receive a moulder's pay, charging his ill-luck to the respondent, and cherishing a growing dislike for the latter. Respondent testified that Manoogin was discharged in the afternoon, and that thereafter, about five o'clock, when they chanced to meet in a coffee house, Manoogin used insulting epithets in addressing him. His version of the lawless encounter is that the two met, almost at respondent's door; that he fled, not to the shelter of his home, but out into the street and across it; that Manoogin overtook him, overpowered him, and that while Manoogin had him down, in the snow of the street, and was proceeding to choke him, he whipped out the knife and made a thrust with it, in self defense.

A fair trial was accorded respondent, the jury heard both versions of the story, saw the witnesses, the bloody clothing of the victim, the unstained glove worn on the hand that dealt the blow, and possibly much that the printed record does not reveal. They considered the

evidence, without haste, and concluded that, beyond reasonable doubt, the respondent is guilty as charged, and it is not for this Court to say that the evidence for the State was not the more weighty and convincing, and to the degree of dispelling any reasonable doubt.

Appeal denied.
Judgment for the State.

CORNISH, C. J., sat at argument and participated in consultation, but retired before issue of the opinion.

BASSETT, J., was appointed subsequent to argument, but prior to issue of opinion, hence was not one of the sitting Justices but joined in the opinion.

NORMAN A. SMITH *vs.* HARRY E. JEOJAY.

Cumberland. Opinion August 25, 1925.

In replevin a plea of non cepit, with brief statement alleging title to the property in defendant, and not in plaintiff, throws upon the plaintiff the burden of proof that the title is in him.

The damages provided for in R. S., Chap. 101, Sec. 11, entitles the defendant, as one of the elements of damages, to recover for the interruption of possession, the loss of the use of the goods from the time of their replevin until their restoration.

On motion for a new trial by plaintiff. An action of replevin of a horse. Defendant pleaded non cepit and under a brief statement alleged that the property was his and not the plaintiff's. The jury returned a verdict for the defendant and assessed damages in the sum of two hundred thirty-three dollars and thirty-three cents and the plaintiff filed a general motion for a new trial on the grounds that the

verdict was unwarranted on the evidence, and that the damages were excessive. Defendant to remit all his verdict in excess of one hundred dollars then motion is overruled, otherwise new trial granted.

The case fully appears in the opinion.

Clifford E. McGlauflin, for plaintiff.

Harry E. Nixon, for defendant.

SITTING: WILSON, C. J., PHILBROOK, DUNN, DEASY, STURGIS, BARNES, JJ.

PHILBROOK, J. This is a replevin action brought to recover a certain chattel described in the declaration as "one big bay horse, known as the E. M. Woods horse, belonging to Norman A. Smith," who is the plaintiff in the case. The declaration states that the defendant, on the sixth day of February, A. D. 1925, unlawfully and without any justifiable cause, took the beast and unlawfully detained it.

Plaintiff's exhibit one, admitted without objection, shows that on March 20th, 1924, the defendant gave the plaintiff a Holmes note, of the face value of one hundred sixty-nine dollars, "the same being for one brown horse known as the Percy Welman horse which I have this day bought of said Smith; said property is to remain the property of said Smith until said sum and interest are paid."

Below the signature to the note is added "As further security for the above note I hereby sell to said Smith one big bay horse known as the E. M. Woods horse." This addendum specifying the horse in controversy, is also signed by the defendant but it will be noted that nothing is said as to the title of the Woods horse being in Smith until the note should be paid. The established rule of law relating to restoration of collateral security upon payment of an obligation for which it was given and taken, must therefore govern.

The defendant pleaded non cepit and by way of brief statement said; "That the said horse in said declaration mentioned at said time when, etc., was the property of the defendant, and not of the plaintiff, as by said declaration is supposed, and this he, the said defendant, is ready to verify." Under these pleadings the burden was upon the plaintiff to prove property in himself. *McLeod* v. *Johnson*, 96 Maine, 271. In the absence of any exceptions it is to be presumed that the jury was correctly instructed upon this branch of

the case. The defendant claimed full payment of the note. This the plaintiff denied. The testimony on this point was confined to that given by the parties. The plaintiff, in argument claimed that the defendant's statements could not be relied upon; that they contained absurd and unreasonable propositions and suggestions. But the jury, who saw and heard the parties evidently believed the defendant and found a verdict for him.

This finding of fact we do not feel justified in disturbing.

Damages for the defendant were assessed in the sum of two hundred and thirty-three dollars and thirty-three cents. R. S., Chap. 101, Sec. 11, provides that if it appears that the defendant is entitled to a return of the goods he shall have judgment and a writ of return accordingly, with damages for the taking and costs. This court has held in *Washington Ice Co.* v. *Webster*, 62 Maine, 341, that when the defendant makes a good title to the goods replevied, he is entitled to damages for the interruption of his possession, the loss of the use of the goods from the time of their replevin till their restoration, and for their deterioration; and that in case of the replevin of a horse the defendant would be entitled to the value of its use or for what its services in use would be worth. In this case the horse was taken from the defendant on February 10, 1925. The trial of the case began April 23, 1925. Less than seventy-five days had elapsed between the taking and the rendition of verdict. From all the elements of the case, including this element of loss by detention we are satisfied that the jury verdict on the question of damages was clearly wrong.

If the defendant remits all his verdict for damages in excess of one hundred dollars then motion is overruled, otherwise new trial granted.

So ordered.

BOWKER FERTILIZER COMPANY *vs.* ANDREW W. CLUSKEY.

Aroostook. Opinion August 28, 1925.

Liability of a defendant as guarantor of an agent's fidelity cannot against reasonable objection be enforced in an action on account annexed for goods delivered to the agent.

But where an action is so brought and tried throughout as if brought properly, upon the contract of guaranty, no objection being taken to the form of action and no prejudice appearing, a verdict for the plaintiff will not be set aside.

A party shall not take the chance of obtaining a decision in his favor, without being bound by the result if the decision is against him.

In the instant case, the defendant denied that he signed or authorized the signing of the contract of guaranty. This issue was submitted to the jury. The verdict in the plaintiff's favor was abundantly justified.

On exceptions and motion. An action of assumpsit on account annexed against Henry W. Baston and Andrew W. Cluskey to recover for twenty-five tons of fertilizer. The fertilizer was delivered to Baston who used it in planting, who did not deny his liability and was defaulted. Cluskey did defend and a verdict of $2,240.21 was rendered against him. Cluskey's liability, if any, was that of a guarantor under a written instrument signed by Baston and himself though he denied his signature. Cluskey during the trial did not raise the question that the form of action was not a proper one against him under the circumstances but tried it out resulting in the verdict. Motion and exceptions overruled.

The opinion states the case.

Archibald & Archibald and George A. Gorham, for plaintiff.

George E. Thompson, for defendant.

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

DEASY, J. This is an action of assumpsit on account annexed, brought against Henry W. Baston and Andrew W. Cluskey to recover for twenty-five tons of fertilizer. The fertilizer was shipped by the plaintiff to Baston, was received by him and used by him in

planting. He does not dispute liability and has been defaulted. Cluskey alone defended. A verdict for $2,240.21 was recovered against him.

Cluskey's connection with the transaction grows out of a certain written instrument dated March 5, 1921 purporting to be signed by him, and admittedly signed by Baston. The instrument appoints Henry Baston as the plaintiff's agent at Bridgewater for the sale of fertilizer. Cluskey is not named, nor in any way referred to in the document, except that at the end his name is signed with Baston's.

Baston was properly sued on account annexed. He received and used the fertilizer. In effect, acting as agent for the plaintiff he sold it to himself.

But Cluskey was not the plaintiff's agent. He received no fertilizer. If he signed the instrument, or authorized its signing it was, in effect though not in form, as guarantor of Baston's fidelity.

Such liability cannot, against seasonable objection, be enforced in an action on account annexed. In such an action an obligation for goods bargained and sold, or sold and delivered may be enforced. *Kelsey* v. *Irving,* 118 Maine, 307.

But no fertilizer was either bargained, sold or delivered to Cluskey. Cluskey defended on the ground that the signature purporting to be his was not genuine and was not authorized by him. Upon this issue the case was tried. The verdict was in favor of the plaintiff. The jury was abundantly justified in finding that Cluskey's signature was authorized.

Cluskey's motion must be overruled. The case was tried throughout as if brought upon his contract of guaranty. No objection to the form of action was raised at nisi prius, or even in the Law Court. No prejudice has resulted from the irregularity in pleading.

Upon proof of the issue actually tried and decided judgment in this case will bar a further action for the same cause. *Walker* v. *Chase,* 53 Maine, 258. *Kelsey* v. *Irving,* supra.

"A party shall not take the chance of obtaining a decision in his favor without being bound by the result if the decision is against him." *Raymond* v. *Commissioners,* 63 Maine, 110. *Shepherd* v. *R. R. Co.,* 112 Maine, 350.

Cluskey was entitled to his "day in Court." He has had it.

The exceptions cannot be sustained. The first exception is to the admission of a letter written to Baston purporting to be from Cluskey.

It is not proved that he signed the letter. But the case comes fairly within the rule that makes reply letters prima facie admissible.

Abbott v. *McAloon*, 70 Maine, 98; *Lancaster* v. *Ames*, 103 Maine, 87.

The second exception is to the admission of the instrument in controversy. It is disposed of by the overruling of the motion.

Motion and exceptions overruled.

ELDULA M. LADD

vs.

THE BAPTIST CHURCH OF EAST RANDOLPH, VERMONT ET ALI.

York. Opinion August 28, 1925.

In determining the construction and interpretation of a will the intent of the testator from the entire will must and should control, unless the intent cannot be carried out without conflicting with some positive rule of law, or be effectuated without violating some canon of construction so firmly established as to have become a fixed rule of law governing the transfer of property by will.

In the instant case Eldula M. Ladd, as devisee, has an undivided half of all the real estate that the testatrix left, in life tenancy.

The remainder over is vested in The Baptist Church of East Randolph, Vermont.

A bill in equity seeking the construction and interpretation of the will of Edith M. Parker. A hearing was had on bill and answers and by agreement the cause was reported to the Law Court. Bill sustained. Decree in accordance with the opinion.

The opinion states the case.

Clarence B. Rumery, for complainant.

Robert B. Seidel and Frank E. Parker, for respondents.

SITTING: WILSON, C. J., PHILBROOK, DUNN, DEASY, STURGIS, BARNES, JJ.

DUNN, J. Bill in equity. On report. Where is the title to an undivided half part of all the real estate that Edith M. Parker, who

died domiciled at Biddeford, left? Her probated will is not altogether happy in its phrasing. Its language, as bearing on the question presented for consideration, is this:

First. I give and devise to my husband, Frank E. Parker, all my real estate to have use of the same during life, the property at the decease of my husband to go to the next alive as will hereinafter directs.

Second. I give and bequeath to my husband all money in banks where deposited together in our names. After payment of just debts, funeral charges and expenses of my husband, Frank E. Parker, if any money left to go as directed by first clause of will aforesaid.

Third. I give and bequeath to my mother, Eldula M. Ladd all money in banks that is in my own name.

Fourth. If either of the aforesaid Frank E. Parker or Eldula M. Ladd are deceased prior to my death the property both real estate and personal to go to the one then alive at the decease of both said Frank E. Parker or Eldula M. Ladd the property both real estate and personal to go as will hereinafter directs.

Fifth. If neither of the aforesaid Frank E. Parker or Eldula M. Parker (Ladd?) are alive at my death then I give, bequeath and devise all my real estate and personal property after expenses are paid to Maud J. Erickson to have use of same during life.

Sixth. At the decease of all of the parties heretofore mentioned in this will I direct the remainder of my estate both real and personal to go to the Free Baptist Church of East Randolph, Vermont.

The bill was taken pro confesso as against Maud J. Erickson. She could be let in under the will, only by surviving in reference to the death of the testatrix, both the latter's widower and mother. But she did not, and is out of the case.

The widower put himself out. He elected to reject the provisions of the will made in his behalf and take under the statute of descents. What the testatrix intended should be for her widower is of object now merely as it may tend to dispel any doubtfulness that may lurk elsewhere in the will.

There is not nor ever was a religious organization by the name of Free Baptist Church of East Randolph, Vermont. There existed the Free Will Baptist Church of the same town. Mrs. Parker joined that church, in her girlhood. In corporate succession, five years before the will was written, came The Baptist Church of East

Randolph, Vermont. It continued till the death of Mrs. Parker, the only organized church in the town. And she stood in its membership, and was of its contributing supporters, till she died. That Mrs. Parker meant to designate The Baptist Church of East Randolph, Vermont, in her will, is sufficiently certain.

By allowance from the probate judge, the widower had all the personal estate of the decedent, subject to paying her debts and the charges for administration on her estate. The mother and the church of the testatrix are in amicable opposition touching how the real estate is devised.

Had the widower not renounced the will, all the real estate would have gone to him for life, in virtue of the first dispositive clause. The exercise of his statutory privilege caused title to an undivided half of the realty to vest in him, in fee, the testatrix having died issueless. His waiver did more. It set at naught the tenancy that was designed for him, and this as effectually as his death could have done. Besides, the operative effect of the will, on the other half interest in the real estate, was thereby accelerated. This half, be it borne in mind, passes "to the next alive." One does not have to think the matter over, after reading the will in the knowledge the testatrix's mother is living, to feel assured that the mother is the "next alive." The undivided half of the real estate passes to her. But in what estate?

Mrs. Parker apparently made her will with this general image in her mind. All the real estate to her husband, so long as he might live, he outliving her. Certain money also to him for life. This provision has availability in ample latitude, seemingly after the husband's death, for the defrayment of any of his then unpaid debts, and for his funeral charges, and "if any left to go as directed by first clause." If, by reason of his dying, or, the possibility whereof the testatrix must be considered to have foreknown, because of his renouncing the will, the husband be off the stage, the mother is to come thereon again, having been on for a bequest of money at an earlier time. And should the mother predecease the testatrix and the husband, the husband as the "next alive" to have, additionally to that given him otherwise, the money designed for the mother, which she would fail to live to take. If neither husband nor mother should take, Maud Erickson to have what remained after expenses were paid, during life.

In the endeavor to arrive at testamentary intent, invert clauses four and five. And take the fifth in indirect quotation. If neither husband nor mother are living when I die, in substance runs the phraseology recorded, my real and personal property, the outstanding expenses first being paid, is for Maud Erickson. Fourth clause: If either mother or husband die before me, then the one living at my death, shall have the property, real and also personal.

Both husband and mother are alive. But the husband removes himself from the will. His act advances matters. "The property—to go to the one then alive at the decease of both said Frank E. Parker or Eldula M. Ladd the property both real and personal to go as will hereinafter directs." O, that in the will there were a few plainly effective sentences! Meaning, however, must be collected from the quoted words, read not in isolated text, but in relation with all else.

It is strenuously pressed that fee simple is given the mother, and that the devise over, added without pause for punctuation or capitalization, is inconsistent with and repugnant to the first giving. The argument of counsel is, that in any case the title to property having been once given away, it cannot be regained by the hand of the giver. And that in application to this case, the property was devised absolutely to the mother, she being the "next alive." There are notable decisions that seem this way. And there are notable decisions also the other way. And each and all assert that, in the guiding of the lights of the attendant circumstances, following the way of positive rules and recognized canons, intent as the whole will manifests it, is sought. There is no other test. And 'tis not in the test, so much as in its application, that difficulty lies.

Whatever the established theory may have been, on the topic of when a thing had been put by a testator beyond his power to recall, since the late cases of *Barry and Austin*, 118 Maine, 51, and *Gregg and Bailey*, 120 Maine, 263, in some quarters it is regarded as materially altered. It is not purposed to enter at large on the discussion of this subject. That discussion is exhausted. The views for the present order and contrariwise are elaborately enforced in Gregg and Bailey. To compare the conceptions and collate the series of related decisions would be nothing to purpose. There is but one sensible mode of proceeding, and it to accept and apply the prevailing opinion, regardless of whether it was agreed with or not. The fiat

of the majority is entitled to gracious acceptance. Any mode of proceeding otherwise, would be fraught with evils unnumbered, through the successive generations of the State.

By force of the cases of Barry and Austin and Gregg and Bailey, Eldula M. Ladd, as devisee in the case in hand, has the realty in life tenancy.

The remainder over is vested "as will hereinafter directs." The word "direct" is used in the sixth clause as predicate of the pronoun "I," and that pronoun finds testatrix as antecedent. "At the decease of all the parties heretofore mentioned—I direct the remainder of my estate both real and personal to go to the Free Baptist Church of East Randolph, Vermont." Certainly, the direction speaks of the "remainder." But the will confers on no life tenant an express general power of disposal. There is no power by implication. In the second clause, any money remaining after the payment of the husband's debts and funeral charges and expenses, is to pass in the manner provided by the first clause. Screened before the view of the testatrix, when the fifth clause was written, was the contingency of she herself living longer than her mother and her husband. And she wrote that if this happens, my real estate and personal property, after the expenses are paid, shall be for Maud J. Erickson, for the term of her life. The testatrix conjoins the real estate and the personal property remaining after her own expenses are paid. Such is the "remainder" of which the sixth clause disposes. It is the same property, namely, the real estate, and the personal property remaining after the expenses are paid, not what, if anything, might be undisposed of under any power, but the selfsame real estate and the personal property remaining, the body or the corpus of the complete estate, that the testatrix there gives in fee and in absoluteness, to the Baptist Church that she belonged to. Her will in respect to the personalty was counteracted. But the real estate remains.

Bill sustained.
Decree in accordance with this opinion.

EVA M. BRAGG *vs.* MURDOCK M. HATFIELD.

Penobscot. Opinion August 28, 1925.

A married woman cannot lawfully be arrested on mesne process by virtue of the immunity and exemption accorded her under Sec. 4, Chap. 66, R. S., and such exemption from arrest does not have to be claimed.

Once a married woman is arrested for tort or contract, equitable estoppel aside, right of action for interfering with her liberty is accrued. Such right of action, in contradistinction to the exempted right, may be relinquished voluntarily.

In the instant case there was no relinquishment of right of action by this married-woman plaintiff. The verdict in favor of her, whom this defendant caused to be arrested on mesne process in an earlier civil action, is supported by evidence, credible, reasonable, and consistent, and is lawful.

On exceptions and motion. An action to recover damages for having been arrested on mesne process brought by plaintiff, a married woman, against defendant for having caused her arrest and detention in a civil action brought by defendant against the plaintiff and her husband, alleging exemption from arrest on mesne process under Sec. 4, Chap. 66 of the R. S. Counsel for defendant entered several exceptions to various rulings by the presiding Justice, and after a verdict of $1,089.05 in favor of the plaintiff was returned by the jury, filed a general motion for a new trial. Exceptions overruled. Motion overruled.

The case fully appears in the opinion.

P. A. Smith, for plaintiff.

Wilfred I. Butterfield and Austin W. Snare, for defendant.

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

PHILBROOK, BASSETT, JJ., concurring in the result.

DUNN, J. On exceptions and general motion.

Action by married woman for unlawful arrest and detention.

This married-woman plaintiff was arrested on mesne process for deceit in selling certain real estate. The defendant procured that

process, knowing that she against whom his writ was brought, and not otherwise served than by the making of the arrest, was married. He sued the woman's husband in the same writ, but without mention of their coverture.

The woman did not object her marriage. She was taken by the sheriff from her Stetson home to Bangor, twenty miles away, where bail was given and her release from custody had.

Counsel appeared generally in defense, at the return term of the writ in the Penobscot Superior Court, and pleaded the general issue. The case stood continued until the third term. Then it was moved that the action be dismissed as to the woman defendant, for no sufficient service of the writ. The motion was overruled; the case went to trial on the merits; verdict and judgment were adverse to the defense. The instant action was commenced some twelve weeks after the arrest. It was then, the plaintiff says in uncontradiction, she for the first time learned that the taking of her prisoner was violative of her rights. Whether any of the exceptions that were reserved and allowed shall be sustained, or the verdict which the plaintiff has shall be overturned on the motion, are the questions raised.

A wife is liable for her torts and contracts, and may be sued and her property attached and taken, as though she were sole, "but she cannot be arrested." Thus in substance is it written in the statute book. R. S., Chap. 66, Sec. 4.

Colloquial freedom rather than formal accuracy is manifest in saying that a married woman cannot be arrested. The action in hand shows only too obviously that she may be. But "cannot" as put to use is practically equivalent to "shall not." It is as a word not native to the soil, which the Legislature has naturalized by adopting. "Cannot," taken from everyday speech and touched in the context by the wand of legislative fiat, means that the arrest of a married woman, on mesne process, may not be caused with impunity. Chronology and original phraseology not infrequently are recourse for clarity. Without reference to these a statute may be dark and confused in the thick mists of black letters. In 1866, Chapter 52, in then dealing further with the contractual rights and liabilities of married women, it was provided, among other things, in these words: "But she shall not be liable to arrest on any writ in such suit." The statutes were revised in 1871. At this time the

before-quoted words were altered to read, "but she cannot be arrested." R. S. 1871, Chap. 61, Sec. 4. And, in 1883, Public Laws, Chapter 207, the same manner of expression was retained and made to apply in actions of contract and tort, indifferently. It was the mode of speech, the diction, not the meaning, that the revisal changed. The meaning remains the same: she shall not be liable to arrest; the natural energy of legislative intent is in the statute still, expressed to the ordinary mind with clearness.

The exemption is from arrest rather than from suit. It is for the benefit of women, and it is for the benefit of organized society, on the concept and persuasion that, in the spirit or genius of our civilization, the protection of wives and mothers from harassment from arrest is essential to maintaining the home, the beginning and the end of all government, in integrity.

An arrest of a person entitled to a common-law privilege of an exemption from an arrest ordinarily does not form the ground of an action for damages. *Smith* v. *Jones*, 76 Maine, 138. Parties, witnesses, jurors, and other officers of the court are exempt from civil arrest while attending in court, and for a reasonable time to go to and return from the same. Such right is not absolute in the individual. It is a policy of the law established for the facilitation of the public business. *Smith* v. *Jones*, supra. Whatever the situation might be were a court itself contemned by the arrest of a party, witness, or juror, the individual in his own affairs is without privilege until privileged by the court. As a personal thing, this privilege to be privileged is conditional and quiescent till, for the furtherance of justice, for the good more of others than of the witness, the juror, or of the other, it is determined that he be set apart temporarily from liability to arrest, or delivered from an arrest already made. And if he is, it is from the time that he is, that the privilege of being exempted or discharged, is his. He then is judicially panoplied for the period of the indulgence from being arrested, and thereupon any antecedently-made arrest becomes voidable. Hence, the arrest beforehand is valid until it is avoided.

In virtue of constitutional provision in this State, members of the Legislature are privileged from arrest, except for treason, felony, or breach of the peace, during attendance at, going to, or returning from each session. This privilege may be said to be two-phased. The one, in creation from what the public interest requires from

legislators of their time and care; secondly, merely personal, where a legislator, seeking a summary way for his own relief, sets it up.

Any personal privilege may be waived. The waiver may be express or it may be by implication. *Chase* v. *Fish*, 16 Maine, 132; *Smith* v. *Jones*, supra. Waiver is by implication when the benefit is not applied for seasonably and properly. *Chase* v. *Fish*, supra. And as the privilege of being made privileged may be waived, and there may be waiver of a privilege actually conferred, so equitable estoppel will preclude the averring to the contrary, where one has acted at variance with honesty and fair dealing, and it would be inconsistent with equity and good conscience for him to allege and prove that which might have perhaps otherwise existed.

The non-arrest statute in the instance of a married woman comes home to the point that her exemption is not conditional upon being claimed. Unlimited asylum for woman tortfeasors, nor a place that for them shall afford an inviolable refuge from contracts, has not been prescribed by the Legislature. Estoppel in pais operates alike whether against the conduct of woman or of man. *Kalloch* v. *Elward*, 118 Maine, 346. And a woman arrested on an original writ for tort or contract, may waive the right of action which the violation of her exemption completes. The statute is a legislative "Thou shalt not." Therein lies controlling distinction. A witness may be exempted; the arresting of a married woman is forbidden. Once she is arrested equitable estoppel aside, right of action for interfering with her liberty is accrued. But, as has been noticed, such right of action may be relinquished voluntarily.

The case of *Weston* v. *Palmer*, 51 Maine, 73, cited by the defendant is not ruling here. Decision there antedates the statute. Besides, the wife and husband in that case were not permitted, on writ of error, to reverse the judgment for an error of fact which might have been availed of in the first suit. In *Winchester* v. *Everett*, 80 Maine, 535, the woman was described in the original writ as single. The writ was personally served. The defendant appeared. Eventually judgment was suffered on default, it never having been suggested that she was other than as in the writ was said. Subsequently the judgment debtor was arrested on execution. Then she advanced her marriage. It was held that, the judgment on which the execution issued being valid, an action for the arrest would not lie. Of course, simply by way of mentioning the distinction between an arrest made

by an officer and one caused by a party, an officer, who acts according to his precept in making an arrest, is not a trespasser, although the person arrested is privileged from arrest. *Chase* v. *Fish*, supra.

No words expressly confer the right to sue for violating the immunity. But through the maze of the array of cases from this and other jurisdictions with which the brief of counsel for this defendant has fairly bristled, there runs the thread of recognition of the legal consequence, that if there was wrong, there is remedy. Concerning the status of married women, in reference to immunity from arrest, the intention of the Legislature is clear. If such intention were not to be given effect, for woman's own indemnity where immunity was defied, the action would be in mockery of the purpose of the statute. It could be justified only because of some positive prohibitory rule. And there is none.

To return more immediately to the situation. Exceptions are eight in number. Were a married woman, arrested on mesne process, to be in a legal condition like that of an arrested witness, as the exceptions contemplate that she would, some of the exceptions might not be shaken. But the difference between the state of the woman and the witness has been noticed. Of the exceptions let it suffice to say particularly, that according to the weight of authority the giving of a bond, by a person privileged from arrest, does not ordinarily constitute a waiver. *Baker* v. *Copeland*, 140 Mass., 342; *Washburn* v. *Phelps*, 24 Vt., 506. It may be a link in the chain of waiver. *Kalloch* v. *Elward*, supra. But it is not open to say, as matter of law, that it is conclusive. Nor yet that the tendering of bond and appearing generally and pleading the general issue are unanswerable. *Kalloch* v. *Elward*, supra. Here, the question of waiver was submitted to the jury, to be sure, as though the rights of married women and witnesses were cognates, but, read as a whole, the charge sent waiver as a subject of investigation to the jury fully as favorably to the defendant as he reasonably could have expected.

Upon the issue raised by the motion for a new trial, the defendant does not urge that the instructions given were, as legal propositions, erroneous and that such error prejudiced his cause, or that the jury misunderstood or misapplied the law given to it. The law of the case has been pressed upon attention by the defendant in his exceptions. So, on the motion there is presented, that the verdict is palpably wrong, or, at the least, that there is excessiveness in the amount of the damages.

"The burden which the proponent of a motion to overturn a verdict assumes has been too long and too often declared to require citation.—The court must proceed upon the theory that the jury had a right to accept all the testimony of the plaintiff's side as true, and to reject all the testimony of the defendant's side as untrue, mistaken, or unsatisfactory, unless the testimony, including the circumstances and probabilities, reveals a situation that proves the testimony on the plaintiff's side to be inherently wrong." *Daughraty* v. *Tebbetts,* 122 Maine, 397.

The verdict in the instant case is supported by evidence, credible, reasonable, and consistent, and is commendable and lawful.

Mitigating circumstances and hardships inflicted and injustice done usually find reflection in damages. This plaintiff has an award of $1,089.05. On the question of damages, elements additional to the usual ones of inconvenience, humiliation, disgrace, and worry are indicated lucidly. One single day comprised the time that the plaintiff was kept from her home and her four young children. But there was testimony, the weight and force and measure of which was for the jury, that the plaintiff suffered the mental agony of nervous collapse, and that the arrest contributed to the premature birth which occurred. These were not less excruciating than some other results. Again, the defendant knew that he was suing and arresting a married woman. He deliberately violated the law. In his reckless course he sought, unsuccessfully, to justify before the jury. Evidence to support the award is not lacking.

Exceptions overruled.
Motion overruled.

CORNISH, C. J., sat at argument and participated in consultation, but owing to retirement, did not join in the opinion.

BASSETT, J., was appointed subsequent to argument but prior to appearance of opinion, hence was not one of the sitting Justices but joins in the opinion by concurring in the result.

ROMAN CATHOLIC BISHOP OF PORTLAND *vs.* JOHN YENCHO.

Androscoggin. Opinion August 28, 1925.

A refusal by the Roman Catholic church to permit the interment of a body of a person, who, at the time of death, was not within the communion of the church, in one of its privately owned cemeteries of consecrated soil, may be enforced, where the written interment permit issued by the church contains a condition that no body of a person shall be interred therein not entitled to burial in consecrated ground, without the consent of the Bishop of the diocese.

In the instant case, whether the girl was of the Roman Catholic faith when she died, must be held to be for ecclesiastical determination, since but the church has the power to hear and decide it.

On report. A bill in equity seeking an injunction to prevent the burial of the body of a girl in the Roman Catholic Cemetery of Mount Calvary Cemetery at Lisbon Falls. A restraining order was issued and upon hearing for a temporary injunction by agreement the cause was reported to the Law Court. The respondent claimed the right to inter the remains of his daughter in the cemetery under a written permit issued by The Roman Catholic Bishop of Portland, a corporation sole, owner of the title to the cemetery, but complainant contended that such permit was subject to certain conditions, restrictions and limitations, one of which was that the remains of a person, who, at the time of his death, was not within the communion of the Roman Catholic church, were not entitled to burial in such consecrated ground, without the consent of the Bishop of the diocese. Injunction to issue below in accordance with stipulation under which the bill there sustained came to the Law Court. Decree accordingly.

The case appears in the opinion.

James H. Carroll, for complainant.

Frank A. Morey, for respondent.

SITTING: WILSON, C. J., PHILBROOK, DUNN, DEASY, STURGIS, BARNES, JJ.

DUNN, J. On report. Bill to prohibit the use of burial easement in a privately owned cemetery affiliated with a church organization.

Unless the consent otherwise of the licenser be had, John Yencho's right of sepulture in the Lisbon cemetery, which the corporation sole of the Roman Catholic Bishop of Portland owns, is limited to those designated persons who at the time of their death are entitled to burial in the particular ground that religious rites and ceremonies have set apart and given what is believed to be spiritual harmony and reverence.

One inquiry only is up. It is whether Mr. Yencho shall be enjoined from burying, in the plot where others of that family lie, the body of his child latest to die. This child as the plaintiff maintains, did not die within the communion of the Roman Catholic church, and therefore is ineligible under the outstanding permit to interment in consecrated soil.

The plaintiff has the title and charge of the property and requirements of the Roman Catholic church in the diocesan of Portland. Until within recent time, Yencho and during life this now dead daughter of his, were communicants of the church in the parish at Lisbon. Testimony tends to show that the Yenchos and certain other Slavic people are seceders from the Roman Catholic religion. Mr. Yencho contends with insistence that on the part of none is there change in concept of the science of duty to God and our fellows, but merely in the place of paying vows or devotions, and such for reasons essentially racial and linguistic, the change being to the house of worship in Lisbon, that they of the same stock have erected and supply with a priest of their own. But the record wanders afield. What may have motivated this suit is of unconcern litigiously.

The rights of these parties differ radically from the exclusive and irrevocable privilege, it was held that a licensee from a town had to bury his dead so long as a cemetery should be used. *Gowen* v. *Bessey*, 94 Maine, 114. In that case there was absence of any contractual limitation. In the instant case restriction is obvious in the very evidence of the original agreement. The condition there nominated is demanded. And it is not for this judiciary to reason why. The question arising under the qualification annexed to the

license, whether the girl was of the Roman Catholic faith when she died, must be held to be for ecclesiastical determination, since but the church has the power to hear and decide it. *McGuire* v. *St. Patrick's Cathedral*, 7 N. Y. S., 345; *Dwenger* v. *Geary*, (Ind.), 14 N. E., 903. See too *St. John's Church* v. *Hanns*, 31 Pa. St., 9.

Injunction will issue below in accordance with the stipulation under which the bill there sustained came here.

Decree accordingly.

TRAVELERS INSURANCE COMPANY *vs.* WINFIELD S. FOSS, Admr.

Kennebec. Opinion August 28, 1925.

In an action against an administrator by the insurance carrier of an employer of an employee to whom compensation has been paid, based upon the right of subrogation, for damages for alleged tort by the intestate which occasioned the paying of compensation, the administrator not having testified, the plaintiff may introduce the employee as a witness, though the employee is not within the letter of Sec. 117, Chap. 87, of the R. S., he is within its purpose, its spirit, its equity.

On report. An action brought by plaintiff as the insurance carrier of the employer under the Workmen's Compensation Act, relying on the right of subrogation, against the administrator of the estate of George A. Foss, to recover compensation paid Fred M. Huntley an employee of the Standard Oil Company of New York, whose injury was occasioned by an alleged tort of the deceased, George A. Foss. The question involved was as to whether the employee, Fred M. Huntley, could be introduced as a witness by the plaintiff. Under the stipulations in the report judgment for the plaintiff for $1,700.00 plus taxable costs, except for any witness.

The case fully appears in the opinion.

Perkins & Weeks, for plaintiff.

Charles W. Atchley and Mark J. Bartlett, for defendant.

SITTING: WILSON, C. J., PHILBROOK, DUNN, DEASY, STURGIS, BARNES, JJ.

DUNN, J. On report. Agreed facts from the Superior Court in Kennebec.

Where one is being sued in his capacity as administrator of the estate of a dead person, by the insurance carrier of a statute-subrogated employer of a compensated employee, for damages for tort alleged to have been done by the intestate in his lifetime, which occasioned the paying of compensation, and has not testified, would it be permissible for the plaintiff to introduce the employee, to witness concerning the tort and its accessory facts?

The stage of the record on which the foregoing question is reserved shows this: At Waldoboro, on May 12th in 1922, while Mr. Fred M. Huntley was standing at a spot on the extreme right of Jefferson Street, along side the truck he had driven there for the Standard Oil Company of New York, he was hurt in result of being hit by the automobile that the now dead man then drove backward. Employer and employee were within the Workman's Compensation Act. The plaintiff was the insurance carrier of the employer. Huntley, the employee, claimed compensation. He received it, under an agreement with his employer's carrier, approved by the State Commissioner.

When, in the course of and because of his employment, an employee sustains injury through the actionable fault of a stranger or third person, an employer, or his carrier, paying or liable for compensation, becomes subrogated to the right of action for damages for the injury. R. S., Chap. 50, Sec. 26, as amended by 1921 Laws, Chap. 222, Sec. 8. And may sue in his own name or that of the employee. *Donohue* v. *Thorndike*, 119 Maine, 20. Any excess in the amount of damages recovered, beyond the need for reimbursing the employer for the compensation and the costs and expenses of the action, is eventually for the employee. 1921 Laws, supra.

Legal subrogation, as the Legislature has made it in this class of cases, is the placing of one person as near as possible in the position of another in respect to a debt or claim, and to its rights and remedies. Its office is to secure real and essential and consistent justice, in simplification of procedure, and without circuity of action, on equitable principles. There is distinction, more in the manner of bringing

them to be than in virtual effect, between assigning and subrogating. An assignment rests on contract. Subrogation is an act of law. But the outcome, were a claim for injuries to the person assignable, would be much the same in substituting one person to another person's rights. In the one instance, the person would part with his claim; in the other, the law parts the claim for him. The statute assigns where he cannot.

The long step forward which the Legislature took in comprehensively abrogating common-law rules disqualifying a witness by reason of interest, whether as party or otherwise, was followed by stepping backward to the very point from which the step forward was taken, and by another step in the same direction but not as far as the first, when an administrator or similar fiduciary is opposite as party. Sec. 112 of Chap. 87 of the 1916 revision of our statutes, as enacted in 1856, Chapter 266, removed the disability arising at common law out of the interest of a party as a witness, and allows such interest to be shown only to effect his credibility. Section 117 in the revision is proviso on and carves out actions from Section 112. The proviso declares the abrogating section without application when an administrator is party, save in excepted instances. Hence, unless a case be within an exception, the disqualification which was removed by the one section is restored by the other, and the competency of the witness is to be determined by the rules of the common law. *Sherman* v. *Hall*, 89 Maine, 411; *Weed* v. *Clark*, 118 Maine, 466.

One of the exceptions alluded to is, that if matters before the death of his decedent be made pertinent to issue, by the testimony of the administrator, the adverse party is competent to testify respecting what was thus made of concern.

Perhaps, within the meaning and the policy of the law, recalling the metaphors and reasonings handed down, and the rule of the common law that an interested party cannot, by releasing his interest, invest himself with attesting competency, it may be that Huntley, the witness proffered, should be classified in the category of an adverse party. If he ought to be so catalogued, then, the administrator not having testified, the evidential door is not open. But it is unnecessary to look into this aspect to see whether the door be open or not.

In Section 117 there is this additional exception: If, by reason of having parted with his interest in the controversy during the life-

time of the representative party's intestate, the adverse party is but nominal, he may be called by either side.

Manifestly, the former employee, the proffered witness, is not within the letter of this section of the statutes. But is he not within its purpose, its spirit, its equity? Lord Bacon, who treated the science of the law not solely as a lawyer but as a legislator and philosopher as well, has said: "A case not within the letter of the statute is sometimes held to be within the meaning. The reason for such construction is that every case could not be set down in express terms. In order to form a right judgment whether a case be within the equity of a statute, it is a good way to suppose the lawmaker present, and that you have asked him this question, did you intend to comprehend this case? Then you must give yourself such answer as you imagine he, being an upright and honorable man, would have given. If this be that he did mean to comprehend it, you may safely hold the case to be within the equity of the statute; for while you do no more than he would have done, you do not act contrary to the statute, but in conformity thereto."

In a legal sense, Mr. Huntley has no interest in this case. The law left it optional with him to have compensation from his employer, or to proceed by action against the third person. He elected to take compensation. Thereupon the doctrine of subrogation arose and he no longer had claim against the third person. Both the election and the doctrine relate back to when the injury was done. The employer became liable to pay compensation as of that time, though the amount of the compensation may not have been determined, and determined it may not have been due and payable, until later. When the injury was done the representative party's intestate was alive. It was then that the employee and the claim were parted. But this action is not in the name of the employee. Is this of consequence? The claim is the employer's, or its carrier's. The action is its from the hope of reimbursement in the advantages of success. It has the management thereof. It may dismiss the action, and discharge the claim. Urge that the employee would be entitled to any surplus recovered is not of moment. If this plaintiff recover more than the compensation and expenses, the overplus would belong to Huntley. But this phase is not yet. It may never be. And if it ever is, Huntley will not be party real or nominal to this action, but to

another and different action wherein privity and promise will be imported by statute, and to that other action this defendant will not be party.

Surely, that a feature different still may not appear to be overlooked, if the employer, after written notice, had not sued within the time limit of the statute, the claim would have reinvested in Huntley and he might have sued. But in this there is no relevance now. Adapting and applying the words of Mr. Cleveland, a condition confronts—not a theory.

Were the action in Huntley's name, the situation would seem to come readily enough within the excepting clause, and the adverse party would be competent to testify, being disinterested and non-partisan through subrogation. With the action fully as plain in portrait, anomaly would be patent were it to be said, Huntley is incompetent to witness because the real party is plaintiff in the writ.

The conclusion is, that the Legislature did intend to comprehend this case. On the authority of the report, let judgment be entered for the plaintiff for $1,700.00 plus taxable costs, except for any witness.

So ordered.

The Garbouska Case.

Oxford. Opinion August 31, 1925.

Under the Workmen's Compensation Act, where the injured employee is mentally competent, and not physically incapacitated, or where death results from the injury and there are no dependents entitled to compensation who are mentally incapacitated, or minors, a claim for compensation shall be barred unless an agreement or a petition shall be filed within two years after the occurrence of the injury, or in case of the death of the employee within two years after his death.

On appeal. A petition for compensation filed by Kazmiryna Michalouna Garbouska as dependent widow of Joseph Garbouska, who, on December 7, 1919, while in the employ of the Oxford Paper Company came in contact with an electric current which resulted in death on the following day. The petition in these proceedings was not filed until August 20, 1924. Upon a hearing the Chairman of the Commission deny compensation and held that inasmuch as no agreement as to compensation was ever made and no petition for compensation was filed within the two-year period limitation provided by Section 39 of the Workmen's Compensation Act, the claim for compensation was barred, and from an affirming decree an appeal was entered. Appeal dismissed. Decree below affirmed.

The case appears in the opinion.

Peter M. McDonald, for petitioner.

Verrill, Hale, Booth & Ives, for respondents.

Sitting: Wilson, C. J., Philbrook, Dunn, Morrill, Deasy, Barnes, JJ.

Dunn, J. Appeal from the denial of compensation under the Workmen's Act.

The facts are uncontroverted. An answer denies the allegations of the petition and interposes bars. One is, that if this petitioner ever had right to compensation, enforcement of the right is prohibited, because neither the mutual and approved agreement of the

parties nor petition therefor was seasonably filed. This only was the defense used before the Industrial Accident Commission. Being advanced as the sole conflicting point it is so accepted here. Thereby much is taken as granted, but there is ample reason.

On one day in the December of 1919, while he was at work for the Oxford Paper Company in its Rumford mill, mortal injury emerged from his employment to Joseph Garbouska. He accidentally came in contact with an electric currect of high tension. Mr. Garbouska died on the following day. No steps of any kind were taken to recover compensation for nearly five years. Then the existing petition was filed by Kazmiryna Michalouna Garbouska. She has been always within Russia. Nothing more than mere claim is put forward that the petitioner was the dependent wife of the now dead employee.

The Compensation Act, as applicable to the situation, is Chapter 50, Revised Statutes, amended by 1919 Laws, Chapter 238.

Under the act and subject to official approval and record, an employer and injured employee may agree upon the compensation. If there be no approved agreement redress is by petition. Section 30. The term "employee," if the employee himself is dead, is inclusive of a compensable dependent. Section 1. But that definition is not without exception; see Section 23 relating to proceedings by guardians, next friends, and disinterested persons. The agreement or petition must be filed, within two years from the time of injury, or recovery from physical or mental incapacity, or the date of the death of the employee. Section 39. The qualification of the aforementioned Section 23, for mentally incompetent and infant dependents, does not affect this case at all.

The position of counsel for the petitioner is, that the political rent of Russia made it quite impossible for his client to communicate with our country, sooner than was done. And therefore that she has a sort of floating claim, falling within the distinctive idea of physical incapacity as set out in Section 39, and avoiding the effect and operation of the date-death period, which claim will be as good evidence after the running of that period as it would have been before, inasmuch as the petition was filed within two years of the removal of the "physical disability."

The valor of the counsel outruns his discretion. It is not open for the Commission to award compensation in magnanimous indiffer-

ence to restrictive law. The whole power over the subject of compensation is derived from and limited by the act. The physical incapacity spoken of in the statute is personal to the employee; incapacity in the sense of bodily disability. The words of the statute book are plain, positive, and inexorable.

Each limitation period for the beginning of proceedings is jurisdictional. It pertains to the remedy. The filing of an agreement or petition is action essential to the allowing of compensation. It is mandatory that the one or the other should be placed on record sufficiently early. This petition, not having been filed within the fixed limit, is forever shut out.

In the following cases, culled from the helpful brief of counsel for the insurer, though cited somewhat differently, the principle is applied to facts in effect the match of those in the cause in hand. *Gorski's Case*, 227 Mass., 456; *McLean's Case*, 223 Mass., 342; *Twonko* v. *Rome Brass & Copper Company*, 224 N. Y., 263; *Peterson* v. *Fisher Body Company*, (Mich.), 167 N. W., 987; *Brown* v. *Weston-Mott Company*, (Mich.), 168 N. W., 437; *Bushnell* v. *Industrial Board*, 276 (Ill. 262), 114 N. E., 496; *Petraska* v. *National Acme Company*, 95 Vt., 76, 113 Atl., 536; *Good* v. *City of Omaha*, (Neb.), 168 N. W., 639.

Appeal dismissed.
Decree below affirmed.

HARRY DAY, ADMR. *vs.* CHARLES ISAACSON.

Androscoggin. Opinion September 1, 1925.

The verdict of a jury upon questions of fact is conclusive and final when the testimony is not so strong to the contrary as to clearly show error, or that the jury were influenced by prejudice, bias, passion or mistake.

In the present case the evidence of negligence of defendant was sufficient to warrant the finding of the jury, and the verdict was not clearly, palpably wrong, hence must stand.

On motion for a new trial. An action by the administrator of the estate of Myer Day to recover damages for injuries sustained by decedent through the alleged negligence of defendant's agent and servant, in operating the defendant's automobile in which decedent was riding as an invited passenger. The general issue was pleaded and a verdict for $2,450.00 in favor of plaintiff was rendered and defendant filed a general motion. Motion overruled.

The case is fully stated in the opinion.

Benjamin L. Berman and Harris M. Isaacson, for plaintiff.

Hinckley & Hinckley, for defendant.

SITTING: WILSON, C. J., PHILBROOK, DUNN, STURGIS, BARNES, SPEAR, JJ.

BARNES, J. Plaintiff's intestate died in a hospital, at Brunswick, about 12:30 in the afternoon of July 7, 1920.

He was a passenger in the automobile of the defendant on the night before, riding from Portland toward Bath, as the guest of defendant. The course was over the so-called state highway, and as the car was about to enter Brunswick village, it left the macadam, ran for a distance on the gravelled or earthen margin of the northerly side of the street, struck and broke off a cedar telephone pole, said to have been eighteen or more inches through at its base, and thence ran across field or garden land, the left end of its forward axle upon

or in the ground, plowing a furrow in the sandy soil to a depth of from six to twelve iches and pushing "a lot of dirt right ahead of its radiator," till it stopped at a point sixty feet and four inches from the broken pole.

Myer Day, plaintiff's intestate, an unmarried boy about seventeen years and six months old, was sitting at the time of the accident on the floor of the rear part of the automobile, near the left door. He was conscious when raised from the ground, while in the house nearest the scene of the accident and for much of the time until he suffered death at the hospital, more than twelve hours after the accident.

The automobile was a five passenger Buick car, constructed to carry two on the front and three on the rear seat, owned by defendant and driven by him on the evening in question from Bath to Portland, and for a part of the return trip.

On the return trip defendant left Portland, at about ten o'clock at night, with Bennie Savage, then about twenty-six years of age, in the right front seat and a young woman seated between him and Savage.

On the rear seat were Mrs. Diana Isaacson, mother of defendant, Mrs. Sarah Savage, Bennie Savage's mother, and Mrs. Mamie Isaacson, while Doris Savage, a grown girl, and plaintiff's intestate sat in the laps of the occupants of the rear seat or upon the floor of the car.

Thus there were eight passengers in the car on the fatal journey.

A few minutes after starting from Portland defendant and Savage exchanged seats, and Savage drove the car for the rest of its journey, which ended with the collision some minutes before midnight.

The writ is dated April 15, 1924, and is brought to recover damages for the death of the young man, as provided by law.

There is practically no conflict in the testimony as to the facts so far recited, and there is no question that the car was a new one, in use for less than a week.

The defendant was presented as a witness by the plaintiff, and testified that on the Sunday before the accident, while driving this car from Berlin, N. H., to Lewiston, he had trouble with its steering gear and drove into a garage at Lewiston and "had it fixed up." In answer to a question as to how it happened that Savage drove for him to Brunswick, he testified, "Well, he asked me if he could drive. Said it was kind of dark and that I didn't know the road and asked me for the wheel and I let him have it."

Wm. B. Edwards, of Brunswick, then and now Chief of Police of that town, testified that after the accident defendant informed him that he cautioned Savage two or three times coming from Portland about driving too fast, or cautioned him not to drive too fast.

Another of plaintiff's witnesses, a Mr. Michaels, called by the plaintiff to the hospital within an hour of the accident, testified that he heard defendant state that he cautioned Savage about driving so fast; and that it seemed to him as if the car was going as fast as it could go when the accident occurred.

Another Isaacson, an attorney at the time, in Bath, accompanied Michaels to the hospital and, after testifying to the same effect as Michaels as to the car being at top speed, added that defendant, while they were that night inspecting the wrecked car, told him that Savage asked permission to drive the car, "telling him he would get him into Bath a great deal sooner than two hours."

The defendant's attorneys made use of but one witness, Mrs. Savage, one of the occupants of the rear seat. They also introduced a deposition given by Bennie Savage for use in litigation in New Hampshire, some time prior to hearing in this suit, and the deposition of Diana Isaacson taken for purposes of this trial.

Savage, in the deposition introduced, declared that he was not driving the car at a faster rate than twenty-five or thirty miles an hour, when it was stopped; but he also deposed that the automobile went only three or four feet after it struck and broke the telephone pole; and the two women were certain that the speed of the car was great, and certain of little or nothing else. In no respect did these witnesses assist the defense.

In the case as printed, and in their brief, counsel for the defense state that the action is a conspiracy to defraud the insurance carrier.

The witnesses for the plaintiff were the defendant, and relatives, friends and an attorney for the defendant, but the jury saw and heard the witnesses, and of the veracity of the witnesses and of the weight and probative force of the testimony the jury and not this court are the judges. It needs no citation of authorities upon this point.

The plaintiff recovers, if at all, because Savage did not exercise due care in driving the car just before the telephone pole was hit. The defendant, sitting at the driver's side, and cautioning him as to his rate of driving, made that driver his servant or agent, and, if

such driver did not exercise due care, his negligence is the negligence of defendant. Again citation of authorities is not requisite.

Our statute prescribes that in such a case as this the deceased is presumed to have been free from contributory negligence.

Was Savage driving at a rate of speed that is properly termed excessive, and that convicts defendant of negligence? The telephone pole, even if its core or heart was somewhat hollowed, sheared off, and the surface of the earth scarred for more than sixty feet, as the flying car was brought to a stop, convinced the jury that Savage was negligent.

It was probably unavoidable that the jury were informed that defendant was insured against loss on account of such damages as are demanded. But it must be assumed they were properly instructed in the premises, for no special instructions were requested and no exceptions were taken to such as were given, and without controlling proof that the jury were influenced by bias or prejudice, this court will not interfere with their finding. New trial is sought, counsel urging that the verdict is against the evidence and the weight of the evidence, and that the damages are excessive.

It cannot be had, for such a case as this is peculiarly within the province of a jury, and because the court cannot say that $2,450 is an excessive amount, under the circumstances detailed in this case.

Entry will be,

Motion overruled.
Judgment on the verdict.

MAINE CANDY AND PRODUCTS COMPANY

vs.

ALFRED TURGEON ET ALS.

Androscoggin. Opinion September 12, 1925.

A promise to pay the debt of another if based upon a new and original consideration beneficial to the promisor is not within the Statute of Frauds; nor does the fact that the promisee also agreed to discharge the third party from his liability make the agreement one of novation, unless the third party assents to the agreement; nor does his failure to assent render the promise to pay unenforceable, if based on a new consideration beneficial to the promisor.

In the instant case the declaration while alleging as an inducement for the defendants' promise a desire to relieve a third party of his debt to the plaintiff, the promise to pay the debt is not alleged to be in consideration of the discharge of the debt of the third party, but in consideration of a forbearance to sue him at that time, and the extension of further credit and the sale of merchandise to the defendants on credit.

The declaration does not set forth an agreement of novation and enforceable as such, nor would the evidence sustain such an allegation; but it does set forth an original promise by the defendants based on a new and sufficient consideration beneficial to them, which the court below found to be supported by the evidence, and the findings of fact by the court below must be sustained as there was some evidence in the case to support them all.

On exceptions. An action to recover $216.11 on an oral promise made by defendants to pay said sum, it being a debt of another party, to plaintiff in consideration that it would forbear for a time to sue such third party. The question involved was as to whether the promise alleged was one of novation or a promise to pay the debt of another supported by a new consideration beneficial to the promisors. The cause was heard by the court below in vacation without a jury, all rights of exceptions being reserved, and a finding for plaintiff for the full amount was made. The defendants entered several

exceptions to the admission and exclusion of certain evidence and to the refusal to grant a requested instruction. Exceptions overruled.

The case fully appears in the opinion.

Benjamin L. Berman, Jacob H. Berman and Edward J. Berman, for plaintiff.

M. L. Lizotte and Herbert E. Holmes, for defendants.

SITTING: WILSON, C. J., PHILBROOK, DUNN, DEASY, STURGIS, BARNES, JJ.

WILSON, C. J. An action to recover on an oral promise involving the payment of the debt of another. It was heard by the court below without a jury with right of exceptions reserved.

The case comes to this court on defendants' exceptions to the admission and exclusion of certain evidence and to the refusal of the Justice below to make certain rulings requested by the defendants.

The case was tried by the defendants below and argued before this court upon the ground that the plaintiff in its declaration relied upon a special contract of novation, or a substitution by agreement of the defendants for the original debtor and a discharge of the original debtor, and that the evidence did not support the declaration.

The plaintiff contended below and contends here that the agreement declared on and proved was not one of strict novation, but a promise based upon and supported by a new consideration beneficial to the defendants, and was, therefore, not within the Statute of Frauds, although the promise was to pay the debt of another.

One Philip Giguere the son-in-law of the defendant, Alfred Turgeon, prior to April 1st, 1924, conducted a confectionery store in the city of Lewiston. The plaintiff, a manufacturer and dealer at wholesale in confectionery, had been supplying him with its products. Giguere's financial affairs prior to April 1st had become such that the plaintiff had refused to longer supply him with goods except for cash and upon condition that he should reduce his indebtedness to the plaintiff by weekly payments.

Giguere was also owing other parties, including one of the local banks, which held his notes endorsed by two of the defendants, Alfred Turgeon and Edward Turgeon, to the amount of $2,250. On April 18th, Giguere transferred his business and all his stock in trade to the defendants, who for the purposes of this case, at least, are conceded to be partners.

One of the defendants admitted that no notice was sent to creditors of Giguere of the sale of his stock of goods in bulk as required by Sec. 6, Chap. 114, R. S., and the court so found. The court also found as facts that the plaintiff attacked the validity of the sale upon this ground and threatened to sue Giguere and attach the goods in the hands of the defendants unless they would agree to assume and pay Giguere's indebtedness to it, and that the defendants did promise to pay the debt due from Giguere in consideration of its forbearing to sue and allowing the sale to stand and of its granting further time for the payment of the Giguere account and of furnishing to the defendants, merchandise on the usual terms of credit, and that as a result of the agreement, the defendants were permitted to retain the goods and go on with the business.

There was evidence on which these findings could rest and the defendants' exceptions must be considered in light of these findings of fact.

The defendants made five requested rulings of which the following were denied and are the basis of exceptions: "(3) The plaintiff must prove that Philip Giguere assented to a novation in order that there should be a novation." "(4) That assuming all the testimony of the plaintiff's witnesses to be true, the plaintiff failed to prove there was an agreement between it and the defendants that it, the plaintiff, would extend further credit to the defendants to sell them on credit further certain articles of merchandise." "(5) That assuming all the evidence in the case in its most favorable aspect to the plaintiff's contentions to be true, the evidence fails, under the law, to prove the contract alleged in the writ."

An examination of the plaintiff's declaration and a brief summary of the principles of law applicable to such a state of facts will disclose that the defendants' exceptions are without merit.

While the declaration, as an inducement for the promise, does set forth that, desiring to relieve Philip Giguere of his obligation to the plaintiff, the defendants promised that they would assume the obligation, not in consideration of the relief of Giguere of the debt, but in consideration of forbearance to sue at that time, the extension of further credit and the sale of goods to the defendants on credit; and while it further alleges that the plaintiff did relieve and release Giguere from his obligation and performed its part of the agreement, it does not adequately set forth an agreement of novation and enforce-

able as such, inasmuch as it does not allege that Giguere was a party to it, nor does the evidence show such to be a fact, which is essential to an agreement of novation. Williston on Contracts, Vol. III., Secs. 1869-71.

It, however, does set forth an original promise based on a new consideration beneficial to the defendants, which is supported by the evidence; hence the requested ruling numbered (3) was not applicable to any issue involved in the case, and was properly refused.

The exceptions to the refusal to make the other requested rulings might as summarily be disposed of; as the declaration does set forth an agreement to extend credit and to sell to the defendants further articles of merchandise on credit, and further that in consideration of a forbearance to pursue said Giguere and compel him to pay at that time, the defendants promised to pay the plaintiff the amount sued for in the plaintiff's writ, all of which was done, as the declaration alleges, in consequence of the defendants' desire to purchase the assets of said Giguere and to succeed to his business. The court below having found the facts as claimed by the plaintiff, and we think upon sufficient evidence, the rulings numbered (4) and (5) were also properly refused.

The contention of the plaintiff that the defendants' promise as alleged and proved was one based upon a new and original consideration beneficial to them and therefore not within the Statute of Frauds, although the promise was to pay the debt of another, is supported by abundant authority. *Emerson* v. *Slater*, 22 Howard, 28; *Zimmerman* v. *Holt*, 102 Ark., 407; *Helt* v. *Smith*, 74 Ia., 667; *Munroe* v. *Mundy*, 164 Ia., 707; *Cross* v. *Richardson*, 30 Vt., 641; *Kirby* v. *Kirby*, 248 Pa. St., 117; *Frohart* v. *Duff*, 156 Ia., 144; *Fears* v. *Story*, 131 Mass., 47; *Nelson* v. *Boynton*, 3 Met., 402; 25 R. C. L., pages 493-503; Williston on Contracts, Vol. I., Sec. 472. This principle was also recognized in the cases of *Colbath* v. *Clark Seed Co.*, 112 Maine, 277; and *Starkey* v. *Lewin*, 118 Maine, 87, though in neither of these cases was the promise relied upon to pay a debt of another already incurred.

It mattered not, although as a part of the agreement the plaintiff discharged Giguere and accepted the defendants as his creditor, that novation was not completed, because the agreement was not assented to by Giguere. The oral promise of the defendants to pay, even if it was agreed between plaintiff and defendants that Giguere was thereby discharged, was just as binding, since it was based upon a considera-

tion beneficial to them, and was clearly an original promise on their part and not conditional upon a failure of Giguere to pay. Williston on Contracts, Vol. I., Sec. 473; *Cross* v. *Richardson*, 30 Vt., 648.

The defendants were indorsers of his notes. They had taken over his business and stock of goods. It was obviously for their benefit that the sale be not disturbed by attachment, but that they be permitted to retain the goods, carry on the business, and derive the greatest benefit from the assets and also have further time in which to pay the debt and be extended the usual terms of credit themselves. A promise based upon a forbearance to sue under such conditions where the promisee surrenders up a right to attach, or a lien, and the promisor acquires a corresponding benefit, has frequently been upheld. *Helt* v. *Smith*, supra; *Kirby* v. *Kirby*, supra; *Frohart* v. *Duff*, supra; Williston on Contracts, Vol. I., pages 907-8.

The defendants' exception to the admission of the bank official as to the indorsements of the defendant on the ground of irrelevancy must also be overruled. It was clearly relevant upon the plaintiff's theory of the case to show the interest of the defendants in the financial condition of Giguere as indorsers on his notes as bearing upon the benefits derived by them from the forbearance of the plaintiff to sue and allowing them to retain the assets of their debtor.

The defendants' other exception to the ruling of the court, excluding the bill of sale given by Giguere, offered for the sole purpose, as stated at the time by counsel, to show that it was given to Philip Turgeon, one of the members of the firm, has no merit. The defendants do not now seriously contend that the sale was not in fact made and the business taken over by the defendants as partners and run by them for several months as such under the name of A. Turgeon & Son. The court so found. The evidence warranted the finding.

The record shows no exception taken to any alleged supporting testimony showing a setting aside of the purchase price as a trust fund in the defendants' hands for the benefit of Giguere's creditors. If such had been received, it would only have served to strengthen the position of the plaintiff that the promise of the defendants was not within the Statute of Frauds and was based upon a new and sufficient consideration. *Hilton* v. *Dinsmore*, 21 Maine, 410; *Maxwell* v. *Haynes*, 41 Maine, 559; *Goodwin* v. *Bowden*, 54 Maine, 424; *Stewart* v. *Campbell*, 58 Maine, 449, 450.

Exceptions overruled.

ALBERT E. MOORES

vs.

THE BANGOR AND AROOSTOOK RAILROAD COMPANY.

Aroostook. Opinion September 12, 1925.

A carrier is liable only where the loss occurs on its lines, for linings of a car and stove furnished by the shipper, provided the carrier has fulfilled the provision in its tariff rates, in securing the consent from connecting lines to pay the loss or damage, and was refused, such stove and linings not being a part of the shipment within the meaning of the Interstate Commerce Act.

On report on an agreed statement. An action to recover for the loss of linings to a freight car and a stove furnished by the plaintiff to equip a car of defendant's against freezing to be loaded by plaintiff with potatoes for shipment, under a contract that defendant was not to be liable for loss not occurring on its own lines. The loss did not occur on the lines of defendant but on lines of connecting carriers. Judgment for the defendant.

The case fully appears in the opinion.

N. Tompkins, for plaintiff.

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

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

WILSON, C. J. An action based on an alleged contract to return to the plaintiff at Dyer Brook, Maine, for his use in shipping potatoes, a so-called "lined" car previously fitted by him with linings and a stove and consigned by him with a shipment of potatoes for parties in Boston, Massachusetts. The case is before this court on an agreed statement with a stipulation as to the judgment to be entered, if defendant is found liable.

An ordinary box car, No. 67,547, was, in December, 1919, furnished to the plaintiff by the Director General of Railroads to be lined and equipped with a stove by the plaintiff for his use during the potato-

shipping season of 1919-1920, subject to such tariff regulations as had been approved by the Interstate Commerce Commission in case of interstate shipments and under an agreement entered into between the plaintiff and the Director General, which agreement was assumed by the defendant Railroad when the railroads were restored to their owners March 1, 1920.

On April 9, 1920, car No. 67,547 was loaded with potatoes by the plaintiff for parties in Boston but consigned to himself. The car was received by the defendant and transported over its own lines and by connecting carriers and the potatoes delivered to the parties for whom the shipment was intended. The party receiving the potatoes in Boston unloaded the car and then reconsigned in the same car a part of the shipment to parties in Pittsburg, Penna., from which point the car with its contents was again reconsigned to Akron, Ohio. At some point west of Pittsburg, it is admitted, the stove and lining were removed from the car, and neither the car, nor the stove and linings, have ever been returned to the plaintiff at the point of the original shipment.

While, by the terms of the agreement between the plaintiff and the Director General, all such cars when once billed by a shipper may not be diverted or reconsigned, except in accordance with the rules and regulations of the defendant, what the rules and regulations of the defendant railroad were in this respect does not clearly appear in the agreed statement.

However, according to the stipulations in the agreed statement the plaintiff apparently seeks only to recover of the defendant for the loss of the linings and stove, and as to these it was expressly stipulated in the tariff rules of the defendant covering such shipments that it would not be responsible for the loss or damage to any linings or stove occurring on any connecting lines, but was only bound to use every possible effort to secure authority from its connecting carriers to pay for the same, which, it is admitted, the defendant has done, but has been denied the authority.

Under its tariff rules, the defendant, therefore, can be liable only for loss of or damage to stoves and linings of "lined" cars occurring on its own lines. Such equipment cannot be held to be any part of the shipment or property received for transportation within the meaning of the Interstate Commerce Act. No charge is made for its transportation with the shipment.

The court is unable to determine from the agreed statement what the rights of the parties may be by reason of any alleged failure to return the car; and under the stipulations of the parties as to a judgment based upon loss of stove and linings, the entry must be:

Judgment for the defendant.

BARNES, J., having been of counsel did not participate.

ARTHUR H. HARMON

vs.

CUMBERLAND COUNTY POWER AND LIGHT COMPANY.

Cumberland. Opinion September 23, 1925.

A verdict, in order to stand, must be supported by substantial evidence consistent with the circumstances and probabilities in the case so as to raise a fair presumption of its truth when weighed against opposing evidence.

On general motion by defendant. An action of tort to recover damages to an automobile resulting from a collision with a street car of defendant, alleging negligence on the part of defendant. The general issue was pleaded, and a verdict of $175 was rendered for plaintiff, and defendant filed a general motion for a new trial. Motion sustained. New trial granted.

The opinion fully states the case.

Harry E. Nixon, for plaintiff.

Verrill, Hale, Booth & Ives, for defendant.

SITTING: WILSON, C. J., PHILBROOK, DUNN, DEASY, STURGIS, BARNES, JJ.

BARNES, J. A collision occurred on Preble Street, in the city of Portland, between a street car of the defendant and a touring car

owned and operated by the plaintiff, in the daytime of April 16, 1924, and on a writ charging the defendant with negligently operating its street car the plaintiff recovered a verdict.

The case is before this court on motion, and the sole issue as to whether the verdict is based upon the evidence and justified thereby.

A presumption accompanies a verdict, and where there is conflict of testimony it is presumed that the jury gave the various items of testimony their real worth in marshalling the probabilities. But, when attacked, no verdict will stand unless the greater weight of facts and probabilities justifies the verdict.

"When the evidence viewed in the light of the circumstances surrounding the whole transaction so strongly preponderates against the plaintiff upon points vital to the result as to amount to a moral certainty that the jury erred in the conclusion reached by them, the verdict should be set aside." *Moulton* v. *Sanford & Cape Porpoise Railway Company*, 99 Maine, 508.

In this case, eye-witnesses of the activities of both motorman and plaintiff were in court and testified at the trial. There was conflict of testimony, it is true, but certain pregnant facts as to the due care of the motorman and the want of that due care which the plaintiff pleads in his declaration must have been wilfully or mistakenly neglected by the jury. They were accorded a view of the locus of the accident.

And with the spoken testimony and the evidence of place and distances they had their opportunity to draw inferences, reason and conclude.

But, "a verdict of a jury on matters of fact, and within even their exclusive province, cannot be the basis of a judgment where there is no evidence to support it, or when they have made inferences contrary to all reason and logic." *Day, Admx.* v. *Boston and Maine Railroad*, 96 Maine, 207.

"An inherently incredible story is not made credible by being sworn to, nor can it be allowed to serve as the foundation of a verdict." *McCarthy* v. *Bangor and Aroostook R. R. Co.*, 112 Maine, 1.

"Testimony of an interested party contrary to the facts otherwise conclusively established in the case and all reasonable inference from the situation disclosed by the evidence, does not raise a conflict requiring a finding by the jury." *Flaherty* v. *Harrison*, 98 Wis., 559, quoted with approval in *Moulton* v. *Railway Company*, supra.

Between the nearer curbs of Cumberland Avenue and the passageway next westerly, on the northeasterly side of Preble Street, there is a seventy-seven foot space at the margin of the sidewalk.

Westerly from this passageway, when the plaintiff arrived at the scene of the accident, a taxicab was parked against this sidewalk.

Plaintiff parked his machine, a Hupmobile touring car, behind the taxicab, against the sidewalk, and went into a nearby store.

When he returned from the store to his car, he testified that he looked up the street toward Cumberland Avenue, and observed that there was no car coming. He testified that he got into his car, backed it a little, signalled by extending his hand into the street, then observed the street car coming slowly toward him from the rear and at that time about half-way across the mouth of Cumberland Avenue; that he thought the car would stop; that he moved slowly out toward the car track and that as he went "just by this taxicab" the car struck his machine.

He introduced a witness who was ready to drive out from the Avenue onto Preble Street just as the street car came opposite the mouth of the Avenue, and this witness testified that he slowed down on the Avenue until the street car had passed its mouth, then ran his car out onto Preble Street, moving in the direction of plaintiff, and had got his car "straightened out" on Preble Street, and two car lengths down Preble Street, directly in rear of plaintiff, and then saw plaintiff put out his hand as a signal and the collision followed at once.

On cross-examination plaintiff was not sure that he backed his car before swinging out.

According to the testimony of an engineer, and as the jury might have seen upon the view, it is but eleven feet and ten inches from the curbing where plaintiff's car was parked to the nearer rail of the street car track, and from the curb to the nearest part of the body of the street car it was but nine feet and ten inches.

All witnesses agreed the street car was moving, in the immediate vicinity, at the slowest rate; none set it more than four or five miles an hour.

Considering that there was probably some little space between the taxicab and the corner in its front, and between the taxicab and car of the plaintiff, when plaintiff stepped into his car, the street car, with nothing intervening to obstruct plaintiff's view, must have been in his sight, near him, and its passing imminent.

Plaintiff, and his only witness, testified that if he had jumped his car out with speed, it might have gotten away before the street car arrived.

As a matter of fact, unless the street car was stopped, a collision was inevitable; and it occurred the instant plaintiff's machine presented itself within a foot of the rail.

But was the motorman negligent? It was a one-man car, the motorman at its extreme front. He testified he was moving down Preble Street without power, coasting perhaps as slowly as three miles an hour; that he sounded a whistle at the approach to Cumberland Avenue, and tapped his gong till the collision occurred.

Plaintiff and his witness testified they did not hear any bell from the street car, and plaintiff that he heard no signal.

In corroboration of the motorman, Mr. Shackley, who was riding with him, testified that both whistle and gong were sounded, and a Mrs. Leary, a passenger, testified that she heard the ringing of the gong and that she spoke of it, at the time, to her little girl who accompanied her. Another witness did not recall the signal.

Two men participated in the mishap, each in the exercise of his right to use the highway. Each must have known that between the outer edges of their vehicles, if the motor car remained at the curb, but little if any more than two feet of space intervened. Each saw the other's car as the street car came down. One concluded, as a reasonably prudent man would under the circumstances, that the other would remain in a position of safety until danger of collision was past, and operated his car, the street car, with due care, unquestionably signalling his approach to the plaintiff.

But the latter, familiar with the premises, took a chance. He says, "I thought sure he would stop," and by his leisurely thrust out toward the car track, he invited and received the injury complained of. He must be held negligent.

"If it were 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 it is morally certain that the jury erred in its verdict, the verdict will be set aside." *Hall* v. *Power Company*, 123 Maine, 202.

So here,

Motion sustained.
New trial granted.

CACCIAGIANO'S CASE.

Cumberland. Opinion September 24, 1925.

The findings by the Chairman of the Industrial Accident Commission on questions of fact are final if there is in the case some evidence from which a reasonable man may draw proper inferences upon the question of fact as to what the petitioner's earning capacity may be.

On appeal. A compensation case where compensation was awarded for partial incapacity, and from an affirming decree an appeal was taken alleging that some of the findings of the Chairman of the Industrial Accident Commission were not supported by evidence. Appeal dismissed. Decree below affirmed.

The case appears in the opinion.

Bradley, Linnell & Jones, for petitioner.

Clement F. Robinson and Forrest E. Richardson, for respondents.

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

PHILBROOK, J. This is an appeal from a decree based on a finding of the Chairman of the Industrial Accident Commission which ordered the employer to pay to the petitioner certain compensation because of an accidental injury sustained by the petitioner and arising out of and in the course of the employment.

The record shows that the employer agreed that the petitioner did receive a personal injury by accident on November 18, 1922, while working for the defendant, and that as a result of the injury he lost his index finger and the terminal phalanx of the middle finger of the right hand; that an agreement as to the payment of compensation was entered into and approved by the Commissioner of Labor on January 3, 1923, by the terms of which he was to be paid compensation in the sum of sixteen dollars per week during disability and that compensation was paid the petitioner for forty-two and one half weeks because of the loss of the index finger and part of the middle finger of the right hand.

The present petition filed with the Industrial Accident Commission on September 16, 1924, prays for further compensation following the period of forty-two and one half weeks, for partial incapacity to work because of his injury, and alleges permanent impairment to the usefulness of two fingers of the right hand.

The Chairman of the Commission, basing his findings upon evidence submitted, held;

1. That the petitioner is partially incapacitated for labor because of the injury received by him as described in his petition;

2. That at the time of the accident to the petitioner he was earning a weekly wage of forty-three dollars and twenty cents, working six days a week;

3. That the petitioner, at the time of the hearing, had a weekly earning capacity estimated to be twenty-one dollars and sixty cents per week;

4. That the reduction in the earning capacity of the petitioner was wholly due to the injury received by him while in the employ of the defendant, as set forth in the petition.

5. That the petitioner was therefore entitled to compensation for partial incapacity to work according to the provisions of section fifteen of the Workman's Compensation Act.

It was therefore ordered and decreed that the defendant pay to the petitioner, as compensation for partial incapacity to work, the sum of fourteen dollars and forty cents per week, commencing from the date of the last payment of compensation to the petitioner.

In the argument of the case the defendant now says that his point of reliance is that on the record some of the findings have no evidence to support them. He finally reduces his contention and reliance to the sole proposition that there is no record evidence to substantiate the finding that at the time of the hearing the petitioner had a weekly earning capacity of twenty-one dollars and sixty cents per week. Upon this single hook he hangs his demand that the order and decree of the Chairman of the Commission be reversed.

The mute, optical testimony of a permanent injury to the right hand of a laboring man, and the story of what he had tried to do in the way of labor since the accident, together with what he had earned during that time, were all before the Chairman at the time of the hearing. In his determination of this question of fact he was

permitted to draw such inferences from the evidence and all the circumstances as a reasonable man would draw. *Adams Case*, 124 Maine, 295.

The appeal must be dismissed and the decree below affirmed.

So ordered.

ALSON L. SOULE *vs.* THE TEXAS COMPANY.

ALSON L. SOULE, JR. *vs.* SAME.

ELMER T. SOULE *vs.* SAME.

Androscoggin. Opinion September 24, 1925.

The "attractive nuisance" doctrine has never been adopted by this court.

In the instant case the following instruction was given, "If any person brings in the sight of children, and leaves there, any object that excites the natural curiosity of children, and irresistibly tolls the little children towards it, and if, pursuing the activities of ordinary children, following such lure or bait, such little folks are injured, the party who leaves the machinery there in that position is liable."

This instruction was erroneous and prejudicial and entitles the defendant to a new trial.

On exceptions and motion by defendant. Three actions to recover damages caused by the explosion of a tank, owned and moved by defendant from its original location at 74 First Street in Auburn, some distance down the same street with the intention of sinking it into the ground at a new location. A verdict was returned in favor of the plaintiff in each case, and defendant filed general motions for a new trial, and also entered exceptions to the admission and exclusion of certain testimony, and to an instruction given. The exception to the instruction as to attractive nuisance only was considered and sustained.

The case appears in the opinion.

Frank A. Morey, for plaintiffs.

Strout & Strout, for defendant.

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

PHILBROOK, J. These three actions, tried together, with resultant verdicts for each of the plaintiffs, are before us on defendant's motions for new trial and exceptions.

The actions are in tort for damages arising from the explosion of a gas tank. In our opinion only one exception requires consideration and that one must be sustained.

The learned justice in the court below, in his charge to the jury, said, among other instructions;

"Further, if any person brings in the sight of children, and leaves there any object that excites the natural curiosity of children and irresistibly tolls the little children towards it, and if pursuing the activities of ordinary children, following such lure or bait, such little folks are injured, the party who leaves the machinery there in that position is liable."

This instruction relates to what is known to the law as the "attractive nuisance" doctrine, which has never been adopted in this State and is denied by many courts, *McMinn* v. *Telephone and Telegraph Company,* 113 Maine, 519. Our court in *Nelson* v. *Burnham & Morrill Co.,* 114 Maine, 213, has gone further and declared that upon what seems to be the better reasoning this doctrine should not be adopted. See also *Chickering* v. *Lincoln County Power Company,* 118 Maine, 414; *Kidder* v. *Sadler,* 117 Maine, 194.

We have carefully examined the entire charge in the light of the testimony and conclude that this instruction now under consideration was error and that the defendant was prejudiced thereby.

It therefore becomes unnecessary to enter upon an extended discussion of the motion or the other exceptions.

The mandate will accordingly be

Exception as to attractive nuisance sustained.

MEMORANDA DECISIONS

CASES WITHOUT OPINIONS

MYRON PAROW ET AL. *vs.* FRED S. SHERBURNE.

York County. Decided June 26, 1924. This is an action to recover damages caused by flow of surface water diverted by means of a ditch upon land of the plaintiffs. The order of the presiding Justice in the court below was "Plaintiffs non-suit on the stipulation on the part of the defendant that judgment shall be rendered by the Law Court for the plaintiffs for the sum of Twenty-five dollars and costs if, for any reason, the Law Court shall over-rule the order of non-suit." Exception to this order was taken by plaintiffs.

A majority of the members of the court are of opinion that a question of fact, namely, the extent and nature of the ditch, as affecting the rights and liability of the parties, was one which should have been submitted to the jury; hence the order of non-suit was error. Exception sustained. Judgment for plaintiffs in accordance with the stipulation. *Willard & Ford,* for plaintiff. *Lucius B. Sweet,* for defendant.

JULIA J. CLARK *vs.* ERNEST R. PUSHARD.

Sagadahoc County. Decided June 26, 1924. Real action in which plaintiff claims title by virtue of a warranty deed. Defendant claims by virtue of an attachment, levy on execution, and sheriff's sale, based upon an action in which this plaintiff was defendant, and which arose subsequent to the acquisition of the property by this plaintiff.

Plaintiff seeks to controvert the defendant's title because of alleged irregularities in the proceedings of the officer who levied and sold the land. No question was raised as to the pleadings.

The court is of opinion that the plaintiff's contentions cannot prevail. Judgment for the Defendant. *Henry R. Drew,* for plaintiff. *George W. Heselton,* for defendant.

LUELLA HARRIMAN *vs.* HARRY T. SAWYER.

Androscoggin County. Decided July 11, 1924. The plaintiff recovered a verdict of $4,708.25 for injuries sustained by her in a collision between an automobile driven by her husband and in which she was riding and an automobile driven by the defendant.

The contested issues were the negligence of the defendant and the amount of damages. On the question of liability the verdict is clearly right. The evidence abundantly justified it.

The amount of damages awarded is somewhat large, but if the evidence, both lay and medical, offered by the plaintiff is believed, and we see no reason to discredit it, the verdict is not so grossly excessive as to demand modification by the court. The plaintiff's condition is serious and probably permanent. Motion overruled. *George S. McCarty,* for plaintiff. *S. Arthur Paul and Frederic J. Laughlin,* for defendant.

SYLVESTER M. RAYMOND *vs.* E. I. DUPONT DENEMOURS CO.

Somerset County. Decided July 11, 1924. Action for breach of covenant of a pulpwood stumpage contract. The main issue of fact before the jury was whether the defendant had cleared the lots as required by the contract. The jury found that it had not and assessed damages in the sum of $1,661.01.

The evidence was very contradictory and the result depended upon the effect upon the minds of the jury of the witnesses on either side, and it was a case peculiarly adapted to their judgment and experience. Their intelligence is shown by their comprehension of and answers to the four special findings submitted to them. We see no occasion to disturb their finding on the main question.

The damages seem somewhat large, but not so excessive as to require the court to diminish them on the evidence presented.

The fourth special finding of the jury renders consideration of the exception unnecessary. Motion and exception overruled. *McLean, Fogg & Southard,* for plaintiff. *Bradley, Linnell & Jones,* for defendant.

ERNEST H. ROBERTS

vs.

THE INHABITANTS OF THE TOWN OF LIMINGTON.

York County. Decided July 12, 1924. In this action brought to recover for damages to a portable engine alleged to be due to a defective highway bridge, it is conceded that the plaintiff's verdict should be sustained if the fourteen day notice was given in conformity to R. S., Chapter 24, Section 92. A notice was seasonably given. Admittedly it was in other respects sufficient, but it contained no specification of the nature of the damage to the engine. This the befendant contends is a fatal defect. The reasoning of the defendant's learned counsel is plausible and forceful. The language of the statute is not entirely clear. But the question at issue has been by this court settled adversely to the defendant by the case of *Creedon* v. *Kittery,* 117 Maine, 541. We perceive no sufficient reason for overruling the opinion in that case. Motion and exceptions overruled. *Willard & Ford,* for plaintiff. *Elias Smith,* for defendants.

RALPH E. MORSE *vs.* INHABITANTS OF WALDOBORO.

Lincoln County. Decided July 12, 1924. At the return term of the writ, the defendant, by general demurrer, questioned the sufficiency, in legal and technical form, of the setting out differently in several counts, of the cause of action on which the plaintiff would rely.

Whether the circumstances, as stated in any of the counts, if proved, would be justiciable, is the sole inquiry at this time.

The answer must be adverse to the defendant. He took nothing by his demurrer. Exceptions overruled. *Harold R. Smith,* for plaintiff. *Rodney I. Thompson,* for defendant.

INHABITANTS OF MINOT *vs.* INHABITANTS OF EAST MACHIAS.

Androscoggin County. Decided July 12, 1924. In a case heard by the Justice of the Superior Court for Androscoggin County without the intervention of a jury, presented in the Law Court upon exceptions to the ruling of the presiding Justice ordering judgment for plaintiff, which exceptions do not include a transcript of the evidence, the exceptions will not be sustained upon the ground that the stated findings of the Justice do not include all findings of fact necessary to support the action, in the absence of any request for such findings in accordance with Rule VI. of the trial court. Exceptions overruled. *Tascus Atwood,* for plaintiffs. *Oscar Dunbar and Franklin Fisher,* for defendants.

G. A. CLOSE COMPANY *vs.* HARRY F. BLACKWELL ET AL.

Cumberland County. Decided July 12, 1924. This cause was heard by a single Justice without jury. One of the defendants was defaulted and the other appeared and contested his liability on the

ground that no partnership existed between himself and the other defendant in connection with the enterprise where the work was rendered for which this suit was brought.

The finding of the sitting Justice is as follows: "After a careful consideration of the evidence I find that such partnership existed, or if it did not exist, the defendant D is estopped to deny its existence. I, therefore give judgment for the plaintiff for the amount of the bill and interest from the date of the writ."

It is elementary law that the decision of the presiding Justice on questions of fact submitted to him is conclusive, and exceptions do not lie to his findings unless the only inference to be drawn from the evidence is a contrary one. An examination of the evidence in this case convinces us of the correctness of the findings of the sitting Justice in the case at bar, and the mandate must be, Exceptions overruled. *Ralph M. Ingalls*, for plaintiff. *Maurice E. Rosen*, for defendants.

GEORGE W. MCFADDEN *vs.* FRED H. COBB.

Androscoggin County. Decided July 12, 1924. This is an action of trespass. The plaintiff declared upon two counts. The first count alleged that the entry was without license. The second count admitted license but alleged an abuse of it. No questions as to pleadings were raised, and the parties without brief statement and under a plea of general issue went to trial upon both counts.

Two questions were submitted to the jury and answered, as follows:

"1. Do you find for plaintiff on the first count? Answer: No."

"2. Do you find for the plaintiff on the second count? Answer: No."

General verdict for defendant. Plaintiff moves for a new trial upon the customary grounds. No questions of law are presented for our consideration The issues were issues of fact. The jury found upon those issues in favor of the defendant and the plaintiff has failed to convince us that the jury so manifestly erred or were so improperly influenced by bias, prejudice or passion that their finding should be disturbed. Motion overruled. *Charles F. Adams*, for plaintiff. *George C. Wing, Jr.*, for defendant.

ARCHER C. BAYARD *vs.* J. FRANK GREEN.

Hancock County. Decided July 12, 1924. The jury, believing the plaintiff's version, found in his favor, and that finding was sufficiently justified. Hence, the defendant's motion for a new trial is overruled. *William E. Whiting,* for plaintiff. *B. W. Blanchard and A. M. Rudman,* for defendant.

A. K. HASLAM ET AL. *vs.* J. FRANK GREEN.

Hancock County. Decided July 12, 1924. The question of the trial narrowed to one of credibility and the verdict was for the plaintiff. No reason is perceived for disturbing the conclusion to which the jury came. Motion overruled. *William E. Whiting,* for plaintiff. *B. W. Blanchard and A. M. Rudman,* for defendant.

EZRA E. MUNCE *vs.* FRANK HANSON.

Piscataquis County. Decided September 6, 1924. An action of assumpsit to recover for fourteen and one half tons of fertilizer delivered to Omar O. Jewell and Alfred Bond who had entered into an agreement to purchase a farm of the defendant and were in possession of the farm under a bond for a deed. They were in need of fertilizer to plant a field with potatoes, but had no funds or credit with which to obtain it.

The plaintiff claims that the defendant being interested in the completion of the sale of the farm and relying upon the result of their crops for the payment of notes which he had taken for the purchase price, finally agreed to purchase the fertilizer for them and upon his direction it was delivered to them.

The defendant claims that the sale was made to Jewell and Bond upon the understanding that they were to give the plaintiff a crop mortgage and that he agreed to the payment of the fertilizer bill as a prior claim to his notes for the purchase of the farm.

The evidence is conflicting. If the jury believed the plaintiff and his witnesses, there is much testimony wholly inconsistent with defendant's claim; and even if the evidence is not all consistent with the plaintiff's contentions, it cannot be said that the finding of the jury that the preponderance of the evidence supported the allegations in the plaintiff's writ is so clearly wrong as to require this court to disturb their verdict. While there are some inconsistencies on both sides, a jury heard the evidence and found the facts in favor of the plaintiff under proper instructions. Motion overruled. *Hudson & Hudson,* for plaintiff. *C. W. & H. M. Hayes,* for defendant.

STATE *vs.* FRANK C. BRACKETT.

Oxford County. Decided September 13, 1924. This case is not properly before the court. It purports to have been brought forward on exceptions to the overruling of a demurrer, but no bill of exceptions appears in the record and the docket entries do not show that any such bill of exceptions was allowed or even filed.

The case must be dismissed. The respondent has not suffered by this irregularity however, for an examination of the indictment shows that the demurrer was properly overruled. Case dismissed from Law Court Docket. *Hugh W. Hastings, County Attorney,* for the State. *W. G. Conary and Albert Beliveau,* for respondent.

JOHN A. GILBERT'S CASE.

Sagadahoc County. Decided September 25, 1924. On Nov. 5, 1920 the petitioner accidentally fell breaking his arm and thigh and injuring his head. For these injuries he has received compensation.

An ulcerous condition of the right foot developed which made it necessary about two years and a half after the accident to amputate first two toes and later the right leg about four inches above the ankle.

If there is any evidence in the record supporting an affirmative answer to the following questions the award of compensation for loss of leg must be sustained. Other elements are either proved or tacitly admitted.

1. Was the petitioner's foot fractured?

Dr. Lombard who treated the petitioner, who had X-rays taken and who performed the operations testified that the bones of the foot were fractured.

2. Did the fracture cause or aggravate the ulcerous condition which made amputation necessary?

Dr. Robinson says that "Trivial injury may excite a trophic ulcer" and Dr. Lombard testifies, "I think the fracture caused the whole trouble."

3. Was the fracture of the bones of the petitioner's foot caused by his fall on Nov. 5, 1920?

The petitioner fell twenty-three feet to a concrete floor, his fall being somewhat broken about half way down by striking a timber. Such a fall would reasonably account for a fractured foot as well as a broken leg and arm.

The petitioner testified that before the accident he "never had any trouble with the foot" and that afterward "it hurt every step I took on it."

It therefore appears that in support of each of those propositions there is some evidence. True there are circumstances that weaken and testimony that contradicts it.

But even if the commissioners' finding be manifestly against the weight of evidence it is final. The commission and not the court is vested with the power and charged with the responsibility of determining the preponderance of evidence and deciding which of two or more reasonable and natural inferences shall be accepted. Appeal dismissed with costs. Decree affirmed. *Harry E. Nixon,* for petitioner. *Hinckley & Hinckley,* for respondents.

JACK KUVENT *vs.* LOUIS ALTWERGER.

SAME *vs.* GERTRUDE ALTWERGER.

Cumberland County. Decided October 14, 1924. These actions are before the Law Court upon general motions for new trials filed by defendants. Upon the brief their counsel "frankly concede that . . . . this Court will not now, on review, say . . . . that a new trial on the merits should be ordered, but contend that the damages awarded were manifestly excessive and unwarranted, even though the element of punitive damages was considered."

The record discloses, however, ample evidence to warrant the jury in finding that the assaults were unprovoked, wilful, and malicious. The weight to be given to the evidence is quite as much for the consideration of the jury upon the question of damages as upon the question of liability; and the amount of punitive damages to be awarded must rest in the sound, cool judgment of the jury, under proper instructions, which we must assume were given.

The evidence clearly preponderates in favor of the plaintiff; no reason is shown which will justify the court in interfering with the verdicts. In each action the entry will be Motion overruled. *Harry E. Nixon*, for plaintiff. *Henry N. Taylor and Jacob H. Berman*, for defendants.

C. E. SABBAGUE *vs.* THEOPHILE HALLEE ET AL.

Androscoggin County. Decided October 14, 1924. This was an action to recover a commission of two hundred dollars for obtaining for the defendants a contract to repair a building. It was heard by the court without a jury. The court found that the plaintiff did procure such a contract and that the defendants did promise to pay him the sum of two hundred dollars in case they secured the contract.

The defendants took exceptions to these findings. The exceptions cannot be sustained. The rule is well-settled by numerous decisions of this court that the findings of facts by the court sitting without a

jury are conclusive, if there is any substantial evidence to support them. If the court believed the plaintiff and his witnesses, and their credibility was for him to determine, it cannot be said there was not substantial evidence to support his findings. Exception overruled. *Benjamin L. Berman*, for plaintiff. *Dana S. Williams*, for defendants.

HEZEKIAH HARRINGTON

vs.

ANDROSCOGGIN & KENNEBEC RAILWAY CO.

Androscoggin County. Decided October 14, 1924. An action to recover damages for injuries alleged to have been received from a collision between the defendant's car and the plaintiff's team while crossing the rails of the defendant Company. Plaintiff recovered a verdict, and the case comes before this court on the usual motion for a new trial.

No issue of law is involved. While a motion for a new trial will not be granted when there is a conflict of testimony, and there is some evidence, if believed by the jury, on which a verdict can rest. A verdict cannot stand, if it is clearly contrary to law, or when the only evidence on which it can rest is so contrary to natural laws, reason and human experience, that it is clear that it must have been the result of sympathy, bias or prejudice.

In the instant case, it is inconceivable, if the defendant's car had reached the point testified to by the defendant's witnesses when plaintiff's team started, that the plaintiff, if he had exercised due care, could have failed to see the approaching car in time to have avoided the collision, or that a collision could have occurred if, as he testified, he looked and the defendant's car was not in sight when he started up his horse to cross the tracks and that he did not see it until his sled was part way across the track and the car was then one hundred and thirty feet away.

Either the jury must have failed to appreciate what the duty of exercising due care on the part of the plaintiff involved, or were swayed by sympathy, bias or prejudice in arriving at their verdict. Motion sustained. New trial granted. *Frank A. Morey*, for plaintiff. *William H. Newell*, for defendant.

CHARLES H. MERRILL *vs.* HARRY HAGOPIAN.

Somerset County. Decided October 17, 1924. The plaintiff recovered a verdict of $313.56 for various items of blacksmithing and wood working supplies sold and delivered to the defendant, being a miscellaneous lot of articles that had passed through a fire. The plaintiff claimed a specific contract for the entire lot at an agreed reduced price. The defendant contended that the contract covered certain machinery not delivered, with the exception of one piece, and did not cover the goods delivered and charged for. The nature and scope of the contract of sale were therefore the points at issue.

Considering the credible evidence of the plaintiff corroborated by disinterested witnesses, the inconsistency between defendant's brief statement of defense and the evidence in defense, and the unconvincing nature of the defendant's testimony when viewed in the light of his conduct, we think the verdict was amply warranted. Motion overruled. *Bernard Gibbs,* for plaintiff. *James H. Thorne,* for defendant.

MOTOR SALES COMPANY *vs.* NATIONAL FIRE INSURANCE COMPANY.

York County. Decided October 27, 1924. On report. Action of assumpsit to recover the value of an automobile insured against theft by the defendant and alleged to have been stolen from one Cadorette who had the car in his possession in Biddeford for the purpose of sale on commission.

The initial fact to be proven is that of theft, the defendant claiming that there was no actual theft but that the car was taken out of the State and after the lapse of a convenient time was also returned to Dayton in this State by certain parties with the connivance of those representing the plaintiff corporation. On this issue the burden was on the plaintiff.

It is unnecessary to analyze and discuss the evidence in detail. Such discussion would afford no profit to the profession and no satisfaction to the parties.

It is sufficient to say that considering the consistency of the undisputed facts with the claim of the defendant, the lack of motive on the part of Cadorette to be solely responsible for the taking, the financial straits of the plaintiff corporation, the direct testimony of Cadorette implicating the plaintiff's agent with the fake theft, the uncorroborated denial of the agent, the failure of the party Whitehead who was concerned with the taking to testify in the agent's behalf or in contradiction of Cadorette though present at the trial, the conduct of the plaintiff's agents after the alleged theft, and the general atmosphere surrounding the entire transaction as created by the circumstances, the plaintiff has failed to convince the court that the car was in fact stolen. The entry must therefore be, Judgment for defendant. *Louis B. Lauzier, Willard & Ford, and Emery & Waterhouse,* for plaintiff. *F. R. & M. Chesley, Warner, Stackpole & Bradlee, Marvin C. Taylor and Charles G. Lewis,* for defendant.

F. R. CONANT COMPANY *vs.* S. F. LAVIN.

Androscoggin County. Decided November 29, 1924. The question of this case, with regard to which exceptions by the defense are insisted to apply, is presented by simple and undisputed facts.

From time before and inclusive of that of the transaction in dispute, Mr. S. F. Lavin, the defendant, was treasurer and manager of the Metropolitan Auction Rooms, the corporation in Lewiston of that name. In 1917 or 1918, to begin at the beginning and trace to the instant situation, Mr. Lavin and the F. R. Conant Company first dealt together. At that time the company sold him the lumber that built his garage. About two years later Mr. Lavin was vendor to the company in business that concerned the sale and purchase of certain doors and windows. Within the next year, the original positions being resumed, the company sold and charged material to Mr. Lavin, that went to the place of the Metropolitan Auction Rooms, and was paid for by the promissory note of that concern, signed by Lavin as treasurer. One month later, the company had the check

of the Metropolitan Auction Rooms, in settlement of something not debited as a book account, the nature of which is not shown. Lavin, treasurer, issued that check.

Thus matters were for twenty months. Then it was planned to construct an annex to the building owned by the auction rooms and to erect a garage for that corporation. One Vye, a carpenter, was employed. Lavin went with Vye to the office of the plaintiff and there spoke to its treasurer. Vye, after stating that he was to build an annex and also a garage at the Metropolitan Auction Rooms, showed schedules of the lumber that would be required, and listed prices at which he said that he expected to buy. Plaintiff met the prices. Who owned the building was not mentioned. Neither Lavin nor Vye volunteered information, and the plaintiff's treasurer did not ask, against whom the charges were to be made.

Work was begun. Vye, as lumber and material were needful, telephoned plaintiff therefor, nineteen different times. Sixteen of the original order sheets, written in plaintiff's office when the orders were severally filed, read "For S. F. Lavin." The others read, "S. F. Lavin for Metropolitan Auction Rooms," "For S. F. Lavin Job Main St. Lew. Metro. Auction Rooms," and "For S. F. Lavin Job Met Auc.," respectively. Each load was charged to Lavin at the time and as delivered, though not by any special direction from him. Monthly bills were sent Lavin. He never objected. But in testifying explained that his daughter, the bookkeeper for the corporation had the mail in charge and that he seldom saw the bills. Delivery slips went with the loads. Twelve of them were produced. Every one read "Sold to S. F. Lavin." Eight and no more were receipted. One was signed "S. F. Lavin," another "Etta E. Lavin," still another, "Metropolitan Auction Rms. Vye," another yet, "Vye," and all the rest "Vye," either immediately before or after what were intended for abbreviations of Metropolitan Auction Rooms, two being in this form, "M. A. R. Inc." Plaintiff's treasurer attested that, until it was adjudicated bankrupt, several months after his meeting with Lavin and Vye, he did not know that the Metropolitan Auction Rooms was incorporated as a corporation. For anything he knew that was but the trade name of Mr. Lavin.

Upon these facts the Justice hearing the case in vacation, under R. S., Chap. 87, Sec. 37, rendered judgment for the plaintiff in an action against Lavin for the lumber and material sold and

delivered for the annex and the garage. Mr. Lavin's failure to appraise the plaintiff's treasurer expressly, at the time the schedules and the listings were under discussion, that the treasurer was but speaking to another representative, and whom the latter stood in the stead of, was the predicate of liability. "I think," remarked Judge MORRILL who sat below, . . . "if he was in fact acting for the corporation, he should have said so," . . . . "he cannot now avow an agency which he did not then disclose."

That ruling was, to the minds of counsel for the defendant, to borrow their words, too harsh and too restrictive. They urge with emphasis that, the defendant's agency and his principal's identity being fairly inferable from the record, wrong law was made to rule right facts.

To be sure the facts and circumstances in a given situation may impart knowledge of the principal's existence and who he is, and where representative capacity ought reasonably to be deduced, it is unnecessary for an agent to state that he personally is not pledging his credit. Actual knowledge brought by the agent, or, what is the same thing, that which to a reasonable man is equivalent to knowledge, is the criterion of the law.

The Judge defined the rule, not in amplification, but in reference to the particular case. In effect he said, after finding the facts, and his finding was conclusive, that if Lavin were acting for the corporation, then as the plaintiff had not actual knowledge or what was tantamount thereto, Lavin should seasonably have made his agency known. And thereby it was made clear that there was no error of law. Exceptions overruled. *Reuel W. Smith*, for plaintiff. *Benjamin L. Berman, Jacob H. Berman and Edward J. Berman*, for defendant.

BENJAMIN SHAW & CO. *vs.* MARY KROOT.

Cumberland County. Decided December 2, 1924. Action to recover broker's commissions on a sale of real estate, before the Law Court upon exceptions to a directed verdict for defendant. In considering exceptions of this kind the court has only to determine

whether the evidence, considered most favorably for the plaintiff, would have warranted a verdict in his favor. *Shackford* v. *N. E. Tel. & Tel. Co.*, 112 Maine, 204.

Assuming that the construction placed by the presiding Justice upon the letter written by the prospective customer to the plaintiff is correct, it is not decisive of the case. The letter was only the beginning of negotiations, an offer, and there is testimony that the offer was modified to include payment of a pro rata part of rents, insurance and water rates.

The evidence is flatly contradictory. If the jury believed the version of plaintiff's witnesses, they would have been warranted in finding that the defendant expressed her willingness, when the written offer was communicated to her, to accept $12,500 for her property with a pro rata share of insurance and water rates paid and accruing rent; that the prospective purchaser orally acceded to those terms without reservation before they were withdrawn, and that the defendant, being seasonably notified of the acceptance, refused to carry out the trade. The purchaser's ability being unquestioned, the jury upon this view of the evidence would have been warranted in finding for plaintiff.

On the other hand, if the jury believed the version of defendant and her witnesses, they would have been warranted in returning a verdict for the defendant, upon the ground, if upon no other, that when the written offer was submitted to her, she only authorized a sale for $12,500 with a pro rata share of taxes, as well as insurance and water rates paid and accruing rent, and that such terms were not secured by plaintiff.

The case involves questions of fact for the determination of a jury. Exceptions sustained. *Oakes & Skillin*, for plaintiff. *Harry E. Nixon*, for defendant.

HARLOW K. WESCOTT, ADMR. *vs.* FORREST ELLIS.

Somerset County. Decided January 28, 1925. After the death of the housekeeper of the defendant, her former husband, as adminis-

trator, brings suit for labor of decedent, at ten dollars a week, or for such sum as the jury should find the services, proven rendered, were worth.

The plea is payment, as made to the decedent; trial is had; a jury finds for the defendant, and the case comes up to this court on the general motion.

The deceased woman was an employee of the defendant, and for a term much greater than the time pleaded.

The evidence seems as full and complete as can be gleaned regarding similar engagements in like cases; a jury of the county in which the defendant and decedent had lived and worked, without doubt competent to decide the issue, heard the testimony, saw the witnesses and rendered their verdict, and it is not for this court to say that their finding is so clearly wrong as to justify its reversal. Motion overruled. *Merrill & Merrill*, for plaintiff. *Gower & Shumway*, for defendant.

G. W. Gross *vs.* Danford Bowie & Tr.

Androscoggin County. Decided February 6, 1925. Action upon a promissory note between the original parties; defense, want of consideration. The testimony of the defendant, if believed by the jury, warranted the verdict. The plaintiff was not present at the trial and his version of the transaction was not given in evidence.

The credibility of the defendant's version was entirely within the province of the jury; and whatever our own view might be, if the duty to weigh the evidence was imposed upon the court, we find nothing in the record which warrants us in substituting our view for the conclusions of the jury. Motion overruled. *Tascus Atwood*, for plaintiff. *Frank A. Morey*, for defendant.

Veta Gerber *vs.* David Shwartz.

Cumberland County. Decided March 3, 1925. An action for breach of promise of marriage. The jury found for the plaintiff and

awarded damages in the sum of thirty thousand dollars. The case comes before this court on a motion for a new trial on the usual grounds, the defendant contending that the verdict is against the evidence and that the damages are excessive.

The question of whether there was a promise of marriage and a breach is one of fact and for the jury. This court after a careful review of the evidence cannot say that their conclusion upon this issue was clearly wrong.

Upon the question of damages, the measure in this class of cases is not one easily defined, the law furnishing no definite or precise rule, and the assessment being peculiarly within the province of the jury.

It may involve loss of affection, social position, worldly benefit from the defendant's wealth and standing, mental suffering, shame and humiliation and in this case special damages were claimed by reason of a sale of plaintiff's business and agreement not to enter into such business for a period of years in anticipation of her marriage, though the evidence does not show that this element could have very materially affected the amount of the verdict.

No doubt the worldly benefits she might have received and the social position she might have gained by reason of the wealth and standing of the defendant in the Jewish community and his prominence in the business life of the largest city in the state entered largely into the damages awarded by reason of the defendant's refusal to carry out his promise of marriage.

Outside of a statement to the plaintiff by the defendant during the prosecution of his suit for her hand as to the amount of his wealth, the evidence as to the extent and value of his holdings comes almost entirely from the testimony of the defendant and his sons. Their testimony on this point, however, when pressed in cross examination, is so indefinite and equivocal as to actual values, that this court cannot say after a review of all the evidence, that the jury was not warranted in fixing a value upon the defendant's property at the time the breach occurred, which would amply warrant the damages assessed based on the plaintiff's loss or worldly benefits and social standing coupled with the other elements that may have properly entered into their award. Motion overruled. *Hinckley & Hinckley and Israel Bernstein*, for plaintiff. *Woodman, Whitehouse & Littlefield, and Joseph E. F. Connolly*, for defendant.

ALBERT N. PRATT *vs.* EDWARD K. CHAPMAN.

Cumberland County. Decided March 7, 1925. On exceptions and motion for new trial by defendant. To sustain exceptions they must contain within themselves sufficient to show that the excepting party is aggrieved. *Lenfest* v. *Robbins*, 101 Maine, 176. Moreover, exceptions cannot be sustained unless the excepting party clearly and affirmatively shows that the ruling, made the subject of exceptions, is prejudicial to him and that he has been thereby prejudiced. *Smith* v. *Booth Bros.*, 112 Maine, 304; *Googins* v. *Skillings*, 118 Maine, 299; *Rent, Admr.* v. *Portland Candy Co.*, 122 Maine, 25. These burdens the defendant has not sustained, nor has he sustained the burden of showing that the verdict is so manifestly wrong that it should be disturbed by the motion. Motion and exceptions overruled. *Harry E. Nixon*, for plaintiff. *George Libby*, for defendant.

GEORGE W. FRENCH *vs.* ANTONIO FORGOINE.

Knox County. Decided March 7, 1925. Action to recover personal damages resulting from an automobile collision. The defendant was defaulted and the case was submitted to the jury on the question of damages. The plaintiff recovered a verdict of four thousand eight hundred eighty-five ($4,885) dollars. The defendant seeks a new trial on the ground that the damages assessed are excessive.

The plaintiff is a fish peddler, aged seventy-five years. He was confined to the hospital for three weeks as a result of the accident. After leaving the hospital he was confined to his bed more or less for about five weeks. During the latter period he was cared for by his son and daughter. He claims that from the time of the accident to the time of the trial, a period of about ten months, he has been unable to labor, still suffers pain, is nervous, and has lost about thirty pounds of flesh. He also claims debts incurred for one hundred dollars,

borrowed money, for ambulance service and medical bills of about thirty dollars. According to the medical testimony there is doubt as to complete recovery.

Necessarily no fixed standard, applicable to all cases, can be adopted for the measure of damages in an action like the one at bar, and we are hesitant about reducing a jury verdict upon that question, but after a careful consideration of the record, taking into account the plaintiff's age, his earning capacity which must decrease with increasing years, the annuity value of a verdict, and all the other factors in the problem, we feel that the verdict is excessive.

If plaintiff remits all the verdict in excess of three thousand dollars within thirty days after receipt of rescript by the Clerk of Courts then motion is overruled, otherwise new trial granted. So ordered. *Z. M. Dwinal and O. H. Emery,* for plaintiff. *Arthur Chapman and William B. Mahoney,* for defendant.

Wilfred Girard's Case.

Cumberland County. Decided April 23, 1925. Workman's compensation case, heard before the Chairman of the Industrial Accident Commission. Compensation was denied and the petitioner appealed from the decree. The controversy resolves itself into one of fact, although the petitioner claims that the undisputed testimony points to but one conclusion, one favorable to himself, hence the issue becomes one of law, and not of fact, and as such should be overthrown by the court.

After careful examination of the record we are of opinion that there is sufficient testimony, from which natural and reasonable inferences may be drawn, to justify the finding of the Chairman; that no fraud to exist; and that under the statutory rule of finality of decision upon questions of fact by the Chairman the mandate must be, Appeal dismissed. Decree below affirmed. No costs awarded. *Sidney St. F. Thaxter,* for claimant. *Bradley, Linnell & Jones,* for respondents.

STATE *vs.* FRANK CASTINO.

Franklin County. Decided May 5, 1925. The respondent was indicted for a single sale of intoxicating liquors. After conviction and before judgment his attorney moved in arrest of judgment, which motion was denied and exceptions taken and allowed. The presiding Justice on motion of the county attorney certified that the exceptions were frivolous and the same were thereupon transmitted to the Chief Justice under Sec. 55, Chap. 82, R. S.

The exceptions are clearly without merit. The ground urged in support of the motion in arrest is that the indictment is duplicitous, but the indictment is substantially in the form provided in Chapter 127, R. S., and the one in general use and is not open to the objection urged. Exceptions overruled. Judgment for the State. *Currier C. Holman, County Attorney,* for the State. *Cyrus N. Blanchard,* for the respondent.

MARTHA E. BASFORD *vs.* CLARENCE W. BASFORD AND TRUSTEES.

Penobscot County. Decided May 16, 1925. Action of assumpsit to recover the amount of certain bills stated in the account annexed, which the plaintiff claimed were due at the time of a divorce between the parties and were agreed to be paid by the defendant. The defendant denied such agreement and claimed an agreement to pay certain bills, which he had paid. The only evidence was the testimony of each party, which was flatly contradictory. The jury found a verdict for the defendant. 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 any error on the part of the jury, which would authorize any interference by this court with the verdict. Motion overruled. *Frederick B. Dodd,* for plaintiff. *Wilfred I. Butterfield,* for defendant.

WARREN H. COLBY *vs.* PHILIP R. PORTER.

York County. Decided June 4, 1925. This case is before this court on a general motion for a new trial. In February, 1921, the defendant borrowed a pair of horse sleds from the plaintiff and used them in his lumbering operations. In the course of time the sleds were repeatedly broken and repaired by the defendant or his employees until of the original material only one runner and the iron shoes remained. Upon demand by the plaintiff for a return of the sleds, the defendant offered their return in their altered condition, and the plaintiff refused to accept them. By their verdict, the jury must have found that the defendant had effected a substantial change in the form or nature of the sleds without the knowledge or consent of the owner, and by such misuse of the property had converted it to his own use. An examination of the evidence discloses no reason for disturbing the verdict, and the entry must be, Motion overruled. *Leroy Haley,* for plaintiff. *Robert B. Seidel,* for defendant.

JAMES KELLEY *vs.* B. S. HIGGINS CO.

Hancock County. Decided July 8, 1925. General motion by plaintiff for a new trial. Under the well established rule of this court the motion must be overruled as the moving party has failed to show that the verdict is so clearly wrong that we should disturb it. Motion overruled. *H. L. Graham,* for plaintiff. *Lynam & Rodick,* for defendant.

RAY MOTOR CO. *vs.* EDWIN A. FLANDERS.

Penobscot County. Decided July 8, 1925. An action of *indebitatus assumpsit* to secure the balance due on a promissory note given in part payment for an automobile.

The defense was a breach of warranty and also payment. The case was submitted to a jury which rendered a verdict for the plaintiff for $75.00 and interest, being the balance claimed by the plaintiff to be due on the note.

Upon the issue of a breach of warranty, the defendant affirmed, and the plaintiff denied. The jury saw the witnesses and must have believed the plaintiff's witness. This court cannot say from the printed testimony that the jury clearly erred on this issue.

On the issue of payment, the defendant introduced two checks: one for $75.00, given the next day after the note was given and nine days before its maturity, and another check for $25.00, given two months later, which he claims was given in full settlement of the note, though the note was not surrendered at the time, but, as he claims, was to be delivered later.

The plaintiff's witness says only the check for $25.00 was given on the note. It does not undertake, nor was its witness asked either in direct or cross-examination, to account for the specific application of the seventy-five dollar check, if not on the note. It does appear in evidence, however, that the defendant was owing to the plaintiff at some time, a garage bill, which the defendant does not deny, nor is he inquired of concerning it.

Only by inference does the plaintiff deny the application of the seventy-five dollar check on the note, or the defendant claim its payment on account of the note.

Upon this unsatisfactory record this court is asked to find that the jury's verdict was clearly wrong. It would seem that a little effort and inquiry on either side could have cleared up any uncertainty and disclosed the true situation.

The defendant, however, was content to submit the case upon this testimony. Evidently the jury must have been more strongly impressed with the witness for the plaintiff. What this court might have done, if it had passed upon the evidence after hearing and seeing the witnesses, is immaterial.

If the jury believed the witness who testified for the plaintiff, and there is nothing inherently incredible in his testimony, this court cannot say the jury's finding on the issue of payment was clearly wrong. Motion overruled. *William Cole*, for plaintiff. *Wilfred I. Butterfield*, for defendant.

KENDUSKEAG VALLEY FRUIT GROWERS' ASSOCIATION

vs.

MAINE FRUIT GROWERS' EXCHANGE.

Penobscot County. Decided July 24, 1925. By consent of the parties, this case was reported from the Superior Court in Penobscot County, for the entering of that judgment which the factual and legal situations should seem to require.

The conclusion is that the relationship between the parties, concerning the apples in controversy, was not that of seller and buyer, but rather of principal and agent.

The defendant, a corporation, of which the plaintiff corporation still continued in membership, not having withdrawn in manner as prescribed by the defendant's by-laws, received the apples from the plaintiff for marketing on the cooperative plan.

Not now, but at another time, and in an action fit to facts, the defendant may be held to account for the property that was entrusted to it.

In respect to the instant action on an account annexed for goods sold and delivered, the entry must be, Judgment for defendant. *Ross St. Germain and George E. Thompson,* for plaintiff. *Benjamin L. Berman and Simon Levi,* for defendant.

STATE *vs.* PHILIP HOWARD.

Knox County. Decided September 2, 1925. An indictment for forgery and for uttering a forged instrument. Respondent demurred at the April Term, 1925. His demurrer was overruled and the indictment adjudged good. Respondent excepted. His exceptions were adjudged frivolous and were certified and transmitted to the Chief Justice under Sec. 55, Chap. 82, R. S. No arguments were presented by either side within the time fixed by the statute. An examination of the indictment shows the demurrer to be without

merit. The counts are in the form commonly in use and set forth all the essential elements of the offense charged. Entry must be: Exceptions overruled. Judgment for the State. *Leonard R. Campbell,* for the State. *Edward C. Payson,* for respondent.

HARRY L. SARGENT *vs.* CORNISH AGRICULTURAL ASSOCIATION.

York County. Decided September 9, 1925. An action of tort to recover damages for negligence in not providing a safe place for the plaintiff to work. The defense was that the defendant owed no duty to the plaintiff in this respect, as the relation of master and servant did not exist between them; that the plaintiff was in the employ of another at the time of his injury whose relation to the defendant was that of an independent contractor.

At the close of the testimony, the presiding Justice directed a verdict for the defendant and the case comes here on exceptions to this ruling.

The exceptions must be overruled. While there may be some evidence from which inferences might be drawn that the relation of master and servant did exist between the plaintiff and the defendant, it is so slight, and of so little weight, and is so overwhelmed by the positive testimony of other witnesses, corroborated by the plaintiff's own admissions that he was employed and paid by a third party, that a verdict for the plaintiff upon such evidence would not be permitted to stand.

The determining factors of whether the relations of master and servant or of an independent contractor exist have been so recently and fully laid down by this court in *Clark's Case,* 124 Maine, 47 that further citation of authorities is unnecessary. Exceptions overruled. *Elias Smith,* for plaintiff. *Walter P. Perkins and Frederick R. Dyer,* for defendant.

WILLIAM M. KELLEY *vs.* JAMES R. THURLOUGH.

Cumberland County. Decided September 9, 1925. An action of assumpsit to recover for merchandise sold and delivered. The

defendant set up under a brief statement as a special matter of defense, not a right of set off, but an agreement to apply the amount due the account upon a note given the defendant by the plaintiff. A jury found for the plaintiff. It comes before this court on a motion for a new trial on the usual grounds.

The amount and delivery of the merchandise was not in dispute. A question was raised as to the price agreed to be paid per gallon for gasoline.

The defendant testified, and contends that the only reasonable inference to be drawn from the evidence is, that he was authorized to credit the amount of the bill upon a certain promissory note given to him by the plaintiff in part payment for some real estate.

The plaintiff denied such an agreement and says the defendant had no such authority and did not so credit the goods according to his own testimony.

No set off being pleaded and having set up an agreement to credit the debt of defendant on plaintiff's note, the burden was on the defendant to prove the agreement and the application. The jury must have believed the testimony of the plaintiff as to the price to be paid, and either that there was no agreement to credit the merchandise on the note or that no application had ever been made.

We cannot say that, having seen and heard the witnesses, the jury were clearly wrong in their conclusions. Motion overruled. *Richard E. Harvey,* for plaintiff. *Cook, Hutchinson & Pierce, and Edward T. Atwood,* for defendant.

RULE OF COURT

Amendment to Rule XVII. relating to motion for new trials.

STATE OF MAINE

SUPREME JUDICIAL COURT — At June Law Term, Portland
July 11, 1925.

All the Justices Concurring:

ORDERED: That Rule XVII. is hereby amended by striking out the last sentence beginning with the words "The evidence" and inserting in place thereof the following: "The evidence in support thereof, or in rebuttal or impeachment, shall be taken within such time and in such manner as the Court, or any Justice in vacation, shall order, or the motion will be regarded as withdrawn," so that said Rule XVII. when amended shall read as follows:

XVII.

MOTION FOR NEW TRIALS.

Motions for new trials must be in writing and assign the reasons therefor.

When a motion is made to have a verdict set aside as against law or the evidence, it must be filed during the term at which the verdict is rendered. The party making it shall cause a report of the whole evidence in the case to be prepared and present the same to the presiding Justice for his signature within such time as he shall by special order direct, and, if no such special order is made, it must be done within ten days after the adjournment of the court; if not so done, the Justice shall not be required to sign it and the motion may be regarded as withdrawn, and the clerk, at a subsequent term, may be directed to enter judgment on the verdict.

When a motion for new trial is made for any other cause, it may be filed with the clerk at any time before final judgment, and the clerk shall give immediate written notice thereof, by mail or otherwise, to the adverse party or his attorney. The evidence in support thereof, or in rebuttal or impeachment, shall be taken within such time and in such manner as the court, or any Justice in vacation, shall order, or the motion will be regarded as withdrawn.

By the Court,

SCOTT WILSON,

Chief Justice.

QUESTIONS AND ANSWERS

QUESTIONS SUBMITTED BY THE GOVERNOR AND EXECUTIVE COUNCIL OF MAINE TO THE JUSTICES OF THE SUPREME JUDICIAL COURT OF MAINE, JULY 23, 29, 30, 1924, WITH THE ANSWERS OF THE JUSTICES THEREON.

STATE OF MAINE

EXECUTIVE DEPARTMENT

Augusta, Maine, July 23, 1924.

TO THE HONORABLE JUSTICES OF THE SUPREME JUDICIAL COURT:

Under and by virtue of the authority conferred upon the Governor by the Constitution of Maine, Article six, Section three, and being advised and believing that the questions of law are important and that it is upon a solemn occasion, I, Percival P. Baxter, Governor of Maine, respectfully submit the following statement of facts and questions and ask the opinion of the Justices of the Supreme Judicial Court thereon.

STATEMENT.

In accordance with the provisions of Chapter 6 of the Revised Statutes, and Amendments thereto, a Primary election for the nomination of candidates to be voted on at the general election in September, 1924, was held throughout the State on Monday, June 16, 1924. In the Republican Primary Election thus held there were two candidates for Governor, viz.: Hon. Frank G. Farrington of Augusta and Hon. Ralph O. Brewster of Portland.

Subsequent to the election, on June 23, 1924, the Governor and Council in accordance with Section 16 of said chapter opened and compared all votes as returned from the several towns, cities and

plantations, tabulated the same and forthwith thereafter forwarded to each candidate a copy of said tabulation showing the following result:

Frank G. Farrington, 47,678 votes.
Ralph O. Brewster, 47,358 votes.

Within ten days after the returns had been opened and tabulated as aforesaid, Mr. Brewster filed with the Secretary of State a request for an examination of the ballots cast in the several towns, cities and plantations of the State as listed in Schedule "A" annexed to his petition, as follows:

"Portland, Maine, July 1, 1924.

"HON. FRANK W. BALL,
Secretary of State
Augusta, Maine.

"Dear Sir:

Under the provisions of Chapter 233 of the Public Laws of 1919, being an act additional to Section 15 of Chapter 6 of the Revised Statutes relating to inspection and recount of ballots cast at Primary elections, and as a candidate for the Republican nomination for Governor in the Primary election held on Monday, June 16, 1924, the official returns for which were opened and tabulated by the Governor and Council in accordance with the provisions of the statutes on Monday, June 23, 1924, I now allege that the return or record of the votes cast in the towns, cities and plantations named in the list hereto attached and marked Schedule "A" and hereby made a part hereof and of any and all other towns, cities and plantations in the State does not correctly state the vote as actually cast in such towns, cities and plantations in so far as the return or record of the vote cast for the Republican nomination for Governor is concerned, and I, therefore, request that the Secretary of State shall forthwith direct the clerks of such towns, cities or plantations to forward to the secretary of state forthwith the ballots cast in said town, city or plantation in order that the Governor and Council in open meeting may examine the ballots thus returned to the Secretary of State and

if such returns or records are then found to be erroneous may then correct the returns in accordance with the number of ballots found to have been actually cast in said town, city or plantation in accordance with the provisions of the statutes in such case made and provided.

RALPH O. BREWSTER,
Candidate for the Republican Nomination
for Governor."

In accordance with this request the Secretary of State directed the several clerks of the several cities, towns and plantations of the State to forward forthwith the ballots cast in said places and these ballots are now being examined by the Governor and Council in open meeting in accordance with said request and the provisions of the R. S., Chap. 6, Sec. 15.

On July 14, 1924, at the beginning of the session of the Governor and Council called and held as aforesaid, Mr. Brewster filed the following statement to which are annexed affidavits and other data referred to in said petition.

"TO THE HONORABLE PERCIVAL P. BAXTER, GOVERNOR OF MAINE AND THE MEMBERS OF THE EXECUTIVE COUNCIL:

"I understand that, by virtue of the provisions of Chapter 233 of the Laws of Maine of 1919, amending Section 15 of Chapter 6 of the Revised Statutes of 1916, it is incumbent upon you to ascertain the number of ballots 'actually cast' in the cities, towns and plantations in the State for the candidates for the Republican nomination for Governor in the last Primary election held on Monday, June 16, 1924, and to correct all returns 'in accordance with the number of ballots found to have been actually cast,' when the 'return or record is found (by you) to be erroneous.' The amendment of 1919 very greatly enlarges the powers formerly possessed by the Governor and Council and was enacted, as expressed in the title, in order to enable the Governor and Council 'to correct the record to accord with the facts.'

"It is clear that the laws of the State now make you the proper and competent tribunal to determine the results of a Primary election in accordance with the facts, and pursuant to the suggestion of you

letter of June 25, 1924, I am laying before you certain information which seems to be of importance in your determination of the results.

"A review of this election is asked for both because of evident errors in the tabulations in the various municipalities which have been disclosed by the examination of the ballots and also because of very gross fraud and irregularities in the conduct of the election. Some of these irregularities have been disclosed in considerable detail by a committee of citizens who have been investigating this matter.

"I am attaching to this statement original affidavits of municipal officers and of other responsible citizens which will be of great assistance to you in ascertaining by competent evidence material facts as to the number of ballots 'actually cast' or in other words 'lawfully cast.' The facts evidenced by these affidavits can be substantiated either by the oral testimony or by the depositions of the citizens making the affidavits and of the numerous citizens whose names and addresses are shown in the affidavits.

"The contents of these affidavits may be summarized as follows:

"I. In the election precinct designated as Ward 4 in the City of Portland at least four hundred Republican ballots furnished by the Secretary of State for use at said election were fraudulently marked for Frank G. Farrington as the Republican candidate for Governor, and were placed illegally and fraudulently with the ballots 'actually cast' in said ward in said election for the candidates for the Republican nomination for Governor. This was done secretly after the polls were closed and without any color of right and secretly after the polls were closed names of voters on the registration lists were checked roughly to correspond with the number of ballots thus fraudulently marked and placed with the ballots cast for the Republican nomination for Governor, and said ballots so fraudulently marked and placed, were wilfully, falsely and fraudulently included in the record and in the return of the election officials of said Ward 4, although they were not 'actually cast' in said ward in said election for the purpose of deceiving the canvassing board which should review this matter, thus vitiating the return of the said election officials and discrediting the vote of said ward except as it may be determined by other competent evidence.

"II. It appears by the official returns of Fort Kent, Frenchville, Grand Isle, Madawaska, Saint Agatha, Van Buren, Cyr Plantation, Hamlin Plantation, New Canada Plantation and Wallagrass Plantation that 2,062 votes were reported in the last Primary election for

the Republican nomination for Governor, of which 2,036 were returned for Frank G. Farrington as Republican nominee for Governor, and 26 for Ralph O. Brewster as Republican nominee for Governor. Affidavits are attached of John A. Sweeney, Town Clerk of Fort Kent, of John B. Pelletier, Town Clerk of Van Buren, of Joseph G. Ouellette, Town Clerk of Saint Agatha, and of Arthur J. Nadeau, prominent citizen and attorney in Fort Kent, showing that over a thousand of the votes cast in these several towns and plantations were marked by the election officials in defiance of the law, rather than by the voters themselves, and affidavits of individual voters are also attached showing illegal marking of their ballots in this way. It further appears by the affidavit of Joseph B. Ouellette, Town Clerk of Saint Agatha, that the polls of said town were not closed until 9:30 P. M. Standard Time on June 16, 1924, and that thirty ballots were marked by the election officials and placed in the box after the legal time for closing the polls at 9 o'clock. All of the ballots shown by the record and return of said town were marked for Frank G. Farrington as the Republican nominee for Governor. It further appears by said affidavit that election booths were not used, but all ballots were marked at tables in an open room.

"III. In Ward 4 in the city of Lewiston 228 Republican ballots were reported by the election officials in said ward as 'lawfully cast' in the last Primary election on Monday, June 16, 1924. No enrollments were made on election day by the election officials, according to their official return and prior to that date the total enrollment of Republican voters in said Ward 4 was 131 and this list of enrollments was compiled prior to 1915 and no changes had been made therein since that date A comparison of the check lists and the enrollments will show the number of ballots which could have been lawfully cast in said ward in said election.

"The first tabulation of the official returns showed an apparent majority for my opponent of 320 votes. The affidavits which are filed herewith show that at least fourteen hundred illegal and fraudulent votes for my opponent were included in that tabulation entirely aside from any question of the ballots illegally cast by voters who voted without enrollment. This would show that the illegal and fraudulent votes reverse the result of the election.

July 14, 1924. RALPH O. BREWSTER."

QUESTIONS.

The following questions have arisen in connection with the examination of ballots as aforesaid.

I.

In re Ward Four, City of Lewiston.

Mr Brewster makes the following claim:

"In Ward 4 in the city of Lewiston 228 Republican ballots were reported by the election officials in said ward as 'lawfully cast' in the last Primary election on Monday, June 16, 1924. No enrollments were made on election day by the election officials, according to their official return and prior to that date the total enrollment of Republican voters in said Ward 4 was 131 and this list of enrollments was compiled prior to 1915 and no changes had been made therein since that date. A comparison of the check lists and the enrollments will show the number of ballots which could have been lawfully cast in said ward in said election."

Questions.

(a) Have the Governor and Council right, power, authority and duty to inquire into the circumstances of the voting in said Ward 4 as set forth above and in particular to inquire whether votes were received at said Republican primary election from persons theretofore or on said day not duly enrolled as Republican voters, and if so, what is their power to examine witnesses, compel the production of papers and documents, take testimony and punish for contempt?

(b) In case the Governor and Council have the right, power, authority and duty as aforesaid, and should find that the allegations set forth as above are sustained either wholly or in part, what is this duty with reference to excluding from the count all or any part of the votes cast in said ward on said day, and in particular, in case it should be found that the allegations are sustained but that it is impossible to determine which of the ballots now before them were cast by enrolled Republicans?

(c) What if any effect should be given by the Governor and Council in counting said ballots to such facts as may be found to exist showing irregular, improper or illegal conduct of the ward officials as set forth in said complaint?

II.

In re Aroostook County Towns.

Mr. Brewster makes further claim that in certain towns and plantations in the county of Aroostook votes cast were marked by the election officials contrary to law; that the polls in the town of St. Agatha remained open until 9:30 P. M. Standard Time, on the day of the election; that 30 ballots were marked as aforesaid for voters by election officials and placed in the box after the legal time for closing the polls; that all the ballots returned as voted in said town of St. Agatha were marked for Mr. Farrington and that election booths were not used but ballots marked at tables in open rooms.

Questions.

(a) Have the Governor and Council right, power, authority and duty to inquire into the circumstances of the voting in the towns and plantations set forth above and in particular to inquire whether votes there cast were marked at the request of the voters by election officials although the voters were physically able to mark their ballots themselves; a certificate of assistance not appearing on said ballots; or otherwise contrary to law; whether the polls remained open after the legal closing hour and whether election booths were not used, and if so, what is their power to examine witnesses, compel the production of papers and documents, take testimony and punish for contempt?

(b) In case the Governor and Council have the right, power, authority and duty as aforesaid, and should find that the allegations set forth as above are sustained either wholly or in part, what is their duty with reference to excluding from the count all or any part of the votes cast in said towns and plantations on said day and in particular in case it should be found that the allegations are sustained but that it is impossible to determine which of the ballots now before them

were cast after being marked as above set forth or after the legal closing hour for the election, or were marked on tables in an open room and not in an election booth?

(c) What if any effect should be given by the Governor and Council in counting said ballots to such facts as may be found to exist showing irregular, improper or illegal conduct of the election officials?

III.

In re Ward 4, Portland.

Mr. Brewster makes further claim:

"In the election precinct designated as Ward 4 in the city of Portland at least four hundred Republican ballots furnished by the Secretary of State for use at said election were fraudulently marked for Frank G. Farrington as the Republican candidate for Governor and were placed illegally and fraudulently with the ballots 'actually cast' in said ward in said election for the candidates for the Republican nomination for Governor. This was done secretly after the polls were closed and without any color of right and secretly after the polls were closed names of voters on the registration lists were checked roughly to correspond with the number of ballots thus fraudulently marked and placed with the ballots cast for the Republican nomination for Governor and said ballots so fraudulently marked and placed, were wilfully, falsely and fraudulently included in the record and in the return of the election officials of said Ward 4, although they were not 'actually cast' in said ward in said election for the purpose of deceiving the canvassing board which should review this matter, thus vitiating the return of the said election officials and discrediting the vote of said ward except as it may be determined by other competent evidence."

It is stated by Mr. Brewster that some of the facts which tend to indicate the fraud above referred to are that there were 647 names enrolled as Republicans in said ward on the enrollment list but 873 Republican primary ballots were cast; that the check marks on the incoming check list and outgoing check list in said ward do not correspond; that a large number of citizens whose names appear on the voting list to have been checked are ready to testify that they

did not go to the polls; and that the names of voters who had been stricken from the list and dead men's names are checked as having been voted upon.

QUESTIONS.

(a) Have the Governor and Council right, power, authority and duty to inquire into the circumstances of the voting in said Ward 4 in the city of Portland as set forth above, or elsewhere, and in particular to inquire whether votes were received at said Republican primary from persons theretofore or on said day not duly enrolled as Republican voters or were secretly placed with the ballots cast subsequent to the close of the election; and if so, what is their power to examine witnesses, compel the production of papers and documents, take testimony and punish for contempt?

(b) In case the Governor and Council have the right, power, authority and duty as aforesaid, and should find that the allegations set forth above are sustained either wholly or in part, what is their duty with reference to excluding from the count all or any part of the votes cast in said ward on said day, and in particular in case it should be found that the allegations are sustained but that it is impossible to determine which of the ballots now before them were cast by enrolled Republicans or were placed with the ballots cast secretly subsequent to the election as aforesaid?

(c) What if any effect should be given by the Governor and Council in counting said ballots to such facts as may be found to exist showing irregular, improper or illegal conduct of the ward officials as set forth in said complaint?

IV.

IN RE UNOFFICIAL BALLOTS.

(1) It appears that included in the ballots cast at the election were certain ballots not officially furnished prior to the election by the Secretary of State to the towns where they were cast. Some of these are official ballots issued to towns other than the towns where they were used, in some cases both towns being in the same legislative class and in some cases not; some are typewritten ballots; some are

specially printed ballots, and all differ in some details from the official ballots and do not bear the endorsement of the Secretary of State.

The Governor and Council are informed that these ballots are accounted for as follows: On the day of the election there was a shortage of Republican ballots in these towns; in some cases local election officials obtained ballots from other towns to which they had been officially issued; in other towns local election officials and private citizens had ballots prepared by a local printer after consultation with the Secretary of State over the telephone and the cost of printing these ballots is to be defrayed by the State; in other towns ballots were printed by the local election officials and private citizens at private expense without authority of Secretary of State; none were exact copies of the official ballots; and in other towns typewritten ballots were prepared either by the local election officials or by voters without consulting the Secretary of State. In the cases where the Secretary of State was called by telephone and asked to authorize the printing and use of extra or emergency ballots, the said Secretary of State expressly authorized the said printing and use and the ballots were printed and used with his knowledge and consent and under his authority; the Secretary, however, was in some doubt as to his having the right and power to grant said authority and so notified the parties with whom he talked; he told them that whatever right and power he had to authorize the said printing and use, he delegated to them but that there might be some questions raised as to the legality of the ballots.

(2) Certain ballots officially issued for use at the Democratic primary are found marked with the names of Republican candidates and included with the Republican ballots forwarded to the Governor and Council, this having occurred in some cases because in the emergency created by the absence of sufficient Republican ballots, Democratic ballots were handed for use to those requesting Republican ballots.

(3) Certain ballots prepared for absent voters were used in voting precincts, the ballot being the same as the official ballot except they bore the title "Absent Voting Ballot" which was in some cases stricken out with lead pencil. In some cases no absent voting envelope accompanied the absent voting ballot included in the ballots before the Governor and Council.

(4) Official ballots issued, to one town are found among the ballots of another town apparently having been included by mistake among the ballots sent to that town and used by voters in the second town, after in some cases striking out name of first town on the ballots; in other cases, not.

(5) Certain "specimen" ballots were used in voting precincts, in some cases the words "Official Ballot, Frank W. Ball, Secretary" having been written on the back in ink or pencil; in other cases the words "Specimen Ballots" having been erased; and in other cases no erasures or additions having been made to the specimen ballot as issued from the Secretary of State's office.

QUESTIONS.

(a) What right, power, authority and duty have the Governor and Council to accept or reject any or all of the above classes of ballots?

(b) What right, power, authority and duty have the Governor and Council to receive testimony either of the election officials or of any other persons in explanation of the presence of said ballots in said ballot box?

(c) What right, power, authority and duty have the Governor and Council to summons election officials and other witnesses to take testimony and compel the production of papers in explanation of the ballots as aforesaid?

V.

IN RE INSUFFICIENT BALLOTS AND FAILURE TO USE CHECK LISTS.

The Governor and Council have been informed that in certain towns the Republican primary ballots were insufficient for the number of voters who applied so that voters who came to the polls and asked for Republican ballots were unable to vote, and that in certain towns the official voting lists were not used at the polls, during a part or the whole of the day of the election.

QUESTIONS.

(a) Have the Governor and Council right, power, authority and duty to inquire into the circumstances just set forth?

(b) If so, what is their power to examine witnesses, compel the production of papers and documents and punish for contempt and to exclude from the count all or any part of the votes cast in said towns on said day?

VI.

IN GENERAL.

(1) Is the decision of the Governor and Council on the ballots before them and on the evidence, documents and testimony which in accordance with the advice of the court may be received in evidence by them final?

(2) With reference to, placing the burden of proof in any proceeding thereafter, what is the legal effect of the issuing by the Secretary of State of a notice to the alleged successful candidate stating the result of the tabulation made by the Governor and Council on June 23, 1924?

(3) In case the Governor and Council should be unable to decide which candidate received the plurality of votes in the primary election, what is the right, power, authority and duty of the Governor and Council with reference to declaring that there has been no choice in the primary and with reference to further proceedings then to be taken?

(4) In certain towns all of the election officials were not present during the time the polls were open. In some cases persons assisted in the election who were not authorized by law to do so. What effect, if any, would such facts have on the counting of the ballots from such towns and have the Governor and Council the power to receive testimony in relation to the same?

(5) Are the decisions of the Governor and Council in primary election cases final or can they be reviewed by the Supreme Judicial Court?

(6) Where official ballots appear to be in every way regular but have been marked "spoiled" "cancelled" "assisted" or "void"

in lead pencil without any apparent reason, and the council are unable to find out any reasons for such marks, shall such ballots be counted?

(7) There are certain ballots marked within the square by a perpendicular line and a line touching it at right angles but not crossing the line, thus (⊢); ballots marked with perpendicular line and another line touching it at an acute angle or at an obtuse angle but not crossing it, thus (⊢); ballots marked with a cross with one side connected, thus (✕); ballots marked with a check mark, thus (V); ballots marked with a cross at the right of the name of the candidate but not within the square; ballots where the cross on the square bears an additional mark or marks in, through or across it, as for example: ✕ ✕ ✕ ✕ ballots where the names of two candidates appear for a single office and a cross is marked in the square opposite the blank space, that is, below the name of the second candidate, thus:

RALPH O. BREWSTER, Portland	
FRANK G. FARRINGTON, Augusta	
	X

QUESTION.

Shall any or all of the above described ballots be counted?

Respectfully submitted,

PERCIVAL P. BAXTER,

Governor of Maine.

RANSFORD W. SHAW,
Attorney General.

CLEMENT F. ROBINSON,
Deputy Attorney General.

STATE OF MAINE.

EXECUTIVE DEPARTMENT.

Augusta, Maine, July 29, 1924.

TO THE HONORABLE JUSTICES OF THE SUPREME JUDICIAL COURT:

Further investigation of the ballots cast in the Primary election on June 16th, have brought out some new facts and the following additional questions are respectfully submitted:

(1) Certain ballots are not marked in the square opposite either candidate for Governor but a cross was made at the right of the space opposite the words "For Governor" and above the square opposite the name of the first candidate, thus:

For Governor	X
RALPH O. BREWSTER	
FRANK G. FARRINGTON	

2. Certain Democratic ballots were used in which the name of the Republican candidate has been written into the ballot and marked with a cross but there is no evidence before the Governor and Council to determine whether or not there was a shortage of Republican ballots in that town; in some cases, however, the election officials filed an affidavit with the Governor and Council that the Republican ballots were all used and that Democratic ballots were made over and used in the emergency.

QUESTION.

(a) Shall the ballots described in paragraph one be counted?

(b) What is the duty of the Governor and Council with reference to the ballots described in paragraph two?

(c) In some towns the "Official List of Candidates" furnished by the Secretary of State to the election officials to be posted as required by the statute, was taken down and used as a ballot. Should such "List of Candidates" be counted?

Respectfully submitted,

PERCIVAL P. BAXTER,

Governor of Maine.

RANSFORD W. SHAW,
Attorney General.

CLEMENT F. ROBINSON,
Deputy Attorney General.

STATE OF MAINE.

EXECUTIVE DEPARTMENT.

Augusta, Maine, July 30, 1924.

TO THE HONORABLE JUSTICES OF THE SUPREME JUDICIAL COURT:

I herewith submit one additional question relating to the counting of the Primary ballots cast June 16, 1924.

QUESTION.

In the event that the court decides that the Governor and Council shall inquire into the question of fraudulent and illegal ballots and after hearing should reject such ballots in the count for Governor which is being made, is it their duty to revise the figures made by them in relation to other candidates and to throw out such illegal

ballots although they have been already counted for offices other than for Governor, no recount having been asked for by any other candidate?

In other words, will the original tabulation made by the Governor and Council as to all other offices where no recount was asked for stand as final, or shall the Governor and Council revise their original findings and throw out whatever illegal ballots they may find upon examination of the ballots cast for Governor, from the tabulation made for all other candidates voted for in the Primary election?

Respectfully submitted,

PERCIVAL P. BAXTER,

Governor of Maine.

TO HIS EXCELLENCY, GOVERNOR PERCIVAL P. BAXTER AND THE HONORABLE EXECUTIVE COUNCIL:

The undersigned Justices of the Supreme Judicial Court have the honor to submit the following answers to the questions propounded to us bearing date July 23, 1924, in connection with your examination and counting of the ballots cast for the Republican candidates for Governor in this State at the Primary Election held on June 16, 1924.

PREFATORY STATEMENT.

A brief preliminary statement may clarify the situation.

The primary election, so called, for the nomination of candidates for the several offices by the members of the political parties entitled to representation on the primary ballot is governed by Revised Statutes, Chapter 6, and amendments thereto, and the questions submitted involve for the most part matters of statutory construction.

It is a well settled principle of law that statutory provisions regulating the conduct of elections are divided into two general classes, mandatory and directory. It is not easy to frame a definition that shall cover all cases, but, broadly speaking, requirements in a statute which are of the very essence of the thing to be done and the ignoring

of which would practically nullify the vital purpose of the statute itself are regarded by the courts as mandatory and imperative; while those directions or details which are not of the essence of the thing to be done but which are prescribed with a view to the orderly conduct of the business, the omission of which would not prejudice the rights of interested parties, are regarded as directory, so far as the consequences of such omission are concerned, unless they are followed by words of positive prohibition. In other words, while it is of course the duty of election officers to follow every statutory requirement on their part, the consequence of their disobedience so far as the innocent voter is concerned is fatal if the requirement be deemed mandatory, but not fatal if it be deemed directory.

It becomes necessary therefore to determine the nature of each provision concerning which a controversy has arisen, and to properly classify it.

With this brief prefatory statement we will consider the questions seriatim.

I.

In re Ward Four, City of Lewiston.

It is claimed that "In Ward 4 in the city of Lewiston 228 Republican ballots were reported by the election officials in said ward as 'lawfully cast' in the last Primary election on Monday, June 16, 1924.

No enrollments were made on election day by the election officials, according to their official return and prior to that date the total enrollment of Republican voters in said Ward 4 was 131 and this list of enrollments was compiled prior to 1915 and no changes had been made therein since that date. A comparison of the check lists and the enrollments will show the number of ballots which could have been lawfully cast in said ward in said election."

Questions.

(a) Have the Governor and Council right, power, authority and duty to inquire into the circumstances of the voting in said Ward 4 as set forth above and in particular to inquire whether votes were received at said Republican primary election from persons theretofore

or on said day not duly enrolled as Republican voters, and if so, what is their power to examine witnesses, compel the production of papers and documents, take testimony and punish for contempt?

(b) In case the Governor and Council have the right, power, authority and duty as aforesaid, and should find that the allegations set forth as above are sustained either wholly or in part, what is this duty with reference to excluding from the count all or any part of the votes cast in said ward on said day, and in particular, in case it should be found that the allegations are sustained but that it is impossible to determine which of the ballots now before them were cast by enrolled Republicans?

(c) What if any effect should be given by the Governor and Council in counting said ballots to such facts as may be found to exist showing irregular, improper or illegal conduct of the ward officials as set forth in said complaint?' "

ANSWERS.

(a) We are of opinion, that if occasion requires, the Governor and Council acting under the authority of Chapter 233 of the Public Laws of 1919 have the right, power and authority to inquire into the circumstances under which the votes were cast in said Ward 4, and to ascertain the facts.

That statute provides that after written application has been duly made, alleging that the return or record of the vote cast in any town does not correctly state the vote as actually cast in such town, the Governor and Council in open meeting shall examine the ballots cast in said town and returned to the Secretary of State, and if such return or record is found to be erroneous the return shall be corrected in accordance with the number of ballots found to have been actually cast in said town.

The Governor and Council are to find, that is to determine, the correctness of the record or return, and to make the necessary corrections if any are required. They are made by the Legislature the tribunal to pass upon the results in primary elections, and we think this necessarily implies the ascertainment of the necessary facts in connection therewith if challenge is made. Opinion of Justices, 116 Maine, 578-9.

As a corollary they have the power to summon witnesses at the expense of the State, examine them, order the production of papers and documents, take testimony, but not to punish for contempt, that power being vested elsewhere.

Unless however, the allegations are of such a nature that the facts if ascertained to be as claimed would authorize the changing of the record or return, it would not seem to be the duty of the Governor and Council to pursue such investigation. The errors may consist merely in the failure on the part of the election officers to strictly follow directory requirements and, if so, voters are not to be disfranchised and the ballots actually cast are to be counted and allowed notwithstanding the non-observance of certain provisions. Therefore it could not be said to be the duty of the Governor and Council to carry on an investigation which would evidently be futile in the end.

If, however, non-compliance with a mandatory provision is charged or fraud is alleged, then it becomes the duty, as well as the privilege of the Governor and Council to make all necessary investigation and determine the actual facts.

(b) Our answer is that under the allegations in this particular question it is not the duty of the Governor and Council to pursue the investigation.

The statute requiring enrollment applies only to municipalities containing more than 2000 inhabitants, and even in those the voter if not already enrolled may be enrolled on primary election day. In towns of less than 2000 inhabitants the voter need not be enrolled at all and can call for any ballot he desires and it is given him. Great opportunity is thereby offered for the electors of one party to take part in the nominations of the opposing party, but the Legislature has so ordained and the remedy, if any be desired, rests with the same law making power.

The question put to us relates to a municipality where enrollment was prescribed and shows that the election officers, through ignorance, laxity or carelessness were clearly unfaithful to their sworn duty. No attention has been paid to the matter of enrollment, but this condition had existed for nine years and through all the intervening elections. It did not pertain to the election of June 16, 1924, alone. Nor is there any charge of fraud against the officials. Under all these circumstances and considering the fact that in so large a majority of the municipalities of the State the Legislature requires

no enrollment, we think that in the larger towns and cities it should be regarded as directory and that the failure of the officials to comply with it did not render the election invalid, and did not disfranchise the voters. The requirement of enrollment should be regarded as directory as applying to the voter, but it is mandatory in its application to election officials, and if the violation be wilful the violator may be punished. But failure of the officials to comply with the law must not be allowed to invalidate an election not violating the secrecy of the ballot and otherwise properly held, nor to disfranchise the innocent voter. These ballots should be counted as actually cast.

(c) The answer to the preceding questions covers this. The conduct of the ward officers as set forth in the complaint, while irregular is not claimed to have been fraudulent.

II.

In re Aroostook County Towns.

It is claimed "That in certain towns and plantations in the county of Aroostook votes cast were marked by the election officials contrary to law; that the polls in the town of St. Agatha remained open until 9·30 P. M., standard time, on the day of the election; that 30 ballots were marked as aforesaid for voters by election officials and placed in the box after the legal time for closing the polls; that all the ballots returned as voted in said town of St. Agatha were marked for a single candidate and that election booths were not used but ballots marked at tables in open rooms.

Questions.

(a) Have the Governor and Council right, power, authority and duty to inquire into the circumstances of the voting in the towns and plantations set forth above and in particular to inquire whether votes there cast were marked at the request of the voters by election officials although the voters were physically able to mark their ballots themselves; or otherwise contrary to law; whether the polls remained open after the legal closing hour and whether election booths were

not used, and if so, what is their power to examine witnesses, compel the production of papers and documents, take testimony and punish for contempt?

(b) In case the Governor and Council have the right, power, authority and duty as aforesaid, and should find that the allegations set forth as above are sustained either wholly or in part, what is their duty with reference to excluding from the count all or any part of the votes cast in said towns and plantations on said day and in particular, in case it should be found that the allegations are sustained but that it is impossible to determine which of the ballots now before them were cast after being marked as above set forth or after the legal closing hour for the election, or were marked on tables in an open room and not in an election booth?

(c) What if any effect should be given by the Governor and Council in counting said ballots to such facts as may be found to exist showing irregular, improper or illegal conduct of the election officials?

ANSWERS.

(a) This is covered by Answer I. (a).

(b) Three questions are raised, which we will consider in their order:

First: the allegation that certain ballots were cast by persons physically able to mark them, but marked at their request by the election officials.

In the general September election this privilege of assistance is governed by section 19 of chapter 7, and that section is made a part of the primary law by reference under chapter 6, section 14.

Section 19 provides that any voter who shall declare to the presiding officer or officers that he cannot mark his ballot by reason of physical disability or from inability to read the same shall receive the assistance of the election clerks." This makes it the duty of the election clerks to assist if the voter declares that he cannot mark his ballot because of infirmity. The test is not the fact of infirmity but the voter's declaration of the fact, on oath if exacted. From the question as put, if certain voters made a false declaration, still it was the duty of the clerks to assist. If in so doing certain details were not complied with we regard these as merely directory. The ballots should be counted as actually cast.

Second: The allegation that the polls were not closed at precisely nine o'clock but were allowed to remain open until nine-thirty and ballots were received in the meantime.

We regard this requirement as to time a directory provision which was substantially complied with in this case. The polls are alleged to have remained open from noon until about nine-thirty P. M. instead of nine; that is about nine hours and a half instead of nine hours. The only apparent effect was that a few more voters exercised the right of franchise than if the exact time had been observed. If the excess had been five or ten minutes that would doubtless be regarded as trivial, while an excess of many hours might be regarded as indicating fraud. On general principles, as we have already observed, a provision is to be regarded as directory if the directions given to accomplish a particular end may be disregarded and yet the given end be in fact accomplished and the merits of the case unaffected. A standard authority states the rule as to time thus: "The particular hour of the day in the case of an election is not of the thing required to be done and where the law fixes the opening and closing of the polls at sunrise and sunset the election should not be invalidated because the polls were closed a few minutes before or kept open a few minutes after sundown. But this rule applies only to unsubstantial departures from the law. There may be such radical omissions to comply with the provisions of a directory statute as will lead to the conclusive presumption that injury must have followed. And so where polls were open from one p. m. until six p. m. instead of from one hour after sunrise to sunset as required by law, the election was held invalid." 9 Ruling Case Law, page 1107. This we think is a correct exposition of the law. It is upheld by the decided cases. *People* v. *Cook*, 8 N. Y., 67; *Corce* v. *Cahill*, 35 Okla., 42; *Tebbe* v. *Smith*, 108 Cal., 101; *Cleland* v. *Porter*, 74 Ill., 76.

The slight excess in time did not invalidate the election.

Third: That election booths were not used as required by statute, but the voters marked their ballots at tables in open rooms.

In our opinion, if these allegations are proved to the satisfaction of the Governor and Council this was the violation of a mandatory requirement, the election was thereby invalidated, and none of the ballots in such town can be counted.

The decision of this question, however, depends not upon the allegations made by a candidate but upon proof of the facts. A manda-

tory provision being assailed it is the duty of the Governor and Council to carefully investigate and determine the actual facts. Voters are not to be disfranchised except for legal cause and facts of this nature are to be carefully ascertained.

The primary election law is modelled after the State biennial election law at which the Australian ballot method is in vogue. Under section 26 of the primary election law section 14 of chapter 7 relating to voting compartments is made a part thereof by reference and all the details as to secrecy are made to apply to primary as well as general elections. The fundamental idea of the Australian ballot method is secrecy, in order to prevent, or at least to diminish, bribery and corruption. To effectuate that purpose booths are required in each voting precinct, within which, apart from public and private gaze, the electors must mark their ballots. There are no exceptions in this provision as in enrollment, depending upon the size of the municipality. It applies to all.

So closely interwoven is this idea of secrecy with the casting of the ballot itself that we deem the requirement as to booths mandatory and imperative, a part of the very essence of the thing to be done. If this provision can be ignored and the elector mark his ballot on a table in the open, in the plain view of spectators as well as of election officers, then the genius and spirit of the Australian ballot are destroyed. *Choissir* v. *York*, 211 Ill., 56, 71 N. E., 940. If one municipality can do this with impunity, all can, the Australian ballot law is virtually repealed, and the safeguards against bribery and fraud are swept away.

It is true that this is a hardship upon the innocent voters who came to the polling place expecting that the officers had done their duty and erected the necessary booths; and it might further be argued that this places the power of invalidating an entire election in the hands of the election officers who have neglected their duty through sinister motives.

The answer, however, is, that to hold such an election valid in face of the utter disregard of the vital and essential purpose of the act is to abolish the wise and well settled distinction between mandatory and directory requirements and to regard all as directory, if voters are thereby to be disfranchised, as in every case they must be. As a matter of public policy we deem it absolutely essential that the secret

ballot system be maintained throughout the State even if in some instances, because of the ignorance or neglect of the officials a few voters may lose their ballots.

Their remedy may perhaps lie in securing more competent men for officials; but because they have failed to do that the entire secret ballot system of the State must not be thrown to the winds.

(c) The conclusion reached in (b) renders any further answer unnecessary.

III.

In re Ward 4, Portland.

It is further claimed: "In the election precinct designated as Ward 4 in the city of Portland at least four hundred Republican ballots furnished by the Secretary of State for use at said election were fraudulently marked for Frank G. Farrington as the Republican candidate for Governor and were placed illegally and fraudulently with the ballots 'actually cast' in said ward in said election for the candidates for the Republican nomination for Governor. This was done secretly after the polls were closed and without any color of right and secretly after the polls were closed names of voters on the registration lists were checked roughly to correspond with the number of ballots thus fraudulently marked and placed with the ballots cast for the Republican nomination for Governor, and said ballots so fraudulently marked and placed, were wilfully, falsely and fraudulently included in the record and in the return of the election officials of said Ward 4, although they were not 'actually cast' in said ward in said election for the purpose of deceiving the canvassing board which should review this matter, thus vitiating the return of the said election officials and discrediting the vote of said ward except as it may be determined by other competent evidence."

It is further stated "that some of the facts which tend to indicate the fraud above referred to are that there were 647 names enrolled as Republicans in said ward on the enrollment list but 873 Republican primary ballots were cast; that the check marks on the incoming check list and outgoing check list in said ward do not correspond; that a large number of citizens whose names appear on the voting list to have been checked are ready to testify that they did not go to the

polls; and that the names of voters who had been stricken from the list and dead men's names are checked as having been voted upon."

QUESTIONS.

(a) Have the Governor and Council right, power, authority and duty to inquire into the circumstances o the voting in said Ward 4 in the city of Portland as set forth above, or elsewhere, and in particular to inquire whether votes were received at said Republican primary from persons theretofore or on said day not duly enrolled as Republican voters or were secretly placed with the ballots cast subsequent to the close of the election; and if so, what is their power to examine witnesses, compel the production of papers and documents, take testimony and punish for contempt?

(b) In case the Governor and Council have the right, power, authority and duty as aforesaid, and should find that the allegations set forth above are sustained either wholly or in part, what is their duty with reference to excluding from the count all or any part of the votes cast in said ward on said day, and in particular in case it should be found that the allegations are sustained but that it is impossible to determine which of the ballots now before them were cast by enrolled Republicans or were placed with the ballots cast secretly subsequent to the election as aforesaid?

(c) What if any effect should be given by the Governor and Council in counting said ballots to such facts as may be found to exist showing irregular, improper or illegal conduct of the ward officials as set forth in said complaint?

ANSWERS.

(a) As fraud on the part of election officers is directly charged in this instance our answer is in the affirmative as to the fraudulent acts, both as to the right, power and authority, and also as to the duty on the part of the Governor and Council to inquire into the facts and circumstances. The matter of enrollment, as we have already seen, is a directory requirement, and need not be so inquired into.

(b) The law abhors fraud and nowhere looks upon it with greater aversion than when it affects the purity of the ballot upon which rest the security and permanence of our form of government. When fraud is proven in connection with an election in any ward the value of the record and return of that ward as legal evidence has been destroyed, their probative force has gone. The vote cast in that ward then becomes a matter of proof by other legal evidence than the record and return. *Russell* v. *Stevens*, 118 Maine, 101. Nor, under those circumstances, does the presumptive element of legality and validity attach to any given ballot so that it may be counted. The mingling of the spurious with the genuine prevents this. What then shall be done under these circumstances? The entire vote is not to be rejected, for by so doing honest and law-abiding electors would be disfranchised and that is to be avoided if legally possible. Nor is the entire vote to be counted because that would carry into complete execution the attempted fraud. Somewhere between these two should lie the path of justice under the law. In our opinion that path lies here:

(1) If satisfactory proof can be furnished to the Governor and Council of the exact number of these spurious ballots and of the name of the candidate for whom they were cast, we think the Governor and Council would be justified in deducting that proven number from the total as given to that candidate according to the record and return.

(2) If, however, such proof is lacking, then the fraud if proven has opened the door of extraneous evidence so that other proof may be adduced to establish the fact of how many ballots were actually cast by legal voters in that ward, and for what candidates.

That can be done by the sworn testimony of the voters, produced either personally or by depositions before the Governor and Council, claiming that they voted in that ward and stating for whom they voted. Such evidence can be compared by the Governor and Council with the incoming and outgoing check list and thus verified. No elector is obliged to give such testimony. If a voter prefers to keep his choice a secret he can do so.

Those electors who do not care to disclose the facts will lose their vote, but this method will permit the counting of ballots actually cast so far as they are proved, and to this extent will protect the innocent and thwart the machinations of the guilty.

(c) This has been answered in (b).

IV.

"In re Unofficial Ballots.

"(1) It appears that included in the ballots cast at the election were certain ballots not officially furnished prior to the election by the Secretary of State to the towns where they were cast. Some of these are official ballots issued to towns other than the towns where they were used; in some cases both towns being in the same legislative class and in some cases not; some are typewritten ballots; some are specially printed ballots, and all differ in some details from the official ballots and do not bear the endorsement of the Secretary of State.

"The Governor and Council are informed that these ballots are accounted for as follows: On the day of the election there was a shortage of Republican ballots in these towns; in some cases local election officials obtained ballots from other towns to which they had been officially issued; in other towns local election officials and private citizens had ballots prepared by a local printer after consultation with the Secretary of State over the telephone and the cost of printing these ballots is to be defrayed by the State; in other towns ballots were printed by the local election officials and private citizens at private expense without authority of Secretary of State; none were exact copies of the official ballots; and in other towns typewritten ballots were prepared either by the local election officials or by voters without consulting the Secretary of State. In the cases where the Secretary of State was called by telephone and asked to authorize the printing and use of extra or emergency ballots, the said Secretary of State expressly authorized the said printing and use and the ballots were printed and used with his knowledge and consent and under his authority; the Secretary, however, was in some doubt as to his having the right and power to grant said authority and so notified the parties with whom he talked; he told them that whatever right and power he had to authorize the said printing and use, he delegated to them but that there might be some questions raised as to the legality of the ballots.

"(2) Certain ballots officially issued for use at the Democratic primary are found marked with the names of Republican candidates and included with the Republican ballots forwarded to the Governor

and Council, this having occurred in some cases because in the emergency created by the absence of sufficient Republican ballots, Democratic ballots were handed for use to those requesting Republican ballots.

"(3) Certain ballots prepared for absent voters were used in voting precincts, the ballot being the same as the official ballot except they bore the title 'Absent Voting Ballot' which was in some cases stricken out with lead pencil. In some cases no absent voting envelope accompanied the absent voting ballot included in the ballots before the Governor and Council.

"(4) Official ballots issued to one town and found among the ballots of another town apparently having been included by mistake among the ballots sent to that town and used by voters in the second town, after in some cases striking out name of first town on the ballots; in other cases, not.

"(5) Certain 'specimen' ballots were used in voting precincts, in some cases the words 'Official Ballot, Frank W. Ball, Secretary' having been written on the back in ink or pencil; in other cases the words 'Specimen Ballots' having been erased; and in other cases no erasures or additions having been made to the specimen ballot as issued from the Secretary of State's office.

QUESTIONS.

"(a) What right, power, authority and duty have the Governor and Council to accept or reject any or all of the above classes of ballots?

"(b) What right, power, authority and duty have the Governor and Council to receive testimony either of the election officials or of other persons in explanation of the presence of said ballots in said ballot box?

"(c) What right, power, authority and duty have the Governor and Council to summons election officials and other witnesses to take testimony and compel the production of papers in explanation of the ballots as aforesaid?"

ANSWERS.

(a) Revised Statutes, Chapter 6, Section 8, provide how the official ballots for a primary election shall be prepared and printed

under the direction of the Secretary of State, the fac simile of whose signature appears upon the back of each official ballot as prescribed in the last sentence of that section: "On the back shall be printed so as to be visible when folded 'Official Nominating Ballot' followed by the designation of the polling place for which the ballot is prepared, the date of the primary election and a fac simile of the signature of the Secretary of State."

This fac simile signature gives to the ballot its official character. It guarantees to the voter and to the election officers that it is the official ballot according to law. It is the hallmark of authenticity and is an indispensable part of the ballot itself. Ballots which fail to bear this fac simile signature are not official, do not purport to be and cannot be counted.

Section 20 of Chapter 7 of the election law makes this clear: "No ballot without official endorsement shall, except as herein otherwise provided, be allowed to be deposited in the ballot box and none but ballots provided in accordance with the provisions of this Chapter shall be counted."

This provision is mandatory, and there is no exception in the statute that modifies this express requirement. It is of the very essence of the result to be accomplished and not a mere detail. To hold otherwise would be to nullify the purpose of the primary law, to ignore the safeguards furnished by the statute and open the door to endless confusion and possible fraud. Unofficial ballots cannot be counted.

There are various classes of ballots specified in the statement of facts and a specific answer should properly be given to each class, following the general principle above laid down.

(1) Official ballots furnished to one town but used in another.

The ballots themselves were official. The name of the town is placed upon the ballot for the sake of convenience in distribution by the Secretary of State. It really forms no essential part of its official character. Ballots issued to one town may be transferred to another by authority of the Secretary of State and, when so transferred, may be legal official ballots in the second town. Nor need the towns be in the same representative class.

(2) Typewritten ballots.

These must be rejected, lacking official sanction.

(3) Ballots locally printed after consultation with the Secretary of State and with his approval in so far as it could be legally given.

These must be rejected. They lacked authentication indorsed upon the ballot itself as required by law. It makes no difference at whose expense they were printed.

(4) Ballots locally printed at private expense.

These must be rejected for the reasons given above.

(5) Democratic official ballots marked with the names of Republican candidates.

These cannot be counted for the Republican candidates. If they could, then the primary election which is designed to be and is in fact a two-fold election, one for each political party, is a farce. Section 27 of the primary law makes this two-fold nature of the election plain, viz.: "In construing the provisions of this chapter and of all sections of the Revised Statutes hereby made applicable as aforesaid to the primary elections to be held hereunder and to all matters herein contained, before and after such primary election, material to the purposes thereof, they shall as the duties of officers, forms, blanks, ballots, elections, warrants, returns, and all other matters so far as necessary for accomplishing the purposes of this chapter, be understood and interpreted as though said primary election is a separate election for each political party making its nominations hereunder, and to be conducted as to that party as nearly as practicable the same as the regular biennial State elections in September are conducted for all the electors, except in so far as the manner of proceeding before, at and after said September election may be modified or changed by this chapter for the purpose of said primary elections."

In other words, for considerations of convenience and expense, the primary elections are held on the same day and at the same time and place, but one must not interfere with another so far as official ballots are concerned. They are absolutely distinct.

The Republican official ballot was white, the Democratic was yellow. The one cannot be changed into the other any more than can the colors.

The spirit of the primary law and its letter so far as expressed make a clear line of demarcation between the two classes of ballots, and a Democratic official ballot once issued to an elector becomes a part of the Democratic election, must be kept within the Democratic list and cannot be changed by the voter to a Republican ballot. If the Democratic voter wishes to vote for a person who is a Republican on his Democratic ballot, he may doubtless do so by writing or pasting in

the name of such person and marking a cross at the right. R. S., Chapter 6, Section 14. But if this is done the person whose name is so written or pasted in becomes a Democratic, not a Republican, nominee for the office and must be counted among the Democratic nominees. The ballot cannot be counted with the Republican ballots.

(6) Absent voting ballots.

These were designed of course for the use of absent voters, but they were official ballots duly authenticated, were given to the innocent voters by the election officers, and received in the ballot boxes. If this was authorized by the Secretary of State we think they should be counted, whether accompanied by the absent voting envelope or not.

(7) Official ballots sent by mistake to the wrong town.

They were received as of the town where used, and if such use was authorized by the Secretary of State, they were official, whether the name of the proper town was erased by any voter or not, and should be counted.

(8) Specimen ballots.

These cannot be counted. They were not designed to be used by voters, bore no fac simile signature of the Secretary of State and therefore were not official. The statute itself, Chapter 6, Section 9, makes a distinction between "ballots" which means official ballots and "sample ballots."

(b) and (c).

The answer to (a) covers the ground so fully that further answer of (b) and (c) becomes unnecessary.

V.

"In re Insufficient Ballots and Failure to Use Check Lists.

"The Governor and Council have been informed that in certain towns the Republican primary ballots were insufficient for the number of voters who applied so that voters who came to the polls and asked for Republican ballots were unable to vote, and that in certain towns the official voting lists were not used at the polls during a part or the whole of the day of the election."

QUESTIONS.

(a) Have the Governor and Council right, power, authority and duty to inquire into the circumstances just set forth?

(b) If so, what is their power to examine witnesses, compel the production of papers and documents and punish for contempt and to exclude from the count all or any part of the votes cast in said towns on said day?

ANSWERS.

(a) The Governor and Council have the right, power and authority to inquire into the circumstances if they desire so to do, but we do not think it is their duty to do so, because such inquiry could accomplish nothing. There is no claim that the Secretary of State did not fully comply with the statute in furnishing to each municipality not less than sixty ballots for every fifty votes and fraction thereof cast by the party at the preceding election, that is, an increase of twenty per cent., which was supposed by the Legislature adequate to take care of the normal increase of voters. Nor is it alleged that he did not furnish such additional ballots as were requested under R. S., Chapter 6, Section 9. Nor is there any charge of fraud on the part of any one.

The fact simply is that the machinery provided by the Legislature has in this instance broken down, as machinery is apt to break, and it must be repaired by the same branch of the government which created it and set it in motion. No other branch can do or assume to do this.

No new election can be ordered by the Governor and Council in those towns where the supply of ballots was inadequate. Op. Justices 70 Maine, 560. Under our three-fold division of governmental powers, executive, legislative and judicial, the Legislature, and it alone, can prescribe the method of calling and holding an election. It has done so for primary elections in chapter six of the Revised Statutes. The first words of that chapter are: "All nominations of candidates for any State or County office including United States Senator, member of Congress and member of the State Legislature shall hereafter be made at and by primary elections to be held in accordance with the provisions of this chapter. Every political party entitled by law

to representation upon the official ballot at State elections held biennially on the second Monday in September . . . shall nominate all its candidates for such offices, to be voted for at such elections under the provisions of this Act and not in any other manner."

The Legislature therefore, speaking for the people, has confined the method of nominations to Chapter 6. That chapter provides for one primary election to be held on the third Monday of June preceding the State election, and on no other date. It makes no provision for a second primary in case for any reason the first does not fully function. No power is given to anybody to call such second primary, and none can be called. It is one of those cases, not infrequent, where the theory and practice do not coincide and where nothing can be done at the time save to accept the situation. The law making power may make the necessary changes if it desires.

For these reasons we do not think a duty is imposed upon the Governor and Council to inquire into the circumstances creating the situation.

The use of the check list is a directory requirement in its application to the voter, though mandatory as to officers, and the failure to use it did not invalidate the election either in whole or in part. *Mussey* v. *White*, 3 Maine, 290; *State* v. *Gilman*, 96 Maine, 431, 434.

(b) If, however, the Governor and Council see fit to investigate, we think it is within their power, as already stated, to examine witnesses, order the production of papers and documents, but not to punish for contempt.

But it is not within their power to exclude from the count for the reason of insufficient supply, all or any part of the ballots actually cast in said towns.

Those actually cast and otherwise regular must be counted.

VI.

"In General."

We will consider these questions separately.

"(1) Is the decision of the Governor and Council on the ballots before them and on the evidence, documents and testimony which in accordance with the advice of the court may be received in evidence by them final?"

ANSWER:

We must respectfully decline to answer this question. It has nothing whatever to do with the counting of the ballots which is the subject matter on which our advisory opinions have been asked, but relates to the legal situation after the ballots have been counted and the result announced. It affects the legal rights of the interested parties at that future time, and what those legal rights, if any, may then be can only be determined by proper legal proceedings brought at that time.

We do not deem it proper to foreclose any legal proceedings without giving the parties the opportunity of full hearing and argument.

"(2) With reference to placing the burden of proof in any proceeding thereafter, what is the legal effect of the issuing of a notice to the alleged successful candidate stating the result of the tabulation made by the Governor and Council on June 23, 1924?"

ANSWER.

For the reason stated above in answer to question (1) we must respectfully decline to answer this question. It belongs to the same class.

"(3) In case the Governor and Council should be unable to decide which candidate received the plurality of votes in the primary election, what is the right, power, authority and duty of the Governor and Council with reference to declaring that there has been no choice in the primary and with reference to further proceedings then to be taken?"

ANSWER.

The duty of the Governor and Council is simply to count the ballots and announce the result. The uncontested ballots are readily tabulated. The contested ballots are to be counted in accordance with the advice herein contained. The result is then reached mathematically, and that result only remains to be announced. The candidate having the highest number is then deemed to be and should be declared to be the nominee. In case of a tie, which would seem to be improbable in this case, the result is reached by lot, Section 16. We

can conceive of no other situation where there has been no choice in the primary except that of a tie vote, and we know of no other proceedings to be taken by the Governor and Council except to break the tie as the statute prescribes. There need not be unanimity on the part of the Governor and Council. In case of disagreement the majority would control.

"(4) In certain towns all of the election officials were not present during the time the polls were open. In some cases persons assisted in the election who were not authorized by law to do so. What effect, if any, would such facts have on the counting of the ballots from such towns and have the Governor and Council the power to receive testimony in relation to the same?"

ANSWER.

Our answer is that the facts if found to be as alleged would not affect the validity of the ballots actually cast. They must be counted.

If the election officials failed to observe the regulations regarding their acts in this respect in the conduct of the election, such regulations are to be considered directory so far as the consequence upon the voters is concerned and they are not to be thereby disfranchised.

The Governor and Council have power to receive testimony in regard to the alleged acts if they desire, but as before stated, it would be labor without results.

"(5) Are the decisions of the Governor and Council in primary election cases final or can they be reviewed by the Supreme Judicial Court?"

ANSWER.

This question is in effect the same as No. (1) and we must respectfully decline to answer it for the reasons there stated.

"(6) Where official ballots appear to be in every way regular but have been marked 'spoiled' 'Cancelled' 'assisted' or 'void' in lead pencil without any apparent reason, and the Council are unable to find out any reasons for such marks, shall such ballots be counted?"

ANSWER.

We think the first inquiry should be as to the person who placed the words "spoiled," "cancelled," "assisted" or "void" upon the ballots, and the Governor and Council have the power and it would seem to be their duty to ascertain that fact.

If the words were placed there by the voter himself with fraudulent intent, which would seem highly improbable, the ballots might be rejected as containing distinguishing marks. But if they were so placed by the election officers when counting the ballots and there is no apparent reason therefor, and the ballots are in due form, then these words should be disregarded and the ballots counted as actually cast, as such acts on the part of the election officers after the ballots in proper form were duly cast could not affect their validity. It is essential therefore, to ascertain the vital fact of their authorship.

If, however, it is found upon investigation that any of these ballots were spoiled by the voters themselves, and as such returned to the election officers, cancelled by them, and new ballots given out by the officials and used by the voters in accordance with the provisions of R. S., Chapter 7, Section 17, then of course such spoiled and cancelled ballots cannot be counted because they were not actually cast.

BALLOTS IRREGULARLY OR IMPROPERLY MARKED.

Before considering the nine cases submitted to us for decision it may be well to make a statement as to the law governing the voter's marking of his ballot. The Legislature has prescribed what constitutes a legal ballot and in unmistakable terms: "The ballot shall be printed so as to give each voter a clear opportunity to designate his choice for candidates for nomination by making a cross (X) to the right of the name of each candidate he wishes to vote for as a nominee to each office." . . . "At the top of the ballot shall be printed in capital letters 'Make a cross (X) in the square to the right of the person you wish to vote for.' "

It is not a matter of intention. It is simply compliance or non-compliance by the voter with a mandatory rule established by the Legislature. That body might have provided that a circle or a check mark or an arrow, or any line, or other mark of whatever form or character, in or near the square should be counted, but it did not.

It prescribed a cross and that alone is the legal and valid mark. No other can be substituted for it. The marking must be by the symbol specified in the statute. *Frothingham* v. *Woodside*, 122 Maine, 525, 532. As the court said in *Bartlett* v. *McIntyre*, 108 Maine, 167: "It might be said with much force that the intention of the voter is as apparent when he places a circle as when he places a cross in the square but the intention is not expressed as the statute demands and therefore such a ballot would be fatally defective." It should also be observed that in establishing this strict though simple method of marking, the Legislature doubtless had in mind the case with which bribed voters could prove the performance of their illegal contract if agreed upon symbols could be permitted.

When it comes to the question whether the marks placed in a given square amount to a cross, a question of fact is raised and "each ballot must be tested by an honest judgment upon an inspection of the ballot itself and mathematical precision in the marking cannot be required or expected. Therefore crosses may be made of any size within the square, they may be made by ink or by a pencil mark of any color or even by the stub of a broken lead; the lines may have been extended inadvertently beyond the squares and in retracing the lines of a cross extra lines may appear. All the countless variations must be referred to the one paramount requirement of what answers to a cross in the square." *Bartlett* v. *McIntyre*, 108 Maine, 167, 168.

The statute provides, R. S., Chapter 7, Section 20, that no irregularity in the form of the cross shall render a ballot defective. But the mandatory requirement that a cross shall be made still stands with added emphasis.

Applying as best we can these general principles to the particular instances, not having the ballots themselves before us but a description of the marks, we decide as follows:

(1) "Certain ballots marked within the square by a perpendicular line and a line touching it at right angles but not crossing the line, thus (⊬)."

ANSWER.

This obviously does not describe a cross (X), and these ballots cannot be counted. A cross is made by lines crossing each other. The statute was not followed by the voters.

(2) "Ballots marked with perpendicular lines and another touching it at an acute angle or at an obtuse angle but not crossing it thus (V)."

ANSWER.

For the same reason as stated in the answer to No. (1) these ballots must be rejected.

(3) "Ballots marked with a cross with one side connected, thus (✕)."

ANSWER.

These ballots should be counted. Apparently the voter made a check mark first and then changed it to a cross, leaving when completed a cross and an additional and unnecessary line connecting two ends of the crossed lines But the voter made a cross within the square and we do not think the additional line invalidated it. The ballots so marked should be counted.

(4) "Ballots marked with a check mark, thus (✓)."

ANSWER.

Certainly this cannot be considered a cross. These ballots must be rejected. *Frothingham* v. *Woodside*, 122 Maine, at 532.

(5) "Ballots marked with a cross at the right of the name of the candidate but not within the square."

ANSWER.

These ballots raise a doubtful question. They might be counted under the liberal view hereinafter stated in Answer No. 7, in the absence of any evidence of intentional fraud on the part of the voter in so placing the cross as a distinguishing mark.

(6) "Ballots where the cross on the square bears an additional mark or marks in, through or across it, as for example: ✕✕✕✕

ANSWER.

We think all these should be counted. They are all crosses and more, and the more did not vitiate the cross. In the absence of any evidence of intentional fraud in making them as distinguishing marks, they are not to be rejected. They are "irregular in form" but that does not make them defective. R. S., Chap. 7, Sec. 20.

(7) "Ballots where the names of two candidates appear for a single office and a cross is made in the square opposite the blank space that is below the name of the second candidate, thus:

Ralph O. Brewster, Portland,	
Frank G. Farrington, Augusta,	
	X

ANSWER.

This precise question has never been decided by our court. It is extremely doubtful, but as the court took a very liberal stand in the case of *Frothingham* v. *Woodside*, supra, we would say that this situation so far as the merits are concerned is somewhat the same as in that case, and these ballots might be counted.

SUPPLEMENTARY QUESTION DATED JULY 29, 1924.

"(1) Certain ballots are not marked in the square opposite either candidate for Governor but a cross was made at the right of the space opposite the words "For Governor" and above the square opposite the name of the first candidate, thus

For Governor	X
Ralph O. Brewster	
Frank G. Farrington	

(2) Certain Democratic ballots were used in which the name of the Republican candidate has been written into the ballots and marked with a cross but there is no evidence before the Governor and Council to determine whether or not there was a shortage of Republican ballots in that town; in some cases however the election officials filed an affidavit with the Governor and Council that the Republican ballots were all used and that Democratic ballots were made over and used in the emergency.

QUESTION.

(a) Shall the ballots described in paragraph one be counted?

(b) What is the duty of the Governor and Council with reference to the ballots described in paragraph two?

(c) In some towns the "Official List of Candidates" furnished by the Secretary of State to the election officials to be posted as required by the statute, was taken down and used as a ballot. Should such "List of Candidates" be counted?"

ANSWER.

(a) These might be counted for the candidate whose name is nearest below, in accordance with our answer in "Ballots irregularly or improperly marked," (No. 7).

(b) These ballots can be counted for the Republican individual whose name was written in, as a Democratic candidate for the nomination, but not for him as a Republican candidate for nomination This is fully covered in Answer IV. (No. 5).

(c) No. These come within the same class as the sample ballots in our answer IV. (No. 8).

SUPPLEMENTARY QUESTION DATED JULY 30, 1924.

"In the event that the Court decides that the Governor and Council shall inquire into the question of fraudulent and illegal ballots and after hearing should reject such ballots in the count for Governor which is being made, is it their duty to revise the figures made by them in relation to other candidates and to throw out such illegal ballots although they have been already counted for offices other than for Governor, no recount having been asked for by any other candidate?

In other words, will the original tabulation made by the Governor and Council as to all other offices where no recount was asked for stand as final, or shall the Governor and Council revise their original findings and throw out whatever illegal ballots they may find upon examination of the ballots cast for Governor, from the tabulation made for all other candidates voted for in the Primary election?"

ANSWER.

Chapter 233 of the Public Laws of 1919 conferred upon the Governor and Council the powers which we have been considering but only when within ten days after the returns are opened and tabulated written application shall be filed with the Secretary of State asking therefor. The limitation of ten days is fixed by the Legislature. Those candidates who fail to file their applications within that time cannot afterwards be heard. Nor has the Governor and Council under such circumstances, on their own initiative, the duty to revise the tabulations already made. We answer this question in the negative.

Very respectfully,

LESLIE C. CORNISH,
WARREN C. PHILBROOK,
CHARLES J. DUNN,
LUERE B. DEASY.

Dated July 31, 1924.

MEMORANDUM.

I am requested by MR. JUSTICE MORRILL to say that because of his absence from the State it is impossible for him to give his opinion on the questions submitted at this time.

LESLIE C. CORNISH.

TO HIS EXCELLENCY, GOVERNOR PERCIVAL P. BAXTER AND THE HONORABLE EXECUTIVE COUNCIL:

The undersigned Justices of the Supreme Judicial Court have the honor to submit the following answers to the questions propounded to the several members of this court bearing date of July 23, 1924, in connection with your examination and counting of the ballots cast for the Republican candidates for Governor at the Primary election held in June last.

Being unable to subscribe in full to the answers submitted by our Associates, and as our difference of view as to the powers and authority of the Governor and Council in such matters is fundamental, and we feel far-reaching, we deem it advisable to submit our views upon this question in a separate reply and at some length.

GOVERNOR AND COUNCIL A CANVASSING BOARD AND NOT JUDGES OF ELECTIONS.

What is the nature of the duties which the Governor and Council perform in determining the result of elections? Until the enactment of the so-called Primary Law, we think it has never been questioned but that they were almost entirely ministerial, and the Governor and Council were in no sense Judges of elections and had no authority to hear testimony outside the records and returns forwarded by the several town clerks except as the Legislature had expressly authorized it in connection with the determination of the meaning of the returns or in showing that the records did not correspond with the returns.

This court has expressed its views upon the nature and extent of these powers on numerous occasions and always to the same effect, and the courts of other States have viewed in the same light, the authority and powers of similar Boards, whether made up of the Governor and Council or specially created. Opinion of Justices, 25 Maine, 566; 54 Maine, 602; *Drew* v. *State Canvassing Board,* 16 Fla., 17; *Oglesby* v. *Sigman et als.,* 58 Miss., 502; *Lewis* v. *Comr's of Marshall Co.,* 16 Kan., 108.

In these instances and on all other occasions where the question has arisen, at least, prior to 1912, this court has always held that the powers vested in your Excellency and your Honorable Council were

ministerial and restricted to the canvassing of the returns and their correction to accord with the records of the election officials; that the Governor and Council were in no sense judges of elections, and had no authority to investigate improper conduct of the election or determine its effect upon the result.

As the members of this court said in 1845 in reply to questions submitted by the Governor: "The powers conferred upon the Governor and Council are specific and precise, and it is believed it would be irregular to go beyond them or deviate in any measure from them. If they could secure evidence that the certificates were erroneous in one particular, they might with equal propriety do so in another and so exercise the powers of Judges of elections generally and without restrictions."

In 1865, after the Legislature had given the Governor and Council authority to correct the returns to accord with the records of the election officials, the members of this court again said in reply to questions propounded by the Governor: "The power of the Governor and Council in relation to the matter under consideration has been increased in two respects only, the number of votes and the names of the persons voted for. In no other respect was their authority enlarged. The language of the statute is clear and precise. Its meaning is obvious. Had the Legislature intended to confer more extensive authority on the Governor and Council, they would have indicated such intention."

We quote from an opinion of the late Justice Brewer while occupying a place on the Kansas Supreme Court, simply for the purpose of emphasizing the practically universal opinion of the courts as to the general nature of your duties. In 16 Kan., 108, this eminent Justice says: "It is common error for a canvassing board to overestimate its powers. Whenever it is suggested that illegal votes have been received, or that there were other fraudulent conduct or practices at elections, it is apt to imagine that it is its duty to inquire into these alleged frauds and decide upon the legality of the votes. But this is a mistake. Its duty is almost wholly ministerial. Questions of illegal voting and fraudulent practices are to be passed upon by another tribunal. The canvassers are to be satisfied of the genuineness of the returns. The duty of the canvassing board is to ascertain and declare the apparent result of the voting. All other questions are to be tried before the Court for contesting elections or in *quo warranto* proceedings."

Such we believe will be conceded to have been the nature and scope of the duties of the Governor and Council in this State in case of elections prior to 1912 and the passage of Sections 6 and 10 of Chapter 1 of the Laws enacted at the special session of that year.

By this Act of 1912 the clerks of the several towns were for the first time ordered to forward to the Secretary of State not only the returns and other records of the election officials, but also the ballots "used at the election."

Even then, however, the Governor and Council did not of their own motion do any more than canvass the returns and correct them when shown to be erroneous in accordance with the records of the election officials; but upon written application alleging that the returns or records do not correctly state the vote actually cast in any town the Governor and Council shall then examine the ballots, and if the return or record is found to be erroneous the return shall be corrected in accordance with the number of ballots found to be actually cast in such town.

Did the Legislature by this Act intend to change the well-established and fundamental character of the duties of the Governor and Council as canvassers of election returns to that of Judges of elections with the broad judicial powers of summoning witnesses, weighing evidence and determining questions of law and fact, and this without any express language indicating any intent to create such a radical change? Such implied powers in cases of elections surely are not required of necessity. Adequate authority is vested in the Judicial Department to hear and determine all such questions under the election law. It could serve no purpose to vest such authority in the Governor and Council when it could not be final. For these and other reasons unnecessary to enumerate at length, we think it inconceivable that the Legislature could have intended under the election law to have so radically changed the nature of the duties of the Governor and Council from those of a purely canvassing board to those of a judicial or quasi judicial body with power to judge elections, without clearly expressing such an intent. We find the whole trend of judicial decisions is against any such authority being granted by implication.

Powers of Canvassing Board in Primary Elections.

So far we have considered only the statutes applicable to general elections.

The so-called Primary Law, however, is fashioned so closely after the general election law as to the conduct of elections, providing of ballots, method of voting, recording of results, making of returns and preservation of ballots and the final canvassing of the returns by the Governor and Council,—the primary elections being always referred to as elections in the Act itself,—and so many sections of the election law being bodily adopted as a part of the Primary Law, it would seem incontrovertible that so far as the authority and powers of the Governor Council are concerned as the final canvassing board in both primary and general elections, the statutes relating to general elections and the statute relating to Primary Elections must in this respect be construed as statutes *in pari materia.*

When first enacted in 1913 the Primary Law contained no provision for the forwarding of the ballots to the Secretary of State and the only duty of the Governor and Council was to canvass the returns or to correct them according to the records of the election official, as they had done since 1857 in case of general elections.

That their duties were ministerial under this Act as originally passed, there will be no question.

In 1919, however, the Legislature added the same provision to the Primary Law as to the correction of the returns in accordance with the "ballots actually cast," as it had done in case of the election law in 1912, and in almost exactly the same language, except as to the time within which application to correct the return shall be made.

There is no more indication in the language of the Act amending the Primary Law that the Legislature intended to change the nature of the duties of the Governor and Council in the canvassing of returns than in case of the election law under the Act of 1912. Having adopted the same language, the inference is irresistible that the same construction should be applied.

If the Governor and Council now have the authority to summon witnesses, take testimony and determine from evidence outside the returns, records and ballots, who received the highest number of

votes, except as whether the returns correspond with the records or as to the meaning of the returns, which is expressly authorized, it must be by implication alone.

Let us examine the language of the Amendment of 1919, Chapter 233, having in mind that prior thereto the Governor and Council only had before them the returns of the town clerks and the records of the election officials as to the number of votes cast, with the right to take testimony only to show that the returns do not accord with the records of the election officials, or to aid in construing the returns.

The Legislature by the Act of 1919 provided that upon written application alleging that the return or record of the vote cast in any town does not correctly state the vote actually cast in such town, the Secretary of State shall direct the clerk of the town to forward the ballots cast in the town. Nothing more. The Governor and Council shall then in open meeting do what? Not summon witnesses and hear evidence to determine the number of votes actually cast, but "*examine* the ballots cast in such town," and if the return or record is found to be erroneous, correct the return in accordance with the ballots actually cast in the town.

It is suggested that the ballots "actually cast" means legally cast; and that in cases of alleged fraud the only way in which it can be determined is by taking outside evidence. Even so, the only method authorized by the Legislature of determining the number of "ballots actually cast" is by an examination of the ballots themselves. If it was intended that the Governor and Council should judicially inquire into the conduct of the election, we cannot conceive that it would have left it to inference, involving as it would, such a radical and fundamental change in the duties of the Governor and Council in such matters.

The words "ballots actually cast" were, we think, used rather in contra distinction to the returns and records of the election officials, to which the Governor and Council had hitherto been confined In other words, the returns are now to be corrected in accordance with the ballots which the Governor and Council find upon an examination of them to have been actually cast, rather than the number shown to have been cast according to the records of the election officials.

There is no necessity of reading into the statute the authority to go into a judicial investigation of the conduct of the election to give meaning to the words "ballots actually cast." It unquestionably involves a determination by the Governor and Council as to whether

the ballots forwarded as cast are on their face legal ballots as prescribed by the statute. A ballot unlawful on its face is no ballot; but no authority is vested in the Governor and Council to go outside the records, returns and ballots required to be forwarded to the Secretary of State in determining the number of ballots cast in any town.

To hold that the Legislature must have intended to give the Governor and Council these broad powers, because no other tribunal has the power, if such be the fact, is in our opinion offset by the consideration that if the decision of the Governor and Council were final in the matter, the Legislature would hardly have vested in the Governor and Council the final authority to determine from a general inquiry as to the conduct of primary elections who was nominated, having in mind that a Governor may be called upon to pass upon his own nomination.

If the Legislature has for any reason or by oversight omitted to provide a method for correcting returns rendered erroneous through fraudulent acts of election officials or voters, it does not justify judicial legislation to supply the deficiency. Should we not take heed, lest, in the language of the eminent jurist above quoted, because of alleged fraud we "overestimate the authority of the canvassing board and imagine it is its duty to inquire into it and decide upon the legality of the votes cast upon extraneous evidence."

We yield to no one in our abhorence of fraud. The public welfare impels us all to condemn it whenever or in whatever form it appears in the selection of our public servants, and demand that it be speedily investigated by the proper officials and promptly eradicated, but we should not in our zeal to remove the evil override fundamental principles of law in order to circumvent single instances of alleged fraud lest we lay the foundations of greater evils by so doing.

When, therefore, it is proposed by implication to read into Chapter 233 of the Laws of 1919 authority in the Governor and Council which changes the entire nature of the functions they have hitherto performed as a canvassing board and to invest them with broad judicial powers, the Justices subscribing hereto are of the opinion that such a construction of this Act and assumption of authority are unwarranted.

The same Legislature which passed Chapter 233 of the Laws of 1919 also enacted a stringent law for the punishment of those engaged in corrupt or fraudulent practices at primary elections. The duty to seek out and punish fraud was by neither of these acts imposed on the Governor and Council. Other officials and tribunals have that duty.

The Governor and Council neither under the Election law or the so-called Primary law, is other than a canvassing board to canvass such records and returns as the Legislature has seen fit to submit to them. It would require language of unquestioned import in our opinion to change the nature of their duties, which have remained the same from the origin of our State, from those of a ministerial nature and clothe them with such judicial powers as is now proposed.

Such authority and powers not being expressly conferred could only be implied by compelling necessity, which does not exist here.

We therefore answer Question I. (a) in the negative, and having answered it in the negative, questions I. (b) and (c) require no answer.

The same answers respectively apply to questions II. (a), (b) and (c), and likewise to questions III. (a), (b) and (c).

As to the questions under IV., except as the answers of our Associates are dependent upon evidence dehors the ballots themselves, we concur; but where extraneous evidence is the sole basis for counting any of such ballots, they must be rejected; or if legal on their face, they should be counted by you.

As to question (a) under V., we, for the reasons set forth in reply to the questions under I., answer that the Governor and Council have no such authority; and question (b) requires no answer.

As to the general questions under VI., except question numbered 6, we concur in the answers of our Associates. As to question numbered 6, we hold that ballots marked "assisted" must be presumed to be ballots in the marking of which the voters were legally assisted and should be counted, unless it otherwise appears from the ballots themselves. Other ballots marked as therein specified should be rejected.

We also concur in our Associates' answers to the supplemental questions under date of July 29, 1924; and while upon the view of the undersigned Justices the supplemental question dated July 30, 1924, is one which cannot arise; if the opinion of our Associates is acted upon, we concur in their answer to this question.

Respectfully submitted,

SCOTT WILSON,
GUY H. STURGIS,
CHARLES P. BARNES.

July 31, 1924.

QUESTIONS SUBMITTED BY THE HOUSE OF REPRESENTATIVES TO THE JUSTICES OF THE SUPREME JUDICIAL COURT, JANUARY 8, 1925 AND FEBRUARY 2, 1925, WITH THE ANSWERS OF THE JUSTICES THEREON.

STATE OF MAINE.

HOUSE OF REPRESENTATIVES, January 8, 1925.

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 question, to wit:

Whereas a Bill has been introduced into the House of Representatives providing for the limitation of buildings in specified districts of cities and towns, which bill is in form similar to that recommended by an Advisory Committee appointed by the Secretary of Commerce of the United States for legislation of the various states, and

Whereas the question of the power of a Legislature to enact laws limiting buildings according to the terms of said Act under the Constitution of this State has been raised and an amendment to the Constitution pertaining to the same is before the House of Representatives:

QUESTION 1.

Has the Legislature the right and authority under the Constitution to enact a law according to the terms of the following Bill?

House of Representatives,
Jan. 13, 1925.
Read and passed.

CLYDE R. CHAPMAN,
Clerk.

STATE OF MAINE.

IN THE YEAR OF OUR LORD ONE THOUSAND NINE HUNDRED AND TWENTY-FIVE.

AN ACT Relating to the Limitation of Buildings in Specified Districts of Cities and Towns.

Be it enacted by the People of the State of Maine, as follows:

Section 1. Grant of Power.—For the purpose of promoting health, safety, morals, or the general welfare of the community, the legislative body of cities and incorporated villages is hereby empowered to regulate and restrict the height, number of stories, and size of buildings and other structures, the percentage of lot that may be occupied, the size of yards, courts, and other open spaces, the density of population, and the location and use of buildings, structures, and land for trade, industry, residence, or other purposes.

Sec. 2. Districts.—For any or all of said purposes the local legislative body may divide the municipality into districts of such number, shape, and area as may be deemed best suited to carry out the purposes of this Act; and within such districts it may regulate and restrict the erection, construction, reconstruction, alteration, repair, or use of buildings, structures, or land. All such regulations shall be uniform for each class or kind of buildings throughout each district, but the regulations in one district may differ from those in other districts.

Sec. 3. Purposes in View.—Such regulations shall be made in accordance with a comprehensive plan and designed to lessen congestion in the streets; to secure safety from fire, panic, and other dangers; to promote health and the general welfare; to provide adequate light and air; to prevent the overcrowding of land; to avoid undue concentration of population; to facilitate the adequate provision of transportation, water sewerage, schools, parks and other public requirements. Such regulations shall be made with reasonable consideration, among other things, to the character of the district and its peculiar suitability for particular uses, and with a view to conserving the value of buildings and encouraging the most appropriate use of land throughout such municipality.

Sec. 4. Method of Procedure.—The legislative body of such municipality shall provide for the manner in which such regulations and restrictions and the boundaries of such districts shall be determined, established, and enforced, and from time to time amended, supplemented, or changed. However, no such regulation, restriction, or boundary shall become effective until after a public hearing in relation thereto, at which parties in interest and citizens shall have an opportunity to be heard. At least 15 days' notice of the time and place of such hearing shall be published in an official paper, or a paper of general circulation, in such municipality.

Sec. 5. Changes.—Such regulations, restrictions, and boundaries may from time to time be amended, supplemented, changed, modified, or repealed. In case, however, of a protest against such change, signed by the owners of 20 per cent. or more either of the area of the lots included in such proposed change, or of those immediately adjacent in the rear thereof extending . . . . feet therefrom, or of those directly opposite thereto extending . . . . feet from the street frontage of such lots, such amendment shall not become effective except by the favorable vote of three fourths of all the members of the legislative body of such municipality. The provisions of the previous section relative to public hearings and official notice shall apply equally to all changes or amendments.

Sec. 6. Zoning Commission.—In order to avail itself of the powers conferred by this act, such legislative body shall appoint a commission, to be known as the Zoning Commission, to recommend the boundaries of the various original districts and appropriate regulations to be enforced therein. Such commission shall make a preliminary report and hold public hearings thereon before submitting its final report, and such legislative body shall not hold its public hearings or take action until it has received the final report of such commission. Where a city plan commission already exists, it may be appointed as the Zoning Commission.

Sec. 7. Board of Adjustment.—Such local legislative body may provide for the appointment of a Board of Adjustment, and in the regulations and restrictions adopted pursuant to the authority of this act may provide that the said Board of Adjustment may, in appropriate cases and subject to appropriate conditions and safeguards, make special exceptions to the terms of the ordinance in harmony with its general purpose and intent and in accordance with general or specific rules therein contained.

The Board of Adjustment shall consist of five members, each to be appointed for a term of three years and removable for cause by the appointing authority upon written charges and after public hearing. Vacancies shall be filled for the unexpired term of any member whose term becomes vacant.

The board shall adopt rules in accordance with the provisions of any ordinance adopted pursuant to this act. Meetings of the board shall be held at the call of the chairman and at such other times as the board may determine. Such chairman, or in his absence the acting chairman, may administer oaths and compel the attendance of witnesses. All meetings of the board shall be open to the public. The board shall keep minutes of its proceedings, showing the vote of each member upon each question, or, if absent or failing to vote, indicating such fact, and shall keep records of its examinations and other official actions, all of which shall be immediately filed in the office of the board and shall be a public record.

Appeals to the Board of Adjustment may be taken by any person aggrieved or by any officer, department, board or bureau of the municipality affected by any decision of the administrative officer. Such appeal shall be taken within a reasonable time, as provided by the rules of the board, by filing with the officer from whom the appeal is taken and with the Board of Adjustment a notice of appeal specifying the grounds thereof. The officer from whom the appeal is taken shall forthwith transmit to the board all the papers constituting the record upon which the action appealed from was taken.

An appeal stays all proceedings in furtherance of the action appealed from, unless the officer from whom the appeal is taken certifies to the Board of Adjustment after the notice of appeal shall have been filed with him that by reason of facts stated in the certificate a stay would, in his opinion, cause imminent peril to life or property. In such case proceedings shall not be stayed otherwise than by a restraining order which may be granted by the Board of Adjustment or by a court of record on application on notice to the officer from whom the appeal is taken and on due cause shown.

The Board of Adjustment shall fix a reasonable time for the hearing of the appeal, give public notice thereof, as well as due notice to the parties in interest, and decide the same within a reasonable time. Upon the hearing any party may appear in person or by agent or by attorney.

The Board of Adjustment shall have the following powers:

1. To hear and decide appeals where it is alleged there is error in any order, requirement, decision, or determination made by an administrative official in the enforcement of this act or of any ordinance adopted pursuant thereto.

2. To hear and decide special exceptions to the terms of the ordinance upon which such board is required to pass under such ordinance.

3. To authorize upon appeal in specific cases such variance from the terms of the ordinance as will not be contrary to the public interest, where, owing to special conditions, a literal enforcement of the provisions of the ordinance will result in unnecessary hardship, and so that the spirit of the ordinance will result in unnecessary hardship, and so that the ordinance shall be observed and substantial justice done.

In exercising the above-mentioned powers such board may, in conformity with the provisions of this act, reverse or affirm, wholly or partly, or may modify the order, requirement, decision, or determination appealed from and may make such order, requirement, decision, or determination as ought to be made, and to that end shall have all the powers of the officer from whom the appeal is taken.

The concurring vote of four members of the board shall be necessary to reverse any order, requirement, decision, or determination of any such administrative official, or to decide in favor of the applicant on any matter upon which it is required to pass under any such ordinance, or to affect any variation in such ordinance.

Any person or persons, jointly or severally, aggrieved by any decision of the Board of Adjustment, or any taxpayer, or any officer, department, board, or bureau of the municipality, may present to a court of record a petition, duly verified, setting forth that such decision is illegal, in whole or in part, specifying the grounds of the illegality. Such petition shall be presented to the court within 30 days after the filing of the decision in the office of the board.

Upon the presentation of such petition the court may allow a writ of certiorari directed to the Board of Adjustment to review such decision of the Board of Adjustment and shall prescribe therein the time within which a return thereto must be made and served upon the relator's attorney, which shall not be less than 10 days and may be extended by the court. The allowance of the writ shall not stay

proceedings upon the decision appealed from, but the court may, on application, on notice to the board and on due cause shown, grant a restraining order.

The Board of Adjustment shall not be required to return the original papers acted upon by it, but it shall be sufficient to return certified or sworn copies thereof or of such portions thereof as may be called for by such writ. The return shall concisely set forth such other facts as may be pertinent and material to show the grounds of the decision appealed from and shall be verified.

If, upon the hearing, it shall appear to the court that testimony is necessary for the proper disposition of the matter, it may take evidence or appoint a referee to take such evidence as it may direct and report the same to the court with his findings of fact and conclusions of law, which shall constitute a part of the proceedings upon which the determination of the court shall be made. The court may reverse or affirm, wholly or partly, or may modify the decision brought up for review.

Costs shall not be allowed against the board unless it shall appear to the court that it acted with gross negligence, or in bad faith, or with malice in making the decision appealed from.

All issues in any proceeding under this section shall have a preference over all other civil actions and proceedings.

Sec. 8. Remedies.—In case any building or structure is erected, constructed, reconstructed, altered, repaired, converted, or maintained, or any building, structure, or land is used in violation of this act or of any ordinance or other regulation made under authority conferred hereby, the proper local authorities of the municipality, in addition to other remedies, may institute any appropriate action or proceedings to prevent such unlawful erection, construction, reconstruction, alteration, repair, conversion, maintenance, or use, to restrain, correct, or abate such violation, to prevent the occupancy of said building, structure, or land, or to prevent any illegal act, conduct, business, or use in or about such premises.

Sec. 9. Conflict with other Laws.—Wherever the regulations made under authority of this act require a greater width or size of yards, courts, or other open spaces, or require a lower height of building or less number of stories, or require a greater percentage of lot to be left unoccupied, or impose other higher standards than are required in any other statute or local ordinance or regulation, the

provisions of the regulations made under authority of this act shall govern. Wherever the provisions of any other statute or local ordinance or regulation require a greater width or size of yards, courts, or other open spaces, or require a lower height of building or a less number of stories, or require a greater percentage of lot to be left unoccupied, or impose other higher standards than are required by the regulations made under authority of this act, the provisions of such statute or local ordinance or regulation shall govern.

Presented by MR. OAKES of Portland.

STATE OF MAINE

HOUSE OF REPRESENTATIVES February 2, 1925.

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 the House of Representatives, according to the provisions of the Constitution in this behalf, their opinion on the following question, to wit:

Whereas on January 8th the opinion of the Justices of the Supreme Judicial Court was requested relative to a bill before the House of Representatives entitled, "An Act Relating to the Limitation of Buildings in Specified Districts of Cities and Towns" and the following supplemental-question which may be answered with the previous question will justify a more comprehensive reply.

QUESTION 1.

Has the Legislature the power under the constitution to authorize cities and towns to limit buildings according to their use or construction to specified districts thereof?

Presented by MR. OAKES of Portland.

HOUSE OF REPRESENTATIVES,

FEB. 9, 1925

READ AND PASSED.

A true copy.

CLYDE R. CHAPMAN,

Attest: CLYDE R. CHAPMAN Clerk.

Clerk of the House.

TO THE HOUSE OF REPRESENTATIVES OF THE LEGISLATURE OF MAINE.

The undersigned Justices of the Supreme Judicial Court acknowledge the receipt of a copy of an order passed by the House of Representatives January 13, 1925 requesting the opinion of the Justices relative to a pending bill entitled, "An Act Relating to the Limitation of Buildings in Specified Districts of Cities and Towns;" a copy of the bill referred to is made a part of the order. The question propounded for our consideration is as follows:

"Has the Legislature the right and authority under the constitution to enact a law according to the terms of the following Bill?"

We also acknowledge the receipt of a copy of another order passed by the House of Representatives February 3, 1925, relating to the same pending bill, by which an answer to the following supplemental question is requested:

"Has the Legislature the power under the constitution to authorize cities and towns to limit buildings according to their use or construction to specified districts thereof?"

Before answering the questions propounded we think it proper to avoid any possibility of misapprehension as to our views of the character and scope of the pending bill. We, therefore, take occasion to point out that the Bill in question does not by its terms limit the use, height or construction of buildings; it is not a "zoning law."

An apt definition of zoning is "the regulation by districts of building development and uses of property." Harv. Law Review, May, 1924, Page 834.

We regard the proposed law as an enabling act, delegating to cities and incorporated villages authority to exercise the police power. It relates solely to action by municipalities under the police power; there is no provision whatever for the exercise of the power of eminent domain, with attendant compensation.

The underlying question, then, is whether the Legislature may delegate to the legislative bodies of cites authority to exercise the police power. Of that we have no doubt. The ordinary form of a city charter granting authority to enact ordinances not inconsistent with the constitution and laws of the State is a delegation of authority to exercise the police power. *Reiman* v. *Little Rock*, 237 U. S., 171, 59 L. Ed., 900. The term "incorporated villages" is not applicable in Maine; the term refers to a form of municipality found in some other States, having, we understand, some type of legislative body, such as a council. Our village corporations are not the same; they have no legislative bodies; the inhabitants conduct their affairs in open meeting as inhabitants of towns do.

Again, although the proposed bill may lawfully delegate authority to exercise the police power, every ordinance enacted by the city government must stand or fall on its own merits. A favorable opinion, therefore, on any part of the proposed bill must not be understood as an opinion that an ordinance supposed to be framed under it will be valid.

With these reservations, turning to Section 1 of the proposed bill, we answer:

(a) Regulation of the height of buildings. We are of the opinion that such regulation is a valid exercise of the police power, and may be accomplished by the creation of districts. *Welch* v. *Swasey*, 193 Mass., 364; affirmed 214 U. S., 91. *Cochran* v. *Preston*, 108 Md., 220. *Ayer* v. *Comrs. on Height of Buildings in Boston*, 242 Mass., 30.

(b) Regulation of the construction of buildings. This is also a valid exercise of the police power. We already have in this State very comprehensive authority for such regulation. R. S., Chap. 4, Sec. 98, Par. VIII. *Houlton* v. *Titcomb*, 102 Maine, 272; 10 L. R. A., (N. S.), 580. *Lewiston* v. *Grant*, 120 Maine, 194.

(c) Regulation of the location and use of buildings for trade. We cannot make a more definite answer than to say that the location of some kinds of business is undoubtedly subject to regulation under the police power. R. S., Chap. 23, Sec. 5; *Reiman* v. *Little Rock*, supra. *Hadacheck* v. *Sebastian*, 239 U. S., 394, 60 L. Ed., 348; and it has been held that regulation under the police power is not confined to the supression of what is disorderly, offensive or unsanitary. *C. B. & Q. Ry. Co.* v. *Illinois*, 200 U. S., 561, 592; 50 L. Ed., 596, 609. *Bacon* v. *Walter*, 204 U. S., 311, 318; 51 . Ed., 499, 502.

(d) Regulation of density of population.—Just what method of regulation is proposed, and to what extent, we are not advised. Undoubtedly the regulation of the height of buildings serves to regulate to some extent the density of population; so does the regulation of the construction of buildings in the interest of sanitation and health. Both of these forms of regulation are valid under the police power. But if regulation of density of population is attempted by the establishment of building lines, it probably cannot be justified under the police power, as stated in the following paragraph.

(e) Regulation of the percentage of a lot that may be occupied, the size of yards, courts and other open spaces. Such regulation involves the establishment of building lines. The weight of authority seems to be, that building lines cannot be justified under the police power, (12 A. L. R., 681. 2 Dillon, Mun. Corp., 5th Ed., Sec. 695. 1 Lewis, Em. Domain, 2d Ed., Sec. 144a.), but must be accomplished by the exercise of the right of eminent domain with compensation; such by law of this State is the method for the establishment of parks. R. S., Chap. 4, Sec. 87.

(f) The bill provides for appeals to a Board of Adjustment from any administrative official. We have been unable to discover what powers are conferred, or what duties are imposed upon an administrative official. Any opinion on such a provision must be based upon the ordinance as enacted.

(g) The bill also confers authority to make special exceptions to, and to authorize variance from, the terms of an ordinance. Upon such general provisions we are unable to give an opinion as to the proposed delegation of authority. It is well settled that there cannot be arbitrary discrimination in municipal regulation on the subjects proposed. *City Council of Montgomery* v. *West*, 149 Ala., 311; 123 Am. St., 33, note on Page 36.

It is obvious that any opinion as to the validity of administrative details of a regulatory ordinance must be based upon the exact language of the ordinance as enacted. Compare *Eubank* v. *Richmond*, 226 U. S., 137, 57 L. Ed., 156, with *Thos. Cusack Company* v. *Chicago*, 242 U. S., 526, 61 L. Ed., 472, 476.

February 20, 1925.

Respectfully submitted,

LESLIE C. CORNISH,
WARREN C. PHILBROOK,
CHARLES J. DUNN,
JOHN A. MORRILL,
SCOTT WILSON,
LUERE B. DEASY,
GUY H. STURGIS,
CHARLES P. BARNES.

NOTE.—The above answers were prepared by Mr. Justice Morrill.

L. C. C.

QUESTIONS SUBMITTED BY THE LEGISLATURE TO THE JUSTICES OF THE SUPREME JUDICIAL COURT, MARCH 24, 1925, WITH THE ANSWERS OF THE JUSTICES THEREON.

STATE OF MAINE

IN LEGISLATURE.

March 4, 1925.

WHEREAS, it has been the popular assumption for generations that the wild lands were open to all the citizens of the State for hunting and fishing, subject only to such regulations as may be made from time to time by the Legislature in the exercise of the police power, and

WHEREAS, there is now pending before the Joint Committee of the Legislature on State Lands and Forest Preservation, a bill entitled "An Act Relative to Hunting and Fishing," and

WHEREAS, Section one of said act reads as follows:

"The common law right of the individual to hunt and camp on uninclosed wood lands belonging to another, and the right to cross and recross such lands to lawfully fish and fowl on great ponds, rivers and streams, shall not be denied or abridged to any person in this state." and

WHEREAS, it now appears imperative that the present legal rights of the public as aforesaid on the wild lands be determined,

NOW THEREFORE, ORDERED, the House concurring, that in accordance with the provisions of the Constitution of this State, the Justices of the Supreme Judicial Court are hereby respectfully requested to give this Legislature their opinion on the following questions:

QUESTION NUMBER ONE.

Have the citizens of Maine the right to go upon the uninclosed woodlands belonging to another, without his leave, to hunt and take

fish or for any other purpose, in addition to the right definitely given by the Colonial ordinances of 1641-47 to cross such lands to fish and fowl on the great ponds?

QUESTION NUMBER TWO.

Do the citizens of Maine while exercising any of the rights referred to in the foregoing question have the right to camp temporarily on said land?

IN SENATE CHAMBER
MAR. 10, 1925

READ AND PASSED
SENT DOWN FOR CONCURRENCE

ROYDEN V. BROWN,
Sec'y.

HOUSE OF REPRESENTATIVES
MAR. 11, 1925

READ AND PASSED
IN CONCURRENCE

CLYDE R. CHAPMAN,
Clerk.

A true Copy,
Attest:

ROYDEN V. BROWN,
Secretary.

TO THE HONORABLE SENATE AND HOUSE OF REPRESENTATIVES OF THE STATE OF MAINE:

On March 24th last the several Justices of the Supreme Judicial Court received copies of the following order passed by your Honorable Bodies on March 10th and 11th respectively:

"WHEREAS, it has been the popular assumption for generations that the wild lands were open to all the citizens of the State for hunting and fishing, subject only to such regulations as may be made from time to time by the legislature in the exercise of the police power, and

"WHEREAS, there is now pending before the Joint Committee of the Legislature on State Lands and Forest Preservation, a bill entitled An Act Relative to Hunting and Fishing and

"WHEREAS, Section one of said act reads as follows:

" 'The common law right of the individual to hunt and camp on uninclosed wood lands belonging to another, and the right to cross and recross such lands to lawfully fish and fowl on great ponds, river and streams, shall not be denied or abridged to any person in this state.' and

"WHEREAS, it now appears imperative that the present legal rights of the public as aforesaid on the wild lands be determined.

"NOW THEREFORE, ORDERED, the House concurring, that in accordance with the provisions of the Constitution of this State, the Justices of the Supreme Judicial Court are hereby respectively requested to give this legislature their opinion on the following questions:

"QUESTION NUMBER ONE.

"Have the citizens of Maine the right to go upon the uninclosed woodlands belonging to another, without his leave, to hunt and take fish or for any other purpose, in addition to the right definitely given by the Colonial ordinances of 1641-47 to cross such lands to fish and fowl on the great ponds?

"QUESTION NUMBER TWO.

"Do the citizens of Maine while exercising any of the rights referred to in the foregoing question have the right to camp temporarily on said land?"

The undersigned members of this court, with due deference to a co-ordinate branch of the government, and mindful of their constitutional obligations to give advisory opinions to either or both branches of the Legislature, or to the Governor and Council, on important questions of law and on solemn occasions, after mature consideration are of the opinion, that while the questions of law involved in the inquiries submitted are exceedingly important, both to owners of unenclosed woodlands and to the public the situation

outlined in the order above set forth does not constitute a solemn occasion within the meaning of the Constitution and hence we must respectfully decline to answer the questions submitted.

It appears from the copy of the order transmitted to the several members of this court that there is now pending before your Honorable Bodies an Act which declares that the common law right of hunting and camping on unenclosed woodlands and the right to cross and re-cross such lands to lawfully fish on great ponds, rivers, and streams shall not be denied or abridged to any person in this State.

The members of this court in the questions submitted are requested to advise the Honorable Senate and House of Representatives whether the citizens of this state have any such rights.

If any such rights exist, they, of course, cannot be lawfully abridged or denied by any person; if they do not exist, such legislation can have no effect; and if the Act is intended to grant such rights, where none existed before, it would be in violation of both our State and Federal Constitution as taking private property without just compensation.

The undersigned members are, therefore, of the opinion that the pendency of legislation of this nature does not of itself create a solemn occasion within the meaning of the Constitution requiring the several members of the court to advise the legislative branch of the government whether any such rights exist; and however imperative it may be from a public standpoint to have such rights determined, neither does such necessity alone constitute a solemn occasion for interrogating the members of this court; nor can such rights be judicially determined by inquiries of this nature and answers by the individual members of the court, even though every member be in accord. The opinions of the members of the court obtained in this way have no binding effect. They are merely the opinion of each individual member and are advisory only

A conclusive determination of the legal questions involved can only be had upon proper proceedings in the courts where both sides may be heard and a judgment pronounced after full hearing.

While it constitutes no reason for a refusal to answer the questions submitted, and our only reason for so doing is as above stated, and we add the suggestion with all due respect to your Honorable Bodies it is always unfortunate, we believe, even though a solemn occasion

exists, to have property rights of the nature and importance of the ones herein involved passed upon, except in open court, after full hearing, and where a conclusive determination can be had.

Respectfully submitted,

SCOTT WILSON,
WARREN C. PHILBROOK,
CHARLES J. DUNN,
JOHN A. MORRILL,
L. B. DEASY,
GUY H. STURGIS,
CHARLES P. BARNES.

The Order having been passed before his appointment, and he having been of counsel to some of the interested parties, Justice Bassett respectfully begs leave to be excused from replying.

SCOTT WILSON.

GEORGE McKAY HANSON

IN MEMORIAM

SERVICES AND EXERCISES BEFORE THE LAW COURT, AT PORTLAND, JULY 8, 1924, IN MEMORY OF

HONORABLE GEORGE McKAY HANSON

LATE ASSOCIATE JUSTICE OF THE SUPREME JUDICIAL COURT

Born August 26, 1856. Died April 4, 1924.

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

Resolutions of the Washington County Bar Association, and the address of Hon. GEORGE A. CURRAN of the Washington County Bar, in presenting them:

MAY IT PLEASE THE COURT:

The Washington County Bar has instructed me to present to this court the following resolutions expressive of the respect and love entertained by the members of that bar for the late Justice HANSON, and to ask that these resolutions be entered upon the records of this court.

WHEREAS GEORGE McKAY HANSON for many years an honored and well loved member of the Washington County Bar and for nearly thirteen years an Associate Justice of the Supreme Court of Maine has passed to the great beyond, and

Whereas the members of the Washington County Bar desire to make permanent the record of their appreciation of his life, character and public service,

Resolved: That in the death of Justice HANSON the Bench and the Bar of the State of Maine have suffered a great loss. Just, upright and impartial as a judge, of sterling worth as a citizen, his influence will long be felt as his personality will be remembered and his memory cherished.

Resolved: That these Resolutions be spread upon the records and that the Clerk transmit a copy of the same to the family of Justice HANSON.

GEORGE A. CURRAN
JAMES H. GRAY
HAROLD H. MURCHIE

Committee on Resolutions,
Washington County Bar Association.

Brother HANSON was a native of New Brunswick, born at Elmsville, August 28, 1856, and about two years later came with his parents to Calais, which was his place of residence until his death, on the fourth day of last April.

His services as a public official comprised two years as Mayor of Calais, in 1885 and in 1905; four years as Collector of Customs for the Passamaquoddy District, to which office he was appointed during President Cleveland's second term in 1895: a term as member of the Tax Commission appointed by Governor Cobb: and the last thirteen years as Associate Justice of this Court to which he was first appointed by Governor Plaisted.

Thus it will be seen that nearly half the years of his active life were spent in the public service and to each of these offices he gave the fullest measure of devotion, and discharged his official duties with the utmost fidelity and with credit to himself and benefit to the public.

Early in his life he became interested in the Knights of Pythias and carried into the service of that great Brotherhood the same energy and fidelity that marked his public service and was honored by the highest position that Order could bestow, its Supreme Chancellor.

The degree of Doctor of Laws was conferred upon him by Colby College and Maine University.

These positions and honors are only of interest to us because no man attains them without possessing a character that commands the respect and affection of his fellows.

As a man, Brother HANSON lived a clean and decent life, loving his home and family, bearing his burdens bravely, and giving his aid to every movement for the promotion of good morals and good citizenship, and so far as his means allowed he was generous and helpful, and always courteous and kindly to all with whom he came in contact. These qualities, however, admirable as they are do not explain his success for there are many like him in these respects.

The real key to his life, the foundation upon which his character was built was his capacity and willingness to work. He was physically and mentally strong, energetic and independent. In his boyhood he worked in the saw-mills during school vacations and while pursuing his law studies he worked in an insurance office, and so all through his life he was willing to work for what he wanted and able to inspire his associates in his political and legal controversies to work with him for the accomplishment of their purposes. He was an optimist and failures only incited him to renewed endeavors. To him life was real and earnest and he seemed to me the embodiment of Longfellow's lines.

"Let us then be up and doing,
With a heart for any fate,
Still achieving, still pursuing,
Learn to labor and to wait."

That a poor boy, by his own unaided efforts, can make for himself such a career as that of Brother HANSON, is a credit not only to him but also to the governmental institutions under which such achievements are possible.

REED V. JEWETT, ESQ., of the Washington County Bar then spoke as follows:

MAY IT PLEASE THE COURT:

It is truly fitting that I should come before this court to second the resolutions offered by Brother Curran and to bear witness to the noble life and lofty character of Justice GEORGE M. HANSON, my lifelong friend; and to the influence for good which his life has had on me and on my life.

He was reared in the same town and educated in the same schools as I. As a boy he was held up to me as the ideal successful man, with the promise and assurance, that if I would study and secure an education possibly in time I too might rise to success; and at that time he had only begun to practice law. As I grew to manhood he was my friend and adviser and when I completed my college work, I turned to his office for guidance in the study of law.

All through his life, he remained my friend to counsel, help and advise and I owed him a debt of gratitude, I was never able to fully pay. During the past twenty years, we walked together many times along the same path with the same purpose in view. We were very close to each other. The memory of those days is very pleasant.

In school, his keen mind and wonderful memory made the ordinary lesson easy to master and gave his mind leisure for wide and voracious reading. He loved poetry, especially the poems of Burns and Byron and he never ceased to enjoy the many gems of English poetry which he learned in his school days and loved to quote.

When he graduated from Calais Academy, he began the study of law in the office of Archibald MacNichol, whose fame as a trial lawyer was State-wide. He was admitted to the bar when he was twenty-one years of age.

To his boyhood friends and to the whole community who knew him and admired him he was a success as soon as he began the practice of law. That in itself spelled success to them. The dignity of his person and the complete assurance of success he manifested in all he started to do gave confidence to all who sought his advice and counsel.

He began at once to take an active part in the trial of causes; was vigorous and aggressive in his practice, with the uncommon talent of making the men, whom he so vigorously opposed, his clients, when again business needs required of them the consultation and employment of counsel.

He continued to live in Milltown, two miles from the city proper, until his marriage, and two miles, with no electric cars or convenient railway service, made those two communities far apart socially.

His active mind turned very quickly to the turmoil of politics for diversion. He was hardly admitted to the bar when he was nominated by the Democrats of Calais as their candidate for Mayor. His opponent was a leading and very influential citizen and business man. He was a young man without influence, other than that which his

ability and personal magnetism gave to him, in a community divided into two sections, both strongly Republican, in the larger of which he was entirely unknown up to within a few years, yet, such was the admiration, which his clean, young and aggressive life had already inspired, that he was defeated by a very narrow margin and the following year he was elected Mayor.

His interest in politics grew. His influence widened. He became a State leader, and, as a member of the State Committee, took a prominent part in the second Cleveland campaign in this State and later was a candidate for Congress and only the place of his birth prevented him from becoming a candidate and probably a successful candidate for Governor.

During all these years, he did not neglect his law business, nor did his forced absence from the city for long periods of time weaken his hold on his large clientele. The practice of law was his first love and he gladly turned from politics to his profession with renewed affection and zeal, and the determination never again to be lured from its pleasing pathways.

His duty as a citizen, and the responsibility which he believed this duty imposed upon him, however, never allowed him to shirk public office when the demand arose. And, prior to his appointment on the bench of this State he held several offices of trust and responsibility.

Shortly after admission to the bar, he married Miss Harriet Farrar, a boyhood schoolmate, friend and love.

There is much of the divine in the influence for good that a loving, faithful and sympathetic wife has on a man, and can be equalled only by the noble and inspiring love of a mother for a fond and ambitious son.

His married life from its beginning to its close has been the ideal American family life, that has characterized and established New England home life. Purity of living, lofty ideals of the duties to be met and performed, love and confidence in each other, a desire and love for children and faith in God were the stones with which they builded their edifice, their home, and such homes have made America the wonderful country it is.

From the day of his marriage, his wife was his confident and his daily adviser. They both loved children and their arrival brought added burdens and responsibilities which they met with a smile. His family was his all. No sacrifice was too great for him to make for

their common good. In all that he did, they were the first in his mind, and the honors that came to him at different times in his life were of added value with him, because the pleasure he knew these honors gave to them.

The relations between him and his wife were very intimate. The worries of his profession, ethical questions rising in the practice of law, the many demands on him for assistance were all brought before the home tribunal, and to the decision there reached there was no appeal. Many a young man can thank the kind heart of Justice HANSON for the assistance so badly needed. For, if it was a young man or young woman struggling to secure an education, I doubt if he ever said no; and, of the many boys, whom he assisted, not one ever failed to make good with him, and in their chosen work.

His work as a lawyer and judge will long endure, and his decisions no doubt will be quoted as long as law is practiced in Maine; but, in that book where the deeds of his life are kept in eternal record the help he gave so modestly and quietly to ambitious young men will, I believe, stand out more prominently than many of those acts of his which men know or can read.

But in addition to the personal contact, Justice HANSON'S whole life has been an inspiration to many ambitious boys and girls. In his own community, fond parents pointed him out to their children as an example of what they might hope to do and become, if they would only put forth the proper effort and make the necessary sacrifices. To ambitious boys he was their hero and their inspiration, to whom they never came in vain for advice and help; and often the assistance was given with much sacrifice to himself. There are many men and women today, successful in their chosen life work, who owe very much of what they are, to what Justice HANSON meant to them.

He was a citizen without reproach. He had strong convictions and the courage to express them. There was never any doubt where he stood on all political questions. He was no stradler and he voted as he believed. His faith in God was strong. He was an assiduous reader of the Bible, and much of the simplicity and dignity of his style of writing was due to that fact. He accepted the teachings of the Bible without equivocation and with deep sincerity of faith. He loved music, was very fond of animals and enjoyed the great outdoors and all that is beautiful in nature.

He took an active interest in all local issues, ever ready to give his time and services for the public good and never refused to perform any public task however arduous. He had the gift of speaking, was an natural orator. It was a pleasure to listen to him; and, in all local events of importance, he was always the speaker of the occasion. The great gifts, with which nature endowed him, were always at the command of his fellow citizens in every good cause. He was naturally friendly and never snobbish, although he carried himself with great dignity of carriage. Honors and dignity of office never altered his manner of meeting his friends, neighbors and fellow citizens. He seemed to know everyone and usually addressed them by their first name.

As God gave him opportunities for personal improvement and public service he accepted the duties; and, as he had the light to see, he did at all times what he honestly believed to be right.

HENRY H. GRAY, ESQ., of the Washington County Bar, made the following remarks:

MAY IT PLEASE THE COURT:

One morning in the early Spring of 1880 shortly after I had commenced the Study of Law in the office of Archibald MacNichol at Calais, a young man came into the office. He was tall, erect, broad shouldered, a striking and splendid type of young manhood. It was George M. Hanson who later in life became associate Justice of this court and whose memory we now commemorate.

Although he had not been long admitted to the bar he was then junior member of the law firm of Granger, Granger and Hanson composed of Joseph Granger then quite aged but who had been an active and prominent trial lawyer, his son Fred Granger and himself. This continued only for a short time and he then opened an office by himself.

During my residence in Calais as a student I came to know him well, and an acquaintance was formed that ripened into a warm friendship, which continued to the end.

He soon worked up an active practice, became prominent as a trial lawyer and was in many important cases. As an advocate he was aggressive, fighting every inch of the way, asking and giving no quarter, but when the smoke of legal battle cleared away and he

had fully preserved the interest of his clients, he dropped instinctively and quietly into the genial, lovable citizen and companion which he always was.

Politically he was forceful and aggressive as in the trial of cases, and became the leader of his party in the county and prominent in the State.

Upon his elevation to the honorable position of the Justice of this court, he at once became popular with the members of the bar in every county in which he held court. All speaking words of commendation of the manner in which he managed and conducted his nisi prius terms. He was patient and considerate of counsel and when controversy arose between them, after hearing both parties fully, frequently with rare judgment and tact brought the matter to an amicable adjustment.

As a lawyer he was active, forceful, courteous and faithful to the interests of his clients; as a Judge he was cautious, just, patient and resourceful, always solicitous that justice and equity prevail; as a citizen he was kind, helpful and influential; as a friend he was loyal, steadfast, enduring.

Justice HANSON was genial and companionable wherever one met him, but his most charming, cordial, and engaging manner was exhibited in his own home where surrounded by his family, the visitor met with such genuine and hearty welcome as made him almost feel one of the family. He always showed a solicitous and affectionate regard for his family which was fully reciprocated.

He has gone a little in advance on the road we all must travel. May his relatives, friends, neighbors and associates emulate his many virtues and if in passing they can leave behind such an enviable record of life well spent, success attained and good accomplished they will not have lived in vain.

I join with the other members of Washington County Bar, the members of the other bars in the State and with the members of this court in doing honor to his memory and in expressions of sorrow for his loss.

JAMES H. GRAY, ESQ., of the Washington County Bar, then addressed the court as follows:

MAY IT PLEASE THE COURT:

Services like this to me are very sad. In this case doubly so, for Judge HANSON had been my lifelong friend, our friendship beginning away back in 1880 and continuing without a break to the time of his death.

He was a man of commanding appearance, large of stature, very dignified but not arrogant. He practiced law in Washington County all his life down to the time of his elevation to the Bench, a period of thirty-four years; enjoying a large and varied practice and contending with the ripest lawyers of Washington Bar, well fitting him for a place on the Supreme Bench of Maine to which he was appointed by Governor Plaisted, July 6, 1911, and which position he filled for a period of thirteen years with great distinction.

He conducted himself in the office of an Attorney with all good fidelity, as well to the court as to his clients. He was a splendid trial lawyer; his cases always well prepared, as well to the law as to the fact. He was a forceful and eloquent speaker, and logical in presenting cases to the jury.

As a Judge he was honest, upright and fearless. His opinions were well drawn, concise and full of legal knowledge. He was an ideal nisi prius Judge. He possessed the true judicial patience and listened with attention and forbearance to everything counsel had to say, then deciding as law and justice required regardless of where the axe fell, on friend or foe. There was nothing of abruptness or harshness in his judicial deportment; he was simple, firm and decided.

He was a man of great but unpretentious dignity, strong mind, large heart, firm convictions, generous charity and loyal friendships; always doing good in helping others—Like Dorcas of old when she passed away all the widows stood by weeping, and showing the coats and garments which she made, while she was with them. So with Judge HANSON; when the sad news of his death flashed over the wires on the fourth day of April last it can honestly be said that the people of Washington County, and especially of his own city, paused and bowed their heads in sorrow, and the State mourned the loss of an honest, able and dignified official.

The day of his interment attested the esteem in which he was held; all business was hushed in the city and mourners went about the streets. Old and young, far and near, attended the last sad rites.

Justice HANSON was a man indifferent to ordinary pleasures, to outward pomp, free from personal vanity, lofty in his bearing, independent in his mode of living, spirited in his aims, fervent and earnest in his undertakings. He was a good lawyer, an excellent judge, a splendid citizen and a high-minded christian gentleman.

He had a deep religious nature, believing that when he passed this life he would somewhere enter upon a larger and better life in which the holy Nazerene would be the light and guiding star thereof;

I know not where His Islands lift
Their fronded palms in air;
I only know I cannot drift
Beyond his love and care.

Victor Hugo truly said; "The death of a just man is like the end of a beautiful day."

There is hope that the sun will rise tomorrow, so shall we rise from the grave and its darkness and know another brighter day.

What we call death is but transition and we believe that Judge HANSON awaits us on the other shore ready to greet us when our turn shall come.

The address of HON. HANNIBAL E. HAMLIN, President of the Maine State Bar Association:

MAY IT PLEASE THE COURT:

Time has passed so rapidly in its flight, I find it difficult to realize that my acquaintance with our late Justice HANSON began at the bar practically an ordinary lifetime ago. For more than forty years it was my good fortune to have known him intimately, and through all this long period our cordial and pleasant relations were never marred by even a hasty word.

Admitted to the bar a few years only prior to my own admission, he was of my time and generation. Opposed to him at the bar in many matters, I found him always a fair, honorable and worthy opponent. Associated with him at the bar for a period of some years

in matters of importance, I found him always ready and willing to assume his fair share of the work and responsibilities, and to give full credit for the work and accomplishment of any associate.

Beginning life with no fortune or special influence to assist him, he clutched strongly the ladder of his profession, and through his own industry and perseverance, he rose steadily, round by round, until he reached the top and became worthy for the honorable position of Justice of this court, as a "self made" Judge. His appointment, welcomed by the bar, continued to be recognized by all as a fitting and deserving one. All honor to him and to the country which makes such progress possible.

Justice HANSON carried a great, tender and sympathetic heart. No man was ever more easily touched by the afflictions and sorrows of others than he, and cheerfully and willingly would he have burdened himself with the afflictions and sorrows of others could he have done so and thereby lightened their loads. And yet when the blade of sorrow cut deeply into his own life in the loss of dear ones in his family, he bore his own grief with that fortitude which few possess.

Conscientious in the highest degree, he had a broad, equitable mind and a never-failing desire to see exact justice done—traits of the greatest practical importance to the learned judge in guiding causes and in reaching just decisions in the many complicated, intricate and technical cases so often coming before the courts.

"There is a limit at which forbearance ceases to be a virtue." Not so, however, with Justice HANSON. There seemed to be no limit to his patience, kindness and courtesy to members of the bar, officers of the court, litigants and witnesses. At the same time, he presided over his courts with dignity and impartiality and has added to the record of this court many opinions of an able jurist.

In politics, and of Democratic faith, he was ardent but broad-minded and liberal, and admired the lofty ideals of a statesman rather than the methods of the ordinary working politician. His integrity and sincerity were never questioned. No greater tribute could have been paid him than that shown in his own home city, when, at the last sad rites, people of all classes and religions thronged the church to pay their last tribute of respect to the great and good man whose spirit had departed to that better land.

We shall miss his cordial greetings, his pleasant smile, his sympathy in our sorrows, his kindly assistance and suggestions in our profes-

sional troubles, and his faithful, efficient, and able work as a jurist. Loved, respected and honored, the highest type of citizen, lawyer and jurist, we are grateful in our hearts for having known him. In that ever yet mysterious manner he has been suddenly and silently taken from us and his spirit borne away to that far off shore.

"So fades a summer cloud away;
So sinks the gale when storms are o'er;
So gently shuts the eye of day;
So dies a wave along the shore."

HON. AUGUSTUS F. MOULTON, President of the Cumberland Bar Association, paid the following tribute:

MAY IT PLEASE THE COURT:

In behalf of the members of the Bar of Cumberland County I wish to add a few words of appreciation to what has been said, and so well said, in commemoration of the character of our departed friend, Justice HANSON, and in token of our sorrow at his departure.

Judge HANSON had been upon the Bench a long time, as we reckon in years, and yet he never seemed to be an old man. He had about him always the characteristics of youth, and the cheerfulness and the brightness of vigor and health and activity. His sudden departure, therefore, in the fullness of his powers came to all of us as a very great shock. He was a satisfactory judge. He had the judicial temperament and possessed the fine quality of mind which enabled him to balance both sides impartially before he made his decisions. He was a man that acquired and kept the respect of all who knew him, and especially of the attorneys who conducted cases before him in the courts. In the discharge of his duties he was always fair, courteous, faithful, capable and just in all that he had to do or to say.

It is a pleasure to remember that I had a long personal acquaintance with Judge HANSON. He was a true gentleman, companionable, kindly and sincere, and a hearty friend. With him there was always the suggestion of being judicial in regard to business and also in all the affairs of life. His integrity was beyond question. It is enough to say that he filled the great office, than which none in our civilization is more important, faithfully and well. He has left behind him the record of a good life; and most of all he has left behind him a

memory of that, which in our day is of first importance, in his exemplification of high purpose and conscientious devotion to duty. He sought the truth as God gave him to see truth, and followed its admonitions faithfully and well. As a citizen, as a friend, and as a judge, he has won a reputation that will be held in honor and respect.

We speak of such a life in this world as coming to an end; but there cannot be an end to the lofty ideals of uprightness and conscience and the high qualities which constitute true human manhood. The universe is surely not altogether material, and we are justified in believing, and we heartily believe, that in the great hereafter when "we shall know as we are known," the fundamental fact, which we recognize without teaching and which we call character, as shown in the life of such a person as our late friend, who for so long a time sat as an honored member upon the Bench of this court, will be existent still. His memory will long remain with those who knew him here and will not perish in the endless years which constitute eternity.

"For safe with right and truth he is,
As God lives he must live always.
There is no end for souls like this
No night for children of the day."

EDWARD S. TITCOMB, ESQ., County Attorney for York County, added the following tribute in behalf of the York County Bar:

MAY IT PLEASE THIS HONORABLE COURT:

On more than one occasion, I have felt at loss for an expression of my thoughts in preparation for a discussion of law and fact before this court. Never, however, have I found myself so utterly devoid of words to convey my feelings as in this request that the tribute of the York County Bar to Justice HANSON may be spread upon these records. Would that some older member of our Bar were present who could more adequately and fittingly extol his goodness.

Well do I remember my first meeting with Judge HANSON at the September Term, 1913. Successful with the examination of the August preceding, I presented myself for admission to the York Bar. Introduced to the court in Chambers, I was asked to produce my certificate of qualification. Never thinking that this treasure should serve any purpose other than to be carefully guarded with others of somewhat similar kind, I had failed to consider that the court might

desire some evidence of my qualification as a candidate for admission. Was the well merited admonition forthcoming? In substance that the applicant might well understand that a successful practitioner came into court prepared? No, not even such a suggestion, but simply that he was pleased that I now had an excuse to again attend court that term.

The incident, of little interest, other than to myself, typifies the man. His unfailing kindness to all with whom he came in contact and his never ending friendliness to us all fast ripened into a love and devotion on our part which we shall always cherish and hold dear.

I am unable to recall a single instance of the sometimes often clash of counsel with counsel or witness, with his presence on the Bench, radiating, as it did, the utmost good will to all participants in a cause on trial. His very presence seemed to inspire a reverence to the court which was always accorded him.

If possible, it is even more pleasant to think of him in Chambers, where it seemed most appropriate that he address the Clerk, Bar and Court attendants by their given names as was always his custom.

In speaking as I do, I am mindful of the most cordial relation that now exists between this present Bench and Bar, a relation or situation not unilateral in the making. Yet, I sincerely believe that while we appreciate his long and faithful endeavor as a member of this Honorable Court, we shall cherish his memory more especially as we think and remember him as he was, the ever interested confidant, the intimate and kindly companion, our friend.

Response for the Court by Chief Justice LESLIE C. CORNISH.

BRETHREN OF THE BAR:

Blessed be memory. When those who have walked and worked with us in the daily stress of life vanish from our side and we look to the mile-stones stretching into the future along the way which we must travel alone, then we bless the Giver of all good gifts for the precious boon of memory, for the power to look back over the road that we have travelled together and to recall face and figure and thoughts and purposes and sympathies and acts, to feel again the cordial handclasp and to live again the hours that were filled with happiness. In such a spirit are we met this afternoon. It is a day of memories for our-

selves and a day of just estimate for those who come after us and desire to learn from the tributes which are here enrolled what manner of man and magistrate was our friend and associate whose life we are gathered to honor.

The general outline of the career of a self-made and successful member of our profession who began his work fifty years ago, can usually be traced without difficulty. Birth into a family or neither poverty nor opulence, but where thrift and economy must needs be practiced, education afforded by the local opportunities, ambition to become a member of a learned profession, serious study in the office of a well known attorney, admission to the Bar with assets consisting chiefly of the capacity and desire to work, years of close application to a gradually increasing business, employment by clients with vaster business interests, and finally a position of leadership worthily won and ungrudgingly acknowledged.

This summarizes the upward and onward professional struggle for one without adventitious aids or the support of another's money, and this outlines the active professional life of Justice HANSON.

GEORGE MCKAY HANSON, 45th Justice of this Court, was born at Elmsville, Charlotte County, New Brunswick, on August 26, 1856. He passed away at Portland on April 4, 1924, and the 67 years that stretch between these dates follow the general course already mapped out. Coming with his family to Calais when only two years of age, the remaining 65 years of his life were spent in that community where he ever after made his home and of which he became so substantial a part.

Graduating from Calais Academy in the Class of 1875, he entered at once upon the study of law in the office of Archibald MacNichol, Esq., then and for many years thereafter an able and leading member of the Washington County Bar, known throughout Eastern Maine as a sagacious trial lawyer and a powerful advocate. Doubtless the student was impressed by and imbued with these characteristics of his teacher and himself developed naturally along these lines. He was admitted to the Bar at the October Term, 1877, less than two months after attaining his majority, an unusually early age at which to enter upon the practice of law. Then for thirty-four consecutive years he was an active member of the Bar, constantly gaining in the confidence of his clients, and in the respect and esteem of the community.

Like all attorneys in general practice his work covered a large and constantly increasing field. One rather celebrated case that enlisted his sympathy and zealous service was that of *State* v. *Newell*, reported in 84 Maine, 465, involving the rights of the Passamaquoddy Indians to hunt and fish in this State. Judge HANSON appeared for the respondent and contended that because of certain treaties and rights thereunder the Indians were not amenable to the State laws regulating hunting and fishing. He fought a hard though losing battle in behalf of his dusky client, and often referred to the case as one of the most fascinating in which he had ever been engaged, especially because of the historical lore involved.

On July 26, 1911, he was appointed an Associate Justice of this court, succeeding Chief Justice LUCILIUS A. EMERY, who had retired on reaching the age limit. In many respects each was the exact antithesis of the other. They had few points in common, and yet the strength and usefulness of the Bench as a whole depend upon the variety in the talents of its members.

I love to think of the great body of the common law in this State built up in the 123 volumes of the Maine Reports as a growing temple, in which each of the fifty-one Justices of our court has in turn, as he assumed his duties, contributed his part, fashioned and set his contribution and then when his term of service has ended has laid aside his judicial robe, which was but his workman's apron, and yielded his place to another to carry on the never ending task. The wide learning of a Mellen, a Shepley and an Appleton; the incisive quaintness of a Cutting and a Barrows; the strength, wisdom and applied common sense of a Peters, a Wiswell and a Whitehouse; the cold and compelling logic of a Walton and an Emery, and the patient, analytical thoroughness of a Virgin, a Danforth and a Savage, not to mention the outstanding traits of the other judicial artisans in the long list, all have builded themselves into this temple of justice, and the written opinions like well-fitted and polished stones form one harmonious whole.

In this stupendous task, as well as in the daily routine of nisi prius work, both of which underlie the orderly procedure of government and therefore affect the life, liberty and happiness of every citizen, it is well to have, as in the very nature of things we must have, a diversity of talents, of temperaments and of accomplishments. A

court made up of Judges all of the same essential pattern or type would hardly be desirable. Diversity makes for the better result.

Were I to assign a place to Justice HANSON in this grouping it would be not one of cold law or relentless logic, but of that more human, or perhaps it were better to say of that more divine element of justice and charity. The fundamental question which sprang to his mind as soon as the issues of a case were stated was this,—what is right and just between man and man or between man and the State. Not that legal principles and precedents should be absolutely sacrificed to accomplish a just end, but an effort must be made to find a legal principle or precedent that would permit such an end. This was a marked characteristic of his judicial makeup, perhaps the most marked, and in all his labor upon the Bench that goal was ever before him, to be reached if legally possible.

At nisi prius Judge HANSON was a universal favorite. He was patient, kindly and agreeable, interfering little with the conduct of a case. His mind was free from prejudice and remained open until the time came for final decision. He understood human nature and had a wide experience in business affairs. He had a tender heart and a sympathetic manner. Every litigant, whether victor or vanquished, left his court conscious that the case had been heard before an impartial and justice-loving magistrate. Trials therefore proceeded smoothly, without friction and with apparent ease. His first term was held at Bath in August, 1911, and by a strange coincidence his last term in January, 1924, was held at the same place. Sagadahoc County therefore witnessed his salutatory and his valedictory, though that it was to be his valedictory there was neither hint nor suspicion at the time.

I do not think Judge HANSON enjoyed his appellate work as much as that with a jury. Men and events had more attraction for him than the printed page. And yet he did his full share of work in the Law Court for almost thirteen years. His first published opinion was *Karahalies* v. *Dukais*, 108 Maine, 528, involving the sufficiency of a declaration in an action of forcible entry and detainer, and his last was *Wallace's Case*, 123 Maine, 517, a workmen's compensation case announced after his decease. Sixteen volumes of the Maine Reports contain his contribution to the temple of justice and clearly reveal the scope of his mind and the trend of his thought. He composed readily and his opinions have a graceful charm that carries

the reader along from premise to conclusion with increasing interest. At the consultation table he made for harmony, for he possessed what someone has characterized as a disposition to agree. His attainments were recognized by Colby College and by the University of Maine, both of which institutions conferred upon him the honorary degree of Doctor of Laws.

Justice HANSON'S position as a citizen was fixed in the foremost rank. Every good cause had in him a firm supporter. He gave of his time and of his money. He gave of himself, sometimes undoutedly at a sacrifice were one to look at it selfishly. He identified himself gladly with every movement that tended to enhance the welfare, the morals or the cause of education in his city and county. He was filled with civic pride.

The great outpouring of people of all classes and stations in life, which completely filled the church at his obsequies, on a stormy day in April, was in itself a visible and marked testimonial to the respect and affection in which he was held by those who knew him best. They came, many from a considerable distance, these old clients and friends of his, and especially friends of earlier days, because they loved and honored the man and they were anxious to show their esteem for him. It was an old-fashioned, neighborly, heartfelt tribute, than which is nothing finer or more significant. The State may have claimed him for many years, but at the end when the journey was finished they felt that he still belonged to them.

Judge HANSON was fond of people and liked to mingle with them. There was nothing of the ascetic or recluse about him. That is why he sometimes chafed a bit under the partially cloistered life of the Bench. This trait led him in two directions, toward fraternal organizations and toward politics. He was fond of the ties that bind men together in fraternities, and in time he became the National head of the great order of Knights of Pythias, a position that gave him a broad acquaintance and a large circle of personal friends throughout the United States.

He liked politics. In his early days he enjoyed its rough and tumble. A member of the minority party in this State he was loyal to it and a devoted worker for it, in years of defeat with the same zeal as in years of victory. In 1910 he was his party's candidate for Congress and failed of election in a strong Republican district by a small plurality. When, however, he took his seat upon the Bench

all political activity ceased, as is always the case, and thenceforth he knew only the duties and responsibilities pertaining to his office.

This fondness for people made Judge HANSON always a cheerful and delightful companion. We who have served with him so many years upon the Bench realize full well how warm a place he had won in our hearts, in those innumerable personal ways in which judges are thrown together, and how deep and lasting is our sense of personal loss.

No one who ever met Judge HANSON can forget him. He was a noticeable figure, a bishop in the law, large, portly, dignified, not a cold and forbidding but a warm and attracting dignity, a light and springy step, a cordial sincere welcome, an engaging smile and a hearty handclasp. He gathered friends as a magnet attracts steel, and he held them ever after. There was a certain sensitiveness in his nature that a casual acquaintance might not discover. It sometimes caused him undue solicitude, but it sprang from a fineness in his character that could not be eliminated.

It is neither usual nor proper on an occasion like this to dwell upon family relations, but no tribute to Judge HANSON would be faithful or complete which failed to note his intense devotion to wife and daughters. Never have I observed love more tender nor care and solicitude more constant. The loss of two sons some years ago undoubtedly tended to make the family circle closer as it made it smaller, but the mutual love, respect and admiration constituted a sweet picture of true home life that can never be forgotten.

Judge HANSON'S belief in the future was as strong as his belief in the present. It did not rest upon faith alone, nor upon creed alone, but upon what to him was absolute proof, which left no lingering doubt in his mind. That confidence has now been put to the final test and his proof has been augmented by evidence that awaits only those who have passed beyond the veil.

There, able and honored magistrate, ideal citizen, true friend, lovable and loved companion, we, thy associates of Bench and Bar, leave thee, with equal confidence that after all the wrenchings and separations that are the human lot in this world we shall all meet again "after sunset."

The resolutions offered by the Bar of Washington County are gratefully received and will be spread upon the records of this court.

As a further mark of honor to the memory of our deceased Associate the court will now adjourn for the day.

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When one accepts a deed bounding him by another's land, the land referred to becomes a monument which will control distances. *Perkins* v. *Jacobs*, 347.

BRIDGE ACT—CONSTRUCTION OF.

In R. S., Chap. 82, Sec. 6, Par. XIII., the essential words are; "For a purpose not authorized by law." Under Chapter 319, Public Laws, 1915, and amendments thereto, known as the Bridge Act, the Board therein provided may determine whether the proposed bridge is on a main thoroughfare.

Bullard v. *Allen*, 251.

BROKER'S COMMISSION.

In an action of assumpsit to recover a broker's commission on the sale of real estate, a valid and definite agreement between the owner and the would be purchaser for the purchase of the property is a condition precedent.

Jordan v. *McNally, Tr.*, 216.

In the instant case no such agreement was made between the sellers and the purchaser. The most that could be claimed was an oral agreement to make a subsequent agreement if the terms could be agreed upon in the future, which is no agreement whatever. *Jordan* v. *McNally, Tr.*, 216.

BURDEN OF PROOF.

The burden of proving to the satisfaction of the court that the verdict is manifestly wrong is upon the one seeking to set it aside. *Jannell* v. *Myers*, 229.

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BY-LAWS.

Where a by-law of a benefit association provides three classes of benefits arising from sickness, temporary injury and death, the word "injury" as used in the by-law includes both an injury resulting in temporary disability, and an injury resulting in death.

Where the by-law provides no benefits shall be paid where the sickness or injury is the result of intemperance or immoral act, each of such causes is distinct from and exclusive of the other. The phrase "immoral act" does not include intemperance or the after effects of it.

Croteau v. *Lunn & Sweet Employees Association*, 85.

CARRIERS.

When a carrier stipulates in the bill of lading, accepted by the shipper, of perishable goods shipped in lined or refrigerator cars heated by the shipper or in charge of a caretaker furnished by the shipper, that it will not be liable for loss or damage of such goods, except in case of negligence, the shipper must, in case of loss by fire in one of a connecting carrier's yards, devoted solely to the classification of cars and the makeup of trains for transhipment, prove that the loss or damage was due to some neglect or lack of ordinary care on the part of the carrier or its connecting carrier.

John Groves Co., Inc. v. *Bangor & Aroostook R. R.*, 373.

See *Moores* v. *B. & A. R. R. Co.*, 416.

CEMETERY.

A refusal by the Roman Catholic Church to permit the interment of a body of a person, who, at the time of death, was not within the communion of the church, in one of its privately owned cemeteries of consecrated soil, may be enforced, where the written interment permit issued by the church contains a condition that no body of a person shall be interred therein not entitled to burial in consecrated ground, without the consent of the Bishop of the diocese.

Roman Catholic Bishop of Portland v. *Yencho*, 397.

CHARGE TO JURY.

Where an instruction to a jury unexplained may have been prejudicial to a respondent, an exception, seasonably taken, must be sustained.
State v. *Gallant*, 135.

CHOSE IN ACTION.

An action by the drawer against a terminal railroad for misdelivery of a carload of potatoes shipped by a person in his own name, where an "on arrival" draft with bill of lading indorsed in blank attached for the invoiced value of the potatoes, drawn by the shipper to the order of his bank on the expected buyer and deposited by the drawer in the bank to his credit, not for collection, was dishonored by the drawee and charged back by the bank to the drawer and the papers returned by the bank to the drawer by manual delivery only, thus retransferring the title to the potatoes to and reinvesting it in the drawer, will not lie under the statute in this State unless the assignment of the chose in action for the misdelivery of the potatoes is in writing.

Where the assignment is not in writing the action is maintainable only in the name of the assignor. *Weed* v. *Boston & Maine R. R.*, 336.

COMITY.

Comity between the United States and State Courts should be observed to the fullest extent when the question of immunity is properly made an issue in the State Court and the statutes of immunity should be given the broadest application. *State* v. *Verecker*, 178.

CONSIDERATION OF MARRIAGE.

See *Guild* v. *Eastern Trust and Banking Co.*, 208.

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See *Roman Catholic Bishop of Portland* v. *Yencho*, 397.

DECLARATIONS.

Testimony as to declarations made by the injured several days after the injury, as proving causative connection between the employment and death of the injured, is inadmissible as hearsay. Such testimony may be admissible if the declarations were spontaneously made and were a natural concomitant of the injury.
Ross' Case, 107.

DEED.

A grant of land described as bounded on a passageway and referring to a plan on which a strip of land is marked off corresponding to the passageway described in the deed may convey to the grantee an easement therein of passage, light and air. *Webber* v. *Wright*, 190.

When a plan is referred to as a part of the description in a deed, such plan is made a material and essential part of the conveyance with the same force and effect as if copied into the deed, and is subject to no other explanations by extraneous evidence than if all the particulars of the description had been actually inserted in the body of the grant or deed.

Want of record of the plan makes no difference; it is sufficient to prove the plan and its contents. *Perkins* v. *Jacobs*, 347.

It is well settled that what are the boundaries of land conveyed by a deed, is a question of law; where the boundaries are, is a question of fact. An existing line of an adjoining tract may as well be a monument as any other object.

When one accepts a deed bounding him by another's land, the land referred to becomes a monument which will control distance. *Perkins* v. *Jacobs*, 347.

DEDICATION OF RIGHT OF WAY.

There is no such thing as dedication between an owner of land and individuals. The public must be a party to every dedication. *Littlefield* v. *Hubbard*, 299.

DESCENT OF PROPERTY.

R. S., Sec. 3, Chap. 80, does not go beyond descent and embraces only rights of inheritance of intestate estates of and for illegitmates. It does not attempt to change the status of an illegitmate to a legitimate. The time and place, whether in this State, another State or country, the provision of the statute "adopts him into his family" takes place are immaterial. The law of the domicil of the decedent in force at the time of his death governs in the succession to and distribution of personal property. *Crowell's Estate*, 71.

The rights of descent flow from the legal status of the parties, and where the status is fixed, the law supplies the rules of descent, with reference to the situation as it existed at the death of decedent. *Latham, Appellant*, 120.

So, in this case, the statute passing and distributing the estate of the adoptive father dying intestate since the adoption, rather than that in force at the time

that the child was adopted, determines whether the child is capable of taking the relation of an inheritor to the property that the parent left.
Latham, Appellant, 120.

DRY TRUST.

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DUPLICITY.

A motion in arrest of judgment after verdict on the ground of duplicity comes too late. *State* v. *Chemiesky*, 45.

DWELLING-HOUSE.

At common law a shed connecting the dwelling-house and barn and all other buildings used in connection with the dwelling was deemed a part of the owner's "castle" and was protected from invasion against his will, except by the State in search of violators of the law or by virtue of certain civil processes of which a writ of attachment is not one, and the common law rule still remains in force in this State. *Marshall* v. *Wheeler*, 324.

EASEMENT.

A grant of land described as bounded on a passageway and referring to a plan on which a strip of land is marked off corresponding to the passageway described in the deed may convey to the grantee an easement therein of passage, light and air. *Webber* v. *Wright*, 190.

No right of way of necessity exists over land which borders on the ocean. An easement "of necessity" is sometimes recognized even though the dominant estate may be reached by some other way. A right of way must be one of strict necessity as conveience alone is not sufficient. Every right of way of necessity is founded on a presumed grant; hence none can be presumed over a stranger's land and none can be thus acquired. There is no such thing as dedication between an owner of land and individuals. The public must be a party to every dedication. A way by public user cannot be established if the use is permissive. *Littlefield* v. *Hubbard*, 299.

EMINENT DOMAIN.

In condemnation proceedings, by right of eminent domain, by a water district under authority of a Private or Special Act, the owner of the property so taken may have the question of the necessity of the appropriation for public use judicially determined, and such part of the land so taken as the court shall

determine as being necessary, or the whole of the land so taken if found to be necessary, shall be appropriated, and damages awarded accordingly. If any of the land is judicially determined as necessary the moving party in the condemnation proceedings is considered as prevailing and entitled to costs.
Roberts v. *Portland Water District*, 63.

EQUITY PRACTICE.

On an appeal in equity a transcript of all the evidence must be transmitted to the Appellate Court. A failure to comply with this well-established rule of equity practice must result in a dismissal of the appeal. *DePietro* v. *Modes*, 132.

ESTATES.

The credit of an estate of a deceased person may be pledged for all reasonable expenses incurred in providing a decent burial; not so for a monument or gravestone, though a judge of probate may authorize an expenditure for such purposes to be allowed from the estate, or decree an allowance from the estate to reimburse for such expenditures made without authority from the Probate Court. *Call* v. *Garland*, 27.

ESTOPPEL.

Where the owner of a pair of horses delivered them to the keeper of a sale stable to sell them for him and to pay him a stated price therefor, such owner is equitably estopped to assert title to one of the horses against a bona fide purchaser for value from the keeper of the stable, it appearing that such owner was present in the stable with the prospective purchaser, recommended the horse to him and did not disclose any interest in the horse or any limitation upon the authority of the keeper of the stable. *Hunnewell* v. *Mitchell*, 293.

A party to a written contract, no element of fraud being present, is estopped to deny knowledge of the terms of the contract, or of a provision requiring the written approval of an officer of the corporation before it is binding upon the corporation. *Portland Motor Sales Co., Inc.* v. *Millett*, 329.

EVIDENCE.

It is not exceptional error to admit the testimony of an officer, offered by the State, for the sole purpose of corroborating the testimony of another officer who had testified that he had held a conversation by telephone with the respondent, whose voice he recognized, that such conversation took place.

FINDINGS ON QUESTIONS OF FACT.

FISHERY—RIGHTS OF.

FLATS.

GUARANTOR.

GUARDIAN.

HABEAS CORPUS.

HEARSAY EVIDENCE.

HYPOTHETICAL QUESTION.

ILLEGITIMATES—DESCENT OF PROPERTY TO.

IMMUNITY.

INDICTMENT.

INFANTS.

INSTRUCTION.

INSURANCE.

In an old line life insurance policy the beneficiary has a vested interest; otherwise in fraternal insurance organizations. If the right to modify the policy, or change the beneficiary without his or her consent, is reserved in the contract, then such a policy creates a mere expectancy. When the contract is issued in a State other than that in which the insured resides at the time of its issuance, the lex loci contractus controls. *Tebbetts* v. *Tebbetts*, 262.

INTOXICATING LIQUORS.

An owner of a vessel or building used as a nuisance, though he be in possession does not keep and maintain the nuisance and is not criminally liable unless he himself uses the property for the illegal keeping or sale of intoxicants, or unless he knowingly permits such use of his property to be made.
State v. *Eastern Steamship Lines Inc.*, 76.

The language "knowingly did transport from place to place in said Waldoboro" in an indictment for illegal transportation of intoxicating liquors is sufficient.
State v. *Harvey*, 226.

No specific number of sales are necessary, since the repeal of Sec. 14, Chap. 225, Public Laws, 1856, to establish the offense of common seller of intoxicating liquors, nor are conclusive proof.

The elements constituting this offense may be proven without any evidence o actual sales; or one or more sales under the circumstances shown to exist may warrant a jury in finding a verdict of guilty. *State* v. *Lamont*, 267.

LAW OF THE ROAD.

Under the law of the road in cases of collisions, if a party is on his left side of the road at the time of the collision, it is strong evidence of carelessness, and, unexplained and uncontrolled, conclusive evidence of carelessness.
American Mutual Ins. Co. v. *Witham*, 240.

LEGACY—LAPSED.

The language "to have and to hold the same to her, her heirs and assigns forever" in a will where the legatee, a wife, predeceased the testator, does not prevent a lapse of the legacy, unless other provisions in the will require that the words "to her, her heirs and assigns forever" shall be construed as meaning "to her or her heirs or assigns forever," as such language are words of limitation being descriptive merely of the nature of the estate.
Jones, Ex. v. *Warren, Admr.*, 282.

LEX LOCI CONTRACTUS.

When a contract for life insurance is issued in a State other than that in which the insured resides at the time of its issuance, the lex loci contractus controls.
Tebbetts v. *Tebbetts*, 262.

LIEN.

It seems, that from general knowledge alone that repairs are contemplated and are being made, the consent of the lessor is not to be inferred so as to charge his interest with a lien, but the evidence must go to the extent of showing knowledge of what work was actually being done and that it was more than mere preservative repairs. The consent of the owners must be inferred from the language of the lease, their knowledge of what was contemplated and was actually being done, and their conduct. A claim must stand or fall substantially as made unless inadvertence or mistake is shown.
Maxim v. *Thibault et als.*, 201.

MARRIAGE.

In an action on a check by payee against the executor of the estate of the drawer, who deceased before the check could be presented to the drawee for payment, it being claimed that the check was in part payment of an amount the drawer had promised, orally, and prior thereto, to pay to payee in consideration of marriage, an affidavit in support of the claim presented by the plaintiff against the estate of the decedent is not admissible as evidence in behalf of the plaintiff of the facts therein stated; it is admissible in her behalf only to show that the claim in suit was properly presented; it is admissible as evidence against the plaintiff of any facts therein stated which militate against plaintiff's contention. The facts so stated must be considered in the light of admissions against interest. *Guild* v. *Eastern Trust and Banking Co.*, 208.

The theory of even a tacit renewal by the plaintiff of her promise to marry, and the delivery of the check by the decedent in consideration of her promise then and there renewed to marry him, and that she received the check understanding his intention and participating in it, finds no support in the present records.
Guild v. *Eastern Trust and Banking Co.*, 208.

MARRIED WOMEN.

A married woman cannot lawfully be arrested on mesne process by virtue of the immunity and exemption accorded her under Sec. 4, Chap. 66, R. S., and such exemption from arrest does not have to be claimed.

MONUMENTS.

MONUMENTS OR GRAVESTONES.

MOTIONS FOR NEW TRIAL ON NEWLY-DISCOVERED EVIDENCE.

MOTION IN ARREST OF JUDGMENT.

NEGLIGENCE.

NOTARY PUBLIC.

NOVATION.

NUISANCE.

Where an alleged nuisance has been created or erected by a third party, the present owner into whose hands it has come by purchase since the erection or creation of the nuisance cannot be held liable therefor without notice of the existence and a request for its abatement. *Webber* v. *Wright*, 190.

A landlord will not be held for a nuisance created by his tenant until the expiration of the term and surrender of the premises and then only after notice and request for abatement. *Webber* v. *Wright*, 190.

The "attractive nuisance" doctrine has never been adopted by this court. *Soule* v. *Texas Co.*, 424.

NUISANCE—LIQUOR.

See *State* v. *Eastern Steamship Lines Inc.*, 76.

OFFICIAL SIGNATURE.

An official certificate must be signed by the officer himself in his own hand, or by making his mark, as it is the signature which authenticates it and gives it official character. *Mahoney* v. *Ayoob et als.*, 20.

PLAN.

When a plan is referred to as a part of the description in a deed, such plan is made a material and essential part of the conveyance with the same force and effect as if copied into the deed, and is subject to no other explanations by extraneous evidence than if all the particulars of the description had been actually inserted in the body of the grant or deed.

Want of record of the plan makes no difference; it is sufficient to prove the plan and its contents. *Perkins* v. *Jacobs*, 347.

See *Webber* v. *Wright*, 190.

PLEADING.

A demand in set-off must be pleaded in substance as certain as in a declaration, and for a liquidated sum, or for one ascertainable by calculation. A claim by way of recoupment must be one resulting from a breach of the same contract or transaction as that on which the suit is founded, and not one arising from a new and independent agreement which in no way is a part of the consideration for the original contract. *Ruggles Lighting Rod Co.* v. *Ayer*, 17.

PRIVILEGED COMMUNICATIONS.

In an action for slander if the words spoken by the defendant accusing the plaintiff of larceny were made to a peace officer either for the detection of crime or the protection of his own property, and were made in good faith and without malice, they would be a privileged communication; but if made to the plaintiff in the absence of a peace officer and in the presence of third persons, they would not be so privileged. *Parker* v. *Kirkpatrick*, 181.

PRIVITY OF CONTRACT.

See *Pelletier* v. *Dupont*, 269.

PUBLIC UTILITIES COMMISSION.

Plenary power is given to the Public Utilities Commission to inquire into any neglect or violation of the laws of the State by any public utility, and it is made obligatory upon the Commission to report all violations of law to the Attorney General who is directed to institute all necessary proceedings for the enforcement of the laws of the State. *Eaton et als.* v. *Thayer et als.*, 311.

QUESTIONS OF LAW AND OF FACT.

The construction of a written contract is a question of law for the court. *Dominion Fertilizer Co.* v. *Lyons*, 23.

The finding by a sitting Justice upon questions of fact are final unless clearly wrong. A sitting Justice not required to make a finding on questions of fact, a decree only is required. *Tebbetts* v. *Tebbetts*, 262.

See *Savage* v. *North Anson Manufacturing Co.*, 1.

RATIFICATION.

A ratification of a contract after suit begun, if relied upon as a bar to the suit, must be pleaded. *Portland Motor Sales Co. Inc.* v. *Millett*, 329.

REAL ACTIONS.

In a real action the plaintiff must recover, if at all, on the strength of his own title. *Abbott* v. *Clark*, 185.

RECANTATION.

Recantation by an important witness is not alone sufficient grounds for granting a motion for a new trial. *State* v. *Dodge*, 243.

RECEIVERS.

A receiver appointed by the court to receive and preserve property or funds, is a ministerial officer of the court. He represents the court, acts under its direction, and his possession of the property or funds in litigation is the possession of the court. He has the power or right of possession of the property or funds, and nothing more. He takes no title thereto, and as to any act of his regarding the property or funds, the authority to so act must come from the court. Without that authority no act of his is valid.

Glidden et als., Receivers v. *Rines*, 286.

RECOUPMENT.

A claim by way of recoupment must be one resulting from a breach of the same contract or transaction as that on which the suit is founded, and not one arising from a new and independent agreement which in no way is a part of the consideration for the original contract. *Ruggles Lighting Rod Co.* v. *Ayer*, 17.

REGISTRATION OF VOTERS.

Alleged irregularities in registration of voters cannot be inquired into in proceedings instituted under R. S., Chap. 82, Sec. 6, Par. XIII.

Bullard v. *Allen*, 251.

REMAINDER.

See *Methodist Church of Monmouth* v. *Fairbanks*, 187.

REPEAL.

See *Harris' Case*, 68.

REPLEVIN.

In replevin a plea of non cepit, with brief statement alleging title to the property in defendant, and not in plaintiff, throws upon the plaintiff the burden of proof that the title is in him. *Smith* v. *Deojay*, 381.

RES JUDICATA.

Under a plea of res judicata, if extrinsic evidence is necessary to establish identity of parties, or cause of action, and from the evidence different conclusions may be reached by different minds, it is not a question of law, but of fact for the jury. *Savage* v. *North Anson Manufacturing Co.*, 1.

RIGHT OF WAY.

No right of way of necessity exists over land which borders on the ocean. An easement "of necessity" is sometimes recognized even though the dominant estate may be reached by some other way. A right of way must be one of strict necessity as convenience alone is not sufficient. Every right of way of necessity is founded on a presumed grant; hence none can be presumed over a stranger's land and none can thus be acquired. There is no such thing as dedication between an owner of land and individuals. The public must be a party to every dedication. A way by public user cannot be established if the use is permissive. *Littlefield* v. *Hubbard*, 299.

SCIENTER.

Scienter is immaterial in an action of assumpsit for breach of warranty. *Heal* v. *International Agricultural Corp.*, 138.

SET-OFF.

A demand in set-off must be pleaded in substance as certain as in a declaration, and for a liquidated sum, or for one ascertainable by calculation. *Ruggles Lightning Rod Co.* v. *Ayer*, 17.

SHERIFF'S SALE.

A sheriff's sale on an execution issued on a judgment recovered against debtors jointly, on a levy, of different interests of such debtors in and to different parcels of real estate, owned by them in severalty, is null and void. *Barnes* v. *Hechler et al.*, 30.

SLANDER.

In an action for slander if the words spoken by the defendant accusing the plaintiff of larceny were made to a peace officer either for detection of crime or the protection of his own property, and were made in good faith and without malice,

TOWN MEETINGS.

TRUST.

USER.

VENUE.

VERDICT.

The verdict of a jury upon questions of fact is conclusive and final when the testimony is not so strong to the contrary as to clearly show error, or that the jury were influenced by prejudice, bias, passion or mistake.

Day v. *Isaacson*, 407.

A verdict, in order to stand, must be supported by substantial evidence consistent with the circumstances and probabilities in the case so as to raise a fair presumption of its truth when weighed against opposing evidence.

Harmon v. *Cumberland County P. & L. Co.*, 418

VESTED INTEREST.

In an old line life insurance policy the beneficiary has a vested interest; otherwise in fraternal insurance organizations. If the right to modify the policy, or change the beneficiary without his or her consent, is reserved in the contract, then such a policy creates a mere expectancy. *Tebbetts* v. *Tebbetts*, 262.

VICIOUS ANIMALS.

Owners or keepers of domestic animals are not liable for damages resulting from injury done by them in a place where they have a right to be unless the animals in fact and to the owner's knowledge are vicious. If, however, a person keeps a vicious or dangerous animal which he knows is accustomed to attack and injure persons, he assumes the obligation of an insurer against injury by such animal, and no measure of care in its keeping will excuse him. His liability is founded upon the keeping of such an animal when he has knowledge of its vicious propensities, and his care or negligence is immaterial. Negligence is not the ground of liability and need not be alleged or proved.

Sandy v. *Bushey*, 320.

WARRANTY.

An action on an alleged breach of warranty, that a certain loaf of bread purchased by the plaintiff of a retail dealer was wholesome and fit for human consumption and free from any foreign substances dangerous and harmful to health, will not lie against the manufacturer or baker of the bread, as there is no privity of contract between a manufacturer and a consumer who purchases the articles of a third party, or retail dealer. A consumer's remedy, if any, in such cases is not founded on a breach of a contract of implied warranty, but on a breach of duty on the part of a manufacturer to use due care in the preparation of articles intended for consumption as food, and is founded on negligence.

Pelletier v. *Dupont*, 269.

In the instant case no express warranty existed running from defendant to the plaintiff by reason of any printed matter contained on the wrapper of each loaf of bread when delivered by the defendant to the retail dealer, as there was no privity between the plaintiff and defendant or any consideration for such a warranty; nor did the printed matter on the wrapper constitute such a warranty as is declared on in the plaintiff's declaration. *Pelletier* v. *Dupont*, 269.

WATER DISTRICT.

See *Eaton et als.* v. *Thayer et als.*, 311.

WILLS.

A devise in a will in the following language, "One half in common and undivided interest of and in" several parcels or lots of real estate, to some of which testator had entire title and to others a fractional part of the title, construed as creating new estates, titles in new undivided interests, both in the lots where he owned the entire interest and in those in which he owned a fractional interest.
Daggett et als., Trustees v. *Taylor*, 88.

Legacies, where the testatrix bequeath to A "twenty shares of the capital stock" of a certain corporation, to B "ten shares of the capital stock" of the same corporation, and to C "twenty shares of the capital stock" of the same corporation, are general, not specific, and may be satisfied by the delivery of the specified number of shares of the capital stock of the corporation within twenty months after final allowance of the will without any dividends, either in cash or stock, declared by the company and received by the administrator or executor before such delivery. *Perry, Admr.* v. *Leslie et als.*, 93.

When by will a testator bequeaths and devises all his property, real, personal and mixed, to his wife and daughter to their free use and benefit forever and free from the interference and control of any one, with a gift over at the death of the survivor of what was left, if anything, the remainder is void.
Methodist Church of Monmouth v. *Fairbanks*, 187.

The language "to have and to hold the same to her, her heirs and assigns forever" in a will where the legatee, a wife, predeceased the testator, does not prevent a lapse of the legacy, unless other provisions in the will require that the words "to her, her heirs and assigns forever" shall be construed as meaning "to her or her heirs or assigns forever, "as such language are words of limitation being descriptive merely of the nature of the estate.
Jones, Ex. v. *Warren, Admr.*, 282.

In determining the construction and interpretation of a will the intent of the testator from the entire will must and should control, unless the intent cannot

be carried out without conflicting with some positive rule of law, or be effectuated without violating some cannon of construction so firmly established as to have become a fixed rule of law governing the transfer of property by will.
Ladd v. *Baptist Church of East Randolph, Vt.*, 386.

WITNESSES.

See *Travelers Insurance Co.* v. *Foss, Admr.*, 399.

WORDS AND PHRASES.

WORKMEN'S COMPENSATION ACT.

The distinguishing features between "office" and "employment" are greater importance, dignity and independence; a more secure tenure; requirement of official oath or bond and liability to account as a public officer for misfeasance or nonfeasance and further still to an office is delegated a portion of the sovereign power, which mere employment never embraces. *Pennell* v. *Portland*, 14.

In the instant case the word "official" as used in Sub-section 2 of Section 1 of the Workmen's Compensation Act may be defined with greater precision. It may fairly be interpreted to mean the incumbent of an office created by statute or valid municipal ordinance. *Pennell* v. *Portland*, 14.

ant has unreasonably refused to submit to proper surgical treatment is a question of fact, and the finding thereon by the Chairman, if supported by rational and natural inferences from facts and circumstances proved, is final.
Beaulieu's Case, 83.

In this case the Chairman found "as a mater of fact" that claimant had not unreasonably refused to submit to proper surgical treatment, and the record justifies the finding. *Beaulieu's Case*, 83.

"Dependency" under the Workmen's Compensation Act is determined by the question whether claimant is dependent on the earnings of the employee for support at time of injury. Contributions, if not necessary for the support of claimant and not by him relied upon for his support, do not constitute dependdency. *Henry's Case*, 104.

Under the Workmen's Compensation Act the requirement of the statute that to a petition an answer should be filed may be waived. Testimony as to declarations made by the injured several days after the injury, as proving causative connection between the employment and death of the injured, is inadmissible as hearsay. Such testimony may be admissible if the declarations were spontaneously made and were a natural concomitant of the injury. A finding by the Commission that there was a causative connection between the injury and the death of the injured, in absence of fraud, is supported by some competent evidence, is final and not examinable. *Ross' Case*, 107.

As a condition precedent to the right of an employer, under the Workmen's Compensation Act, to recover damages against another person, by subrogation, is that the injured employee has claimed compensation and that it has been awarded under the act, and the employer has paid the compensation or become liable therefor.

In this case there is no proof of an award, and the proof that the employer did in fact pay compensation whether voluntarily or not, falls short of the necessary conditions precedent under which the action may be maintained.
Creamer v. *Lott*, 118.

That sub-clause (a) under Clause IX., Sec. 1, Chap. 238, Public Laws of 1919, may determine the method of fixing the amount of compensation under the Workmen's Compensation Act, where the employee is employed under coexistent contracts in the employ of more than one employer, it must appear, in order that the total earnings from the different employers may constitute the basis of compensation computation, that such employment has continued under such coexistent contracts during substantially one year immediately preceding the injury. *Juan's Case*, 123.

In this case sub-clause (c) affords a guide by which the compensation to be paid this dependent might be estimated were the record sufficient in its detail to supply the basis on which to base an award.

It is not shown whether, at the time of the accident, the employee was working during the ordinary working hours constituting a full working day. If it be that he was, then what he earned in concurrent contracts of employment is of consequence in computing the amount of compensation; otherwise not. In any event, the process to be followed is that of (c) and not of (a).

Juan's Case, 123.

Where the only access to a manufacturing plant from the public street is over land of another by a right of way in which the employer has a right of passage for all persons having business with it and for its employees in going to and from their work, an injury received by an employee while on his way home from his work and while passing along such right of way may be said to have arisen out of and in course of his employment. *Roberts' Case*, 129.

The period of employment within the meaning of the Compensation Act does not begin and end with the actual work the employee was employed to do, but covers the period between his entering his employer's premises a reasonable time before beginning his day's work, and his leaving the premises within reasonable time after his work is finished, and during the usual lunch hour, he being in a place where he reasonably may be in connection with his duties, or entering or leaving the premises by any way he may reasonably select.

Roberts' Case, 129.

Under the Workmen's Compensation Act, that compensation may be awarded to a dependent, it must appear that the employment of the decedent must have been the proximate cause of his death. *Healey's Case*, 145.

In this case the evidence proves that the decedent's death resulted from the doing of something which his employment neither required nor expected him to do, and in a place where his employment did not take him, and to which his employers, if men of ordinary experience and sagacity, could not be expected to anticipate he would go, for the purpose of washing his hands.

Healey's Case, 145.

Under the Workmen's Compensation Act if no answer is filed the Industrial Accident Commission in proceeding upon the petition may treat the allegations of fact which are well pleaded in the petition as admitted and make such award as the facts so stated in the petition will support. Accident is a befalling; an event that takes place without one's forethought or expectation; an undesigned, sudden and unexpected event; an occurrence to be accidental must be unusual, undesigned, unexpected and sudden. *Brodin's Case*, 162.

Cases of occupational disease cannot be said to have arisen from accidental causes since they are generally the result of long continued processes of absorption of a poisonous substance into the system, they lack the element of "sudden or unexpected event." *Brodin's Case*, 162.

In a common law action brought by an employee to recover compensation for injuries received in the employ of a non-assenting employer under the Workmen's Compensation Act, since negligence is the basis of all actions for injuries suffered by employees, the plaintiff must allege and prove that his injury was in whole, or in part, caused by the negligence of his employer or of some person for whose care the employer is responsible, which, in case of so-called large employers, includes negligence of fellow servants.
Pelletier v. *Central Maine Power Co.*, 193.

An employee hauling from the camp of the employer to its mill-yard timber cut into six-foot lengths is engaged "in the work of cutting, hauling, rafting or driving logs" within Section 4 of the Workmen's Compensation Act, each piece being properly termed a log. It is optional with manufacturers, who are engaged in lumbering operations, to avail themselves of the Workmen's Compensation Act as to their employees engaged in cutting, hauling, rafting, or driving logs, when they accept the Act as to their general manufacturing business. *Cormier's Case*, 237.

The findings, on questions of fact, by the Chairman of the Industrial Accident Commission, in absence of fraud, are final, and not reviewable in respect to the credibility and weight of the evidence, if there is any evidence in support of the finding. *Adams' Case*, 295.

Under the Workmen's Compensation Act, generally speaking, the question as to whether the injured party is an "employee" or an "independent contractor" is determined as to whether the employer has the right to control the work and the means and manner of its performance, if so, the other party is an employee.
Dobson's Case, 305.

Under the Workmen's Compensation Act, an employer, conducting a sawmill and also (to supply logs for his mill) a lumbering operation, may become an assenting employer as to the mill without assenting as to the logging operation. Or he may become an assenting employer as to both operations. It is only necessary to make his meaning clear in simple English language.
Mary A. White's Case, 343.

In an action against an administrator by the insurance carrier of an employer of an employee to whom compensation has been paid, based upon the right of subrogation, for damages for alleged tort by the intestate which occasioned the paying of compensation, the administrator not having testified, the plaintiff

WRITTEN CONTRACT.

WRITTEN STATEMENT FOR OBTAINING CREDIT.

APPENDIX

STATUTES AND CONSTITUTIONS CITED, EXPOUNDED, ETC.

COLONIAL ORDINANCES.

CONSTITUTION OF UNITED STATES.

CONSTITUTION OF MAINE.

ENGLISH STATUTES.

UNITED STATES SUPPLEMENTARY STATUTES.

SPECIAL LAWS OF MAINE.

STATUTES OF MAINE.

REVISED STATUTES OF MAINE.

ERRATA.

In third line from bottom of page 307 substitute "132" for "133."

In twelfth line from top of page 309 substitute "Branning" for "Braming," and "150" for "15."

In sixteenth line from bottom of page 309 substitute "40" for "50."

In last line on page 335 substitute "*Booth Brothers & Hurricane Island Granite Company* v. *Smith*" for "*Booth Bros.* v. *Granite Company.*"

On page 381 substitute "Deojay" for "Jeojay" as name of defendant.