MAINE REPORTS

125

CASES ARGUED AND DETERMINED

IN THE

SUPREME JUDICIAL COURT

OF

MAINE

OCTOBER 1, 1925—DECEMBER 1, 1926

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. WARREN C. PHILBROOK
HON. CHARLES J. DUNN
HON. JOHN A. MORRILL[1]
HON. LUERE B. DEASY
HON. GUY H. STURGIS
HON. CHARLES P. BARNES
HON. NORMAN L. BASSETT
HON. WILLIAM R. PATTANGALL[2]

[1]Resigned May 31, 1926, and appointed Active Retired Justice June 4, 1926.
[2]Appointed July 2, 1926.

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HON. ALBERT M. SPEAR

HON. GEORGE E. BIRD[1]

[1]Died January 19, 1926

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ATTORNEY GENERAL

Hon. RAYMOND FELLOWS

REPORTER OF DECISIONS

FREEMAN D. DEARTH

ASSIGNMENT OF JUSTICES

FOR THE YEAR 1925

LAW TERMS

BANGOR TERM, First Tuesday of June.

SITTING: WILSON, Chief Justice; PHILBROOK, MORRILL, DEASY, BARNES, BASSETT, Associate Justices.

PORTLAND TERM, Fourth Tuesday of June.

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

AUGUSTA TERM, Second Tuesday of December.

SITTING: WILSON, Chief Justice; PHILBROOK, MORRILL, DUNN, STURGIS, BASSETT, Associate Justices.

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CASES

IN THE

SUPREME JUDICIAL COURT

OF THE

STATE OF MAINE

BEERS' CASE.

Cumberland. Opinion October 1, 1925.

Under the Workmen's Compensation Act, if at the time of the accident the employee is "doing his regular work," it may be regarded as equivalent to saying that he was injured in the course of his employment.

Where by consent and desire of the employer, the employee rode upon a truck of employer in going to and from his home to dinner, thus saving time to the benefit of the employer, the errand of the truck at moment of injury being immaterial, constitutes causal connection between the conditions of the case and the injury, and an accidental injury while thus riding would be one rising out of the employment.

On appeal. Claimant was awarded compensation for an injury which occurred while he was riding on a truck of employer with the consent and desire of the employer in going to his home for his dinner; in alighting from the moving motor truck, on arriving at his home, he broke a bone in his leg. An appeal was taken.

Appeal dismissed. Decree below affirmed.

The case fully appears in the opinion.

Frank P. Preti, for claimant.

Oakes & Skillin, for defendant.

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

PHILBROOK, J. This is an appeal by the employer and insurance carrier from a decree granting compensation under the Workman's Compensation Act.

That the injury was an accidental one is conceded, but the issue raises the oft recurring question whether the injury suffered was one arising out of and in the course of the petitioner's employment.

Briefly stated, he claims that he was a dairyman helper and all round man, doing errands, and "anything they told me." At the time of the accident he says that he was riding on the employer's truck, on his homeward way, for dinner; that in a can he was carrying two quarts of milk, one of which was for his own consumption and the other for a neighbor, Mrs. Barber, who had requested him to get the milk for her; that as he stepped from the truck, while it was in motion, he fell and broke his leg; that when the truck was going his way he usually rode upon it; that such custom of riding was with the knowledge and consent of the employer.

Mr. Redfern, treasurer of the respondent company, testified at the hearing that this custom of riding was known and not objected to, by him; that it was understood and agreed that the men, when going home to dinner, or at night, should use the trucks when they wanted to do so; that it would save time and that the company would get more of the services of their men if they rode home and rode back. He further testified that there was no stated time for a noon hour and that because of the very uncertainty of the hours of business he allowed the men to use the trucks. "Sometimes the men would be delayed so much I felt mean not to get them home as soon as I could," said he in testimony.

In the employer's first report of injury, made on form twenty-one, a blank provided by the Industrial Accident Commission, and in this case signed by Mr. Redfern, occur four significant statements,

1. "Q. Was injured employee doing his regular work?"
   "A. Yes."
2. "Q. Was employee injured in course of employment?"
   "A. Yes."
3. "Q. Did accident happen on the premises—if away from the plant state where?"
   "A. On way home to dinner riding on one of our trucks."
4. "Q. Describe in full how the accident occurred?"
   "A. Custom for men to ride on trucks when going to meals in order that time may be saved. Stepped from truck when moving slowly, broke large bone one inch above ankle by not landing on even ground and was thrown."

While his interpretation of legal questions involved may not be conclusive upon the employer, much less upon other interested parties, yet his understanding of the facts of the case, as an intelligent layman would view them, is quite different in some respects than that of astute counsel who now contest the petitioner's claim.

The first two questions are so correlated that answer to one is answer to both. If an employee is "doing his regular work," at the time of his accidental injury, it would seem impossible to avoid the conclusion that he was injured "in the course of his employment."

Who better than the employer would know whether an employee is "doing his regular work" at the time when an accidental injury occurred? Since the employer admits, and the Chairman of the Industrial Accident Commission has found, no fraud appearing, that the petitioner received his injury in the course of the employment, we are not disposed to differ from that admission and finding.

Did the accidental injury arise out of the employment? In *Westman's Case*, 118 Maine, 133, we held that the great weight of authority sustains the view that the words "arising out of" mean that there must be some causal connection between the conditions under which the employee worked, and the injury which he received. Applying that test to the present case, a result in favor of the petitioner is easily and clearly reached. He was riding on one of the company's trucks. Just what errand the truck was upon at that particular moment is not important. By consent, and even desire, of the company, the employees rode upon the trucks in order to save time, whereby the company would get more of the services of their men. Because he was thus riding he received his injury.

The claim that the injury arose from so-called "horse play" is not sustained by evidence of probative value.

Appeal dismissed.
Decree below affirmed.

FRED M. MILLER, PETITIONER

vs.

HIRAM D. WISEMAN ET ALS.

Cumberland. Opinion October 1, 1925.

Whenever it is shown that the inferior court or tribunal has no jurisdiction of the subject matter, and the question is not open on appeal, the court will not refuse a writ of certiorari.

Want of jurisdiction apparent on the face of the record can be raised by motion to dismiss at any stage of the proceedings, and cannot be waived.

A process issuing from a court, the authentication of which rests upon the court seal, is void in absence of a seal.

On exceptions. A petition for a writ of certiorari to require two justices of the peace in a poor debtor's disclosure proceeding, to certify and bring up their records of the proceedings for the purpose of having them quashed for want of jurisdiction on the ground of the absence of a court seal on the process. The application for the writ was denied and exceptions taken. Exceptions sustained.

The case very fully appears in the opinion.

Frank H. Haskell, for the petitioner.

Maurice E. Rosen, for the respondent.

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

DUNN, J. Exceptions to the denial of an application for certiorari to justices of the peace.

An impecunious person held in arrest on execution was discharged on giving bond. R. S., Chap. 115, Sec. 49. He endeavored to save his bondsmen harmless, and to absolve himself from future loss of liberty on any enforcing process of the same judgment, by proceedings under the Poor Debtor's Act (section 51, et seq.).

The citation from the magistrate to the creditor failed to follow the statute in the positive requirement of a seal. Section 51.

At the appointed time and place the parties met. One justice of the peace was chosen by the debtor, and the one by the counsel for the creditor, and the two thus selected sat together in the disclosure court.

Once the court was functioning, the creditor's counsel raised the point of the absence of the seal from the citation, and moved to quash. The motion was overruled. Counsel retired. The hearing went on destitute of interest, and eventually the statute-prescribed oath was administered to the judgment debtor.

On petition for certiorari it was ruled: (1) The omission of the seal is not a matter of substance; (2) that participation in the forming of the court effected cure of clerical irregularity in the process; (3) that, in and as a matter of judicial discretion, certiorari will not issue to correct what an amendment would have reached.

In hearings to liberate debtors, mere want of form and circumstantial errors count as nothing when the situation may be rightly understood, and are amendable on motion. Section 53.

The art of writing was not always an accomplishment common to citizenry. Before literacy was general, and the written signature considered a truer voucher of genuineness, the main proof of the authenticity of documents, whether private or public, was an impression made on clay, lead, wax, paper, or other substance by means of a die of metal, of stone, or other hard material. The employment of seals may be traced to high antiquity. The Bible contains frequent allusions to them. The use of clay in sealing is noticed in the book of Job (xxxviii, 14), and the signet ring in Genesis (xxxviii, 18). Engraved signets were long ago in use among the Hebrews (Ex. xxviii, 11, 36; xxxix, 6). As recent as the time of Shakespeare, Shylock speaks to Antonio:

"Go with me to a notary, and seal me there
Your single bond; . . . ."

—*Merchant of Venice, Act 1, Sc. iii.*

And Antonio replies:

"I 'll seal to such a bond."

—*Id.*

In another play the dramatic poet makes Hamlet say:

"Where every god did seem to set his seal
To give the world assurance of a man."

—*Act 3, Sc. iii.*

Documents are still sealed in compliance with legal formality. But personal seals with effigies, heraldry, or other devices, with or without a name, or with name only, or with legend only, distinguishing the person, or supposed to so distinguish him, and which it would have been difficult to duplicate exactly, are not in use. The seal has lost the power of acting as a substitute for signatures. It is now affixed to legal instruments principally to furnish evidence of their authenticity. Sealing has become constructive rather than actual. *Woodman* v. *York Railroad Company*, 50 Maine, 549.

Under the statutes of Maine, a justice of the peace has no seal of office, but a wafer attached could be called a seal. *State* v. *McNally*, 34 Maine, 210. The demand of the statute, in the very language and order of the olden law, that the citation be "under his hand and seal" (2 Hale P. C.), may be without much present day meaning so far as sealing is concerned. But constitutional legislation calls therefor, and veneration for the law is the politic religion of the State. The requirement that process be sealed would be nugatory, if to regard it or disregard it amounted to the same thing. The compulsion of authority is yet essential to the public good.

If the seal has outlived its usefulness, if its competency to authenticate has ceased, if the effect of its absence should be classed as a formal irregularity which is waived by general appearance, or the absence be amendable at the discretion of the court, if sealing be a custom not adapted to our day, let the Legislature be told. The image of the seal, technical though perhaps it be, is so interwoven with our rules, and understood and advised by the profession as basic, that it is not to be abridged this side of the law-making power. "So long as a seal is required to be affixed, though we may not be able to discover its real use, yet we must not dispense with what the law requires." MELLEN, C. J. in *Porter* v. *Haskell*, 11 Maine, 177. Chief Justice Shepley thought insistence upon the use of the seal to have purpose. "It gives the instrument a higher grade of character, arrests the attention in the hurry of business, allowing a pause for reflection." *State* v. *Drake*, 36 Maine 366. These jurists spoke before the enactment, in 1878, Chapter 59, of the correcting power. But the omission of the seal does not fall in this class. Collateral attack will not avoid its absence from a debtor citation. *Lewis* v. *Brewer*, 51 Maine, 108; *Gray* v. *Douglass*, 81 Maine, 427. In *Lewis* v. *Brewer*, Judge Walton remarked in passing: "If a party desires

to take advantage of such a defect, he should call the attention of the justices to it, in which case they would undoubtedly hold the citation to be insufficient. If not, the aggrieved party could apply for a writ of certiorari to quash their proceedings." Language parallel in effect is in *Gray* v. *Douglass*, supra.

That process shall not abate for want of form, or for incidental errors or mistakes, not bar to understanding rightly the person and the case, is statutory to all courts of justice. Laws 1821, Chap. 59, Sec. 16; R. S. Chap. 87, Sec. 11. The law finds application on both civil and criminal sides. An execution issued by a magistrate without being under seal is void *Porter* v. *Haskell*, supra. In a previous case, where the clerk omitted to affix the seal, he was allowed to do so. *Sawyer* v. *Baker*, 3 Maine, 29. This decision is referred to as made on ex parte motion (*Porter* v. *Haskell*, supra), from which it was inferred as not esteemed a reliable authority (*State* v. *Fleming*, 66 Maine, 142). A venire without seal is illegal. *State* v. *Lightbody*, 38 Maine, 200. An indictment where the venire must be under seal is bad, and amendment cannot supply the lack. *State* v. *Fleming*, supra. An original writ without seal is not amendable. *Witherell* v. *Randall*, 30 Maine, 168. A warrant without seal is void. *State* v. *Drake*, supra. If the writ have a wrong seal, the right one may not be impressed instead. *Bailey* v. *Smith*, 12 Maine, 196. Undeniably, if the writ were unsigned, this correction could be made (*Matthews* v. *Bowman*, 25 Maine at page 163), did the statute not interdict (*Pinkham* v. *Jennings*, 123 Maine, 343). The date of a writ (*Gardiner* v. *Gardiner*, 71 Maine, 266), the teste (*Converse* v. *Damariscotta Bank*, 15 Maine, 431), the return day (*Guptill* v. *Horne*, 63 Maine, 405), and the name of the defendant, rights of third persons not intervening (*Wentworth* v. *Sawyer*, 76 Maine, 434), all are correctable. The reason these errors may be made right, and absence of the seal is forbidden to be, is that theoretic custody of the seal is with the official sealer of the writs, who affixes it to documents in other respects already completed. "No signable writs are to be sealed, till they have been duly signed by the proper officer. R. T. 1656." 1 Tidd's Practice, 33. "As for the commission from the king, it staid at the seal for want of paying the fees." Winthrop, History of New England, 1, 276.

A process, issuing from a court which by law authenticates such process with its seal, is void if issued without a seal. *Aetna Ins. Co.* v. *Hallock*, 6 Wall., 556, 18 Law ed., 948. In this case no power of a

curative statute is involved. But nevertheless it sheds light upon the importance attached to the seal. A summons issued without seal can give no jurisdiction where the statute provides it must be issued under seal, although the statute also provide that the court should disregard any error or defect which does not affect the substantial rights of the parties. *Choate* v. *Spencer*, (Mont.) 20 L. R. A., 424. And, to come back home, want of jurisdiction apparent on the face of the record can be raised by motion to dismiss at any stage of the proceedings. *Tibbetts* v. *Shaw*, 19 Maine, 204; *Pinkham* v. *Jennings*, supra.

Clearly a distinction is to be drawn between appearing generally in proceedings before a tribunal theretofore set up, and as in the nature of the situation one must, appearing to choose one of the magistrates, that a motion to dismiss might be made to him and his associate. Simple mention of the fact of the distinction would seem to dispose of the proposition.

Whenever it is shown that the inferior court or tribunal has no jurisdiction of the subject-matter, and the question is not open on appeal, the court will not refuse the writ. *Bangor* v. *County Commissioners*, 30 Maine, 270; *Levant* v. *County Commissioners*, 67 Maine, 429; *Phillips* v. *County Commissioners*, 83 Maine, 541.

It remains to seal the destruction of the pretended proceedings before the justices of the peace by directing that the mandate be,

Exceptions sustained.

STATE *vs.* JOHN E. MORTON.

Lincoln. Opinion October 2, 1925.

The legal size of lobsters is determined by measurement of the body shell, and the duty of fishermen to liberate short lobsters alive, is not affected by wind, weather, or season of the year.

In certain statutory crimes the motive and scienter, unless the act is made mala prohibita because negligently done, are immaterial on questions of guilt.

Since the Legislature has furnished the method of determining the legal size of lobsters, which method is by measurement of the body shell, it is not error to exclude testimony as to weight of lobsters in determining their legal size.

It is not error to exclude questions relating to wind, weather, or season of the year, as affecting the duty of the fisherman to liberate short lobsters alive, as required by statute.

In the instant case the finding by the jury of the exact number of short lobsters in possession of the respondent, is not necessary, as a finding of any number would justify a verdict of guilty.

On exceptions by respondent. Respondent was charged with possession of short lobsters in violation of the provisions of R. S., Chap. 45, Sec. 35, and amendments thereto. He was found guilty in the Lincoln Municipal Court and on appeal was found guilty by a jury. During the trial before the jury, counsel for the respondent, entered several exceptions to the exclusion of evidence and to instructions and refusal to instruct. Exceptions overruled. Judgment for the State.

The opinion fully states the case.

Weston M. Hilton, County Attorney, for the State.

George A. Cowan, for the respondent.

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

PHILBROOK, J. By complaint and warrant the respondent was charged with possession of short lobsters, which were not liberated alive in accordance with the provisions of R. S., Chap. 45, Sec. 35, as amended Chapter 184, Public Laws 1919, and by Chapter 98,

Public Laws 1921. After hearing by a magistrate the case came to the Supreme Court on appeal. Jury trial resulted in a verdict of guilty and the case is now before us upon fourteen exceptions to the exclusion of evidence and to five instructions and refusal to instruct in the charge of the presiding Justice.

EXCLUSION OF EVIDENCE.

The first, eleventh, twelfth, and fourteenth exceptions arose from the exclusion of inquiries regarding the weight of lobsters, the respondent claiming that such questions, if admitted, and the answers thereto, would tend to dispute the testimony of the Wardens. We are unable to concede the propriety of this claim. The Legislature, in explicit language, has furnished the method of determining the legal size of lobsters, which method is by measurement of the body shell and not by weight. To admit testimony as to weight would be an invasion of legislative standards, to dispute direct evidence of length by doubtful evidence of heaviness.

The second, third, fifth, sixth and seventh exceptions relate to questions concerning the season of the year when the short lobsters were found in the possession of the respondent and had not been liberated in accordance with the provisions of the statute. Herein the respondent claims that in cold weather especially, even by the use of due care, there would be some short lobsters taken aboard any lobster vessel. But if this condition is to be provided for it is the province of the Legislature to make the provision and not the province of this court. Under the statute, as it now exists, "any lobster shorter than the prescribed length when caught shall be immediately liberated alive." Conditions of wind, weather, or season of the year are not provided for by the Legislature and we have no power to provide them.

The fourth, eighth and thirteenth exceptions relate to intent and scienter on the part of the respondent. Herein the respondent claims that if the smackman happens to get some short lobsters on board his vessel, with no intent on his part to violate the law, he should be given opportunity to liberate them, and if left to himself does liberate them, then he has not violated any law, and the question of intent should then be considered by the court; that he must knowingly have such lobsters aboard and neglect, after such knowledge, to

liberate them. The statute in its present form requires immediate liberation, alive, of short lobsters. *State* v. *Chadwick*, 118 Maine, 233. Liberation at the convenience of the fisherman is a far cry from the demand of the statute. The maxim "actus non facit reum, nisi mens sit rea" does not always apply to crimes created by statute, and therefore if a criminal intent is not an essential element of a statutory crime it is not necessary to prove any intent in order to justify a conviction. Many instances may be cited where the doing of an act prohibited by the Legislature constitutes the crime and the moral turpitude or the purity of the motive by which it was prompted as well as knowledge or ignorance of its criminal character as well as the degree of care used, unless the act is made mala prohibita because negligently done, are immaterial circumstances on the question of guilt. The only fact to be determined in such cases is whether the defendant did the act. *State* v. *Rogers*, 95 Maine, 94; *State* v. *Chadwick*, 119 Maine, 45. These principles applied to the contentions of the respondent upon this branch of the case render futile the exceptions immediately under consideration.

The ninth exception relating to the exclusion of evidence as to the effect of bailing lobsters; the tenth to exclusion of evidence as to any market for short lobsters; are not pressed in argument and are of no merit.

THE CHARGE OF THE PRESIDING JUSTICE.

The first exception is to the inquiry presented to the jury in these words: "Did he immediately liberate them after he took them aboard?" The present statute enjoins immediate liberation alive, of short lobsters, *State* v. *Chadwick*, supra. While the question propounded in the charge did not contain the word "alive" yet we think, upon examination of the entire charge, that the jury fully understood the law and that no prejudicial error can be successfully claimed. The exceptions to denial to instruct relate to the following:

"1. The state must prove to you beyond a reasonable doubt that the respondent knowingly had in his possession short lobsters. The number must be found by you."

"2. The state must prove beyond a reasonable doubt that the respondent, given an opportunity after having knowledge of illegal lobsters in his possession, did not liberate such lobsters alive."

"3. It is proper for the jury to take into consideration weather conditions, and the effect of such conditions upon the lobsters while being loaded into the smack, as bearing upon the question of respondent's knowledge of having illegal lobsters aboard."

"4. The burden is on the state to show to you beyond a reasonable doubt that the respondent knowingly, or by ordinary care may have known that he took short lobsters aboard."

These exceptions so far as they relate to intent, scienter and due care, have already been discussed. The finding by the jury of a definite number of short lobsters in the possession of the respondent is not necessary. A finding of any number would justify a verdict of guilty. The number justified by the evidence fixes the penalty which the court must impose.

Exceptions overruled.
Judgment for the State.

LOUISE M. MILLS *vs.* C. EARLE RICHARDSON

L. NEIL MILLS *vs.* SAME.

Cumberland. Opinion October 5, 1925.

New counts are not to be regarded as for a new cause of action when the plaintiff in all the counts attempts to assert rights and enforce claims growing out of the same transgression, act, agreement or contract, however great may be the difference in the form of liability as contained in the new counts from that stated in the original counts.

While this court has always been reluctant to invade the province of the jury, which is to act as arbiters of fact, in the instant case from a careful examination of the entire record, it is forced to the conclusion that the jury erred in their finding.

On exceptions and general motion by defendant. Two actions, tried together, in which both plaintiffs sought to recover damages alleging negligence on the part of the employees of defendant, in caring for Louise M. Mills, one of the plaintiffs, at his hospital at

Skowhegan. The plaintiffs, before pleas were filed, moved to amend the declaration in each writ, which amendments were allowed and defendant excepted. A verdict for plaintiff in each case was rendered and defendant filed general motions for a new trial. Exceptions overruled. Motions for new trial sustained.

The case appears in the opinion.

Joseph E. F. Connolly and Harry C. Libby, for plaintiff.

Pattangall, Locke & Perkins, for defendant.

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

PHILBROOK, J. The plaintiffs are wife and husband. The defendant is a surgeon and physician who owned, controlled and managed a hospital in May, 1918. In that month a physician residing and practicing his profession in the village where the hospital was situated brought the female plaintiff to the hospital to be a patient during her period of childbirth which was then approaching.

According to the testimony of the defendant he had nothing to do with Mrs. Mills' case except to supply the hospital and nurses, that he did not treat the case, that Mrs. Mills was in no sense his patient, and that he gave no directions concerning her treatment, but, on the contrary, that the physician who brought her to the hospital was her attending physician. This attending physician frankly testified that Mrs. Mills was his patient during her stay at the hospital.

The original declarations charged that the defendant was employed as a physician and surgeon to attend Mrs. Mills, in her approaching illness, and that her injuries were the result of his negligence, or the negligence of those who were his servants, in that the defendant, by his servants, who were nurses at the hospital, "improperly, unintelligently, and unskillfully, and carelessly and negligently washed and bathed the body of the plaintiff" (Mrs. Mills) "with an excessive and dangerous amount of bichloride of mercury."

At the trial term in the court below the plaintiffs offered amendments to their declarations which omitted to charge that the defendant's negligence as a physician and surgeon, through his servants, was the cause of the injuries complained against, but did charge that the defendant held himself out as conducting and maintaining a competent and reliable hospital, employing nurses and attendants

of great skill and ability, and qualified to properly and intelligently care for all diseases and physical infirmities. The amended declarations then proceeded to charge that the defendant was employed "to properly and intelligently care for her said condition until she should deliver forth child and become well." In appropriate language the amended declarations then declared that the defendant, by one of his servants, a nurse employed in the hospital, carelessly and negligently bathed Mrs. Mills with an excessive and dangerous amount of bichloride of mercury, from which negligent treatment she received painful and permanent injuries.

To the granting of these amendments the defendant objected and under this objection exceptions were allowed. The defendant claims that the amendments set forth a new and different cause of action.

EXCEPTIONS.

It is quite apparent that the original declarations charged the defendant with liability in his capacity as a physician and surgeon, while the amended declarations charge him with liability as proprietor and manager of a hospital, regardless of the question whether he was acting as a medical man or a layman.

Sustaining and adopting the rule declared in *Smith* v. *Palmer*, 6 Cush., 513, our court, in *Limerick National Bank* v. *Jenness*, 116 Maine, 28, held that new counts are not to be regarded as for a new cause of action when the plaintiff in all the counts attempts to assert rights and enforce claims growing out of the same transaction, act, agreement or contract, however great may be the difference in the form of liability, as contained in the new counts, from that stated in the original counts.

The statements of the liability of a defendant may vary when the wrong done and the loss occurring are the same. *McConnell* v. *Leighton*, 74 Maine, 415.

We hold that by virtue of the rules thus enunciated the amendments were allowable and the defendant takes nothing by his exceptions.

MOTION.

As both actions depend upon the same claim we will, for convenience, now deal only with the case of Mrs. Mills. She claims

that she went to the defendant's hospital as a patient in April, 1918, and on the twenty-seventh day of that month was delivered of her child. She made no complaint of improper treatment until May ninth, at which time she says that she was given a douche containing an excessive amount of bichloride of mercury which caused burning of a portion of her private parts. From this burning she says she sustained the injury from which serious and lasting results followed. But for nearly six years she had made no complaint to the defendant and then, only a few days before the action would be barred by the statute of limitations, she makes known to him that she believes she has a cause of action against him for negligence of his nurse in administering the douche. The charge of the presiding Justice, by the bill of exceptions made part of the record, discloses a most fair and complete statement of the facts which must be proved by the plaintiff, together with a careful and correct statement of the elements of law which governed the case. With testimony and charge as guides the jury rendered a verdict for the plaintiff. This court has always been reluctant to invade the province of the jury, which is to act as arbiters of fact, but in the present case, after examining the entire record with great care, we are compelled to the conclusion that the jurors erred in their finding. Taken at its best, especially in the light of the testimony given by medical experts called by both sides, the conditions of which the plaintiff complains were more likely to have arisen from leucorrhea and other physical conditions, than from the douche. In each case the entry will be

Exceptions overruled.
Motions for new trial sustained.

NOE GAGNON'S CASE.

Somerset. Opinion October 5, 1925.

Under the Workmen's Compensation Act an employee, who, at the time of the injury, was engaged in loading logs at a landing onto cars, owned and operated by the employer in conveying the logs from the landing to his sawmill to be manufactured, the employer having nothing to do with the cutting and hauling of the logs to the landing, is engaged in an employment within the operation of the act, where employer's assent covered "Manufacturing Lumber" and his policy included "Logging railroad-operation."

Whether or not an employee at the time of his injury was engaged in an employment within the operation of the compensation act, is a question of fact to be determined by the Commission, and if any rational view of the evidence supports it, the decision is beyond review on appeal.

Should the ultimate conclusion that an injured employee was within the operation of the act be based on probative facts found which fail utterly to establish the ultimate facts found, the finding could be annulled.

But where, though the facts are not in dispute, ordinary minds might ordinarily conclude oppositely from the same elemental premises, the question is for the trier of facts.

In the proceeding for compensation, the Commissioner's finding on the evidence, that claimant was an employee engaged in manufacturing lumber, and not logging, is one of fact.

The line of demarcation between some evidence and no evidence, between facts settled finally and no facts at all, may be faint, obscure, and not easily definable, yet if the line be there, experience and sense as the companions of reason will bid the rejection of the suggestion of the barrenness of evidence, even before the divisional line is definitely traced.

In the instant case it is not to be said that the conclusion drawn by the Commissioner on the evidence is unreasonable,—that it is erroneous as a matter of law.

On appeal. Workmen's compensation case. Petitioner was injured while working on a landing in the woods loading logs on cars owned and operated by the Jackman Lumber Company, one of the respondents, by having his hand caught and crushed between two logs, the cars being used to convey the logs from the landing to the mill of Jackman Lumber Company where they were manufactured. Compensation was awarded and an appeal taken. The issue involved was

as to whether the petitioner at the time of the injury was performing work for the Jackman Lumber Company covered by its written assent and industrial insurance policy. The employer filed an assent for "Manufacturing Lumber," and in its policy was included "logging railroad-operation" and excluded logging and lumbering operations. Appeal dismissed with costs. Decree below affirmed.

The case fully appears in the opinion.

Claimant appeared without counsel.

Merrill & Merrill, for respondents.

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

DUNN, J. Appeal by an insurance carrier from a decree in favor of a claimant for compensation under the Workmen's Compensation Act.

When, in the course of and out of his employment, accidental physical injury befell Noe Gagnon, he was "rolling the landing."

There is no question about the accident, the extent of the injuries received, the work actually being performed by the claimant, nor the sufficiency of the answer, nor that any condition, but one, is unsatisfied. The contest is whether in his employment the employee was within the boon of the protection of the act.

The employer in becoming an assenter excluded logging and lumbering operations. Assent was restricted to employees in its business of manufacturing lumber. As incidental to or connected with that business was the employer's logging railroad.

The case was heard before the Chairman of the Industrial Accident Commission. He found the fact to be that the injured man was doing work auxiliary to the railroad, which work should be treated as assisting in the manufacture of lumber. Award of compensation was made, enforcing decree was entered, and appeal followed.

Whether the finding of fact is supported by legal evidence is the limit of passing in review. Thus is the declaratory fiat of the Legislature. For the appeal to be sustained, no fraud being involved, any evidence on which the award was rested must be set down as equal to nothing. R. S., Chap. 50, Sec. 4, as amended by 1919 Laws, Chap. 238; *Hight* v. *Company,* 116 Maine, 81; *Simmons' Case,* 117 Maine, 175; *Westman's Case,* 118 Maine, 133; *Mailman's Case,* 118 Maine, 172; *MacDonald* v. *Company,* 120 Maine, 52; *Gauthier's Case,*

120 Maine, 73; *Orff's Case*, 122 Maine, 114; *Williams' Case*, 122 Maine, 477; *Spiller's Case*, 122 Maine, 492; *Ross' Case*, 124 Maine, 107.

In familiar parlance logging is over when the logs are landed. And, after this, is driving. The driver rolls the logs from the landing into the watercourse, whence the drive is floated and urged on and its course directed down to the destined place for sale, or to the manufactory.

In woodcraft as elsewhere in the affairs of men relationships and rights and duties flow from and are differentiated by contracts. A contract might call for the landing of logs in the stream. Then there would be no landing to roll. But alike with the lumberman, running the operation on his own account from the forest to the boom, or to his own mill, and with the logger, or with the independent contractor, each is through hauling, or done logging, when his logs are on the landing. These are colloquial phrases.

What has been said speaks of years ago. In the main matters are still the same as aforetime. But another order has been attained. A privately owned railroad is substitute for a public highway on water. And it was for the Commissioner to harmonize the old with this new condition.

The Jackman Lumber Company, the employer in this case, had its sawmill at Moose River. It maintained no camp in the woods. It was not a lumber operator. It was not a logger. Independent contractors supplied logs to it. They cut and hauled the logs. The landing was fifteen miles from the mill. Trains of log-laden cars arrived over the company's railroad, were unladen of their lading at the mill. The contractors had loaded the cars, when they were at hand, in the stead of piling the logs on the landing. Under the contracts the surplus logs only, so to speak, were landed.

All the logs were hauled. Some were on the landing. It was for the company to load the cars. Gagnon came to do it. He may or not have come with his cant dogs and handspikes as a contractor. It is inconsequential. He came at the instance of the company. He jobbed it for twenty days before going on day work, as he says. Twenty-five days later he got his hand hurt.

As the Commissioner saw and understood the situation, this case of Gagnon's was jammed in between analogousness to the starting of a drive of logs on the one side, and the business of manufacturing

lumber, with the railway operating to the very jam in conceded appurtenance to the business, on the other. The Commissioner broke the jam. Gagnon's Case was landed on the manufacturing side. In the Commissioner's view, it was the mode of hauling logs which was advanced, the more so than the method of driving them, in the evolution of logging and lumbering.

It is easy and natural to say that rolling the landing has to do with driving logs. But more than this is involved. The finding by the Commissioner shall not be disturbed if any competent substantive evidence, or reasonable inferences therefrom, warrants it. In this wise is the posit of controlling principle met at the threshold of of consideration. *Mailman's Case,* supra; *Jacque's Case,* 121 Maine, 353.

Whether or not an employee at the time of his injury was engaged in an employment within the operation of the compensation act, is a question of fact to be determined by the Commission, and if any rational view of the evidence supports it, the decision is beyond review on appeal. *Smith* v. *Coles* (1905) 2 K. B., 827; *George* v. *Industrial Acc. Com.*, (Cal.), 174 Pac., 653. A finding is not at all events impregnable. Should the ultimate conclusion that an injured employee was within the operation of the act be based on probative facts found which fail utterly to establish the ultimate facts found, the finding could be annulled. *Miller* v. *Industrial Acc. Com.*, (Cal.), 178, Pac. 960. But where, though the facts are not in dispute, ordinary minds might ordinarily conclude oppositely from the same elemental premises, the question is for the trier of facts. *Clark's Case,* 124 Maine, 47. In the proceeding for compensation, the Commissioner's finding on the evidence, that claimant was an employee engaged in manufacturing lumber, and not in logging, is one of fact. *Smith* v. *Coles,* supra; *Posey* v. *Moynehan,* 186 N. Y., Supp. 753.

"In ordinary questions of law," to quote from Mr. Seargent Prentiss, "decision travels with confidence and ease upon the highway of precedent, but penetrates with slow and doubtful steps among the less beaten paths." No question exactly as the one presented here has arisen and found answer in our reports. None the less lights are by to guide in searching for the existence of mere evidence.

Employers of loggers and lumberers and drivers may come within the compensation act if they so elect. *Oxford Paper Company* v. *Thayer,* 122 Maine, 201; *Mary A. White's Case,* 124 Maine, 343. In

examining into the scope of an assent, the assenting instrument and the accompanying insurance policy, are to be read. *Fournier's Case,* 120 Maine, 191; *Michaud's Case*, 121 Maine, 537; *Cormier's Case,* 124 Maine, 237; *Mary A. White's Case*, supra. Logging and lumbering operations are expressly excluded from this policy. What is meant by employment in logging and lumbering operations? The Legislature has not given a definition, but has only by implication pointed out that the expression includes the work of cutting, hauling, rafting, and driving logs. R. S., Chap. 50, Sec. 4, as amended by 1919 Laws, Chap. 238, Sec. 4.

The Jackman company, when it took out and filed the policy, was not cutting logs. It was not hauling logs, unless drawing them on and along its private railroad was hauling. The mill had logs "through jobbers"—"by the thousand." And hauling by the jobber, or contractors, ended when there were no more logs to be hauled, and all the logs save those the railroad had already taken away, were on the landing.

Loading the logs from the landing was for the company. The company loaded by its own crews. Again, it "jobbed" the loading. In the evidential portrait Mr Gagnon is first seen as a jobber. His job came to an end. He was hired to labor for a daily wage. It would seem that the manner of paying him, and not the character of his work, was changed. "We were running a crew on a branch of the railroad," testified an executive of the company. This crew was loading the logs. It was not the crew that had actual connection with the operating of the train on the rails. The train crew neither loaded nor unloaded logs. The loading crew remained at the landing, and of this crew was Gagnon.

Operating the railroad was an adjunction to manufacturing lumber. The assenter, and its insurance carrier make this prominent in the record. Stress is laid that the contention of the nonexistence of award-supporting evidence is upheld by the accounting system of the employer. The system is comprehensive in detail. The laundry, the sawmill, an hotel, the railroad, blacksmithing, the clerical force, construction and repairs, not to pause to mention any other, each has appropriate page. And each account closes into another that the gain or loss of the business, or the result in any department, may be known.

So, in the effort to fall this landing man within the exclusion of the assent, there was introduced other testimony to the effect that loading the logs was a distinct business; distinct from the railroad; distinct from the mill; "as separate as the logging end," said the witness.

Apparently, from the complete story of events and their propinquity, the Commissioner found that car loading was separate from the logging end and had to do with railroading, and that the railroading and the logging which preceded it, merged eventually in the composite of manufactured lumber.

The line of demarcation between some evidence and no evidence, between facts settled finally and no facts at all, may be faint, obscure, and not easily definable. And still yet, if the line be there, experience and sense as the companions of reason will bid the rejecting of the suggestion of the barrenness of evidence, even before the divisional line is definitely traced.

On the evidence it is not to be said that the conclusion of facts drawn by the Commissioner is unreasonable,—that it is erroneous as a matter of law. Nor is the conclusion without general likeness in recorded authority. The transfer of coal by a railroad company from a schooner to its cars is "operating a railroad." *Daley* v. *Boston & Albany, etc. Co.*, 147 Mass., 101.

Appeal dismissed with costs.
Decree below affirmed.

UNION SAFE DEPOSIT AND TRUST COMPANY ET AL., TRUSTEES

vs.

FRED V. WOOSTER ET ALI.

Cumberland. Opinion October 10, 1925.

In determining the construction and interpretation of a will where a trust is created to terminate on the death of the beneficiary the language "to be divided equally among my heirs" in the residuary clause of the will which embraced the remainder interest in the trust fund, creates a vested interest in those who are heirs at the time of the death of testator.

Under the language "then to become the property of my children or their heirs" in a clause creating a trust to terminate on the death of the beneficiary, the remainder on the termination of the trust goes to the children living at the time of the death of the beneficiary and to the heirs of a deceased child as an executory interest.

In the instant case the testator could have indicated that the determining of his heirs should be referable to a time different than that of his death, but he did not.

The widow was not an heir of her husband. The son and daughter, and they two only, came within the meaning of the term "my heirs." The daughter is dead, but her will lives and it is for the trustees to pay over that which primarily was intended for the daughter, to the authorized representative performing her will.

It is different in the second trust where the testator gives the interest on two thousand dollars to the widow so long as she lives, "Then to go to my children or their heirs." The estate is in trust until the death of the widow. If the children are then living the property is to be theirs, but if a legatee should die in the lifetime of the intervening life beneficiary, then the property is to go over to the heirs of the dead son or daughter. While the precedent beneficiary was living, the daughter of the testator died. Her gift went, not to the testator's heirs, but by substitution to the daughter's heirs, as an executory interest under the daughter's father's will.

The adverb of time—"then"—"then to go to my children"—ordinarily would be construed to relate merely to the time of the enjoyment of the gift, but this word in connection with the disjunctive conjunction—"or,"—and with regard to the wording of the residuary clause, makes it quite impossible to read the will and collect meaning, without perceiving a clear intention to give the two thousand dollars to the children if they survived the widow; otherwise, to the heirs of either nonsurvivor in the stead of the one dead.

On report. A bill in equity seeking the construction and interpretation of certain clauses in the will of Charles L. Marston who died in Bangor in 1895. The case was reported on bill and answers. Bill sustained. Decree as indicated.

The contentions of the parties sufficiently appear in the opinion.

Sydney B. Larrabee, for Union Safe Deposit and Trust Company, and *Frank L. Marston,* Trustees.

James H. McCann, for Frank L. Marston individually.

Ralph E. Joslin, for Fred V. Wooster.

Cook, Hutchinson & Pierce, for Fidelity Trust Company.

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

DUNN, J. This case was reported on bill and answers to obtain the legal construction of certain clauses in a will.

Charles L. Marston lived in Bangor. He drew his own will. The document was proved and allowed soon following his death in 1895. It creates two trusts. The peculiar testamentary phraseology, as the call is to construe, is this:

"Second. . . . . I also give her (meaning his wife) fifty dollars per month so long as she remains my widow and wish my administrators to pay it to her the first day of each and every month so long as she so remains and I wish the sum of two thousand dollars to be invested so she can have the interest on it as long as she lives, then to go to my children or their heirs . . . . . Meaning in this will to provide well for my said widow's support so long as she remains such but the interest of the two thousand dollars to be paid to her the first of Januray and July as long as she may live, then to become the property of my children or their heirs . . . . ."

"Third. I wish and direct that twenty five thousand dollars be permently invested, the interest or so much of it as is nessary be used to pay the above payments, the balance if any be added to the twenty five thousand dollars."

In the sixth item is this clause:

"And the residue of my property after all the above amounts have been paid and provided for to be divided equally among my heirs."

When the will was written there were living, the wife second in marriage to Mr. Marston, the son born of his former wedlock, the

daughter by his second wife, and no other person of immediate relationship to him. The family situation was the same when Mr. Marston died.

The widow, who never did remarry, now is dead. Previous to the death of the widow the daughter had died issueless and testate. Her husband survives, the sole legatee under her will. The testator's son is alive. The two trust funds are the only undistributed assets. And the interest of the son therein is collateral to his obligation to the bank which is one of these defendants. No creditor of the primary decedent is concerned.

What should the one set of trustees of the two trusts do properly to perform their final duties?

The canonically expressed intention of the testator is the very soul and life of the whole matter. When such intention is ascertained, the will must not be construed beyond that of the maker. His manifest intent, validly established in the context of the entire will, must not be trenched upon and overrun.

To start looking forward from the will. The surviving wife is first beneficiary of both trusts. From the one, fifty dollars every month throughout widowhood. On the death or remarriage of the widow, which ever event is earliest to occur, the trust terminates and the sixth or residuary clause disposes of the fund and the unused increment, the testator's diction being, "the remainder of my property after all the above amounts have been paid and provided for." The "above amounts" is comprehensive of the fund for the monthly payments during widowhood and of the two-thousand-dollar corpus of the second trust. The word, "permently" features in the language of the will, but the permanency of testamental contemplation is past, the purpose of the devisor having been accomplished. *Dodge* v. *Dodge*, 112 Maine, 291. And the property in this fund passed, in vested but possession-deferred interest, to and among those persons upon whom the law would have cast distributive succession to Mr. Marston's property at his death, had he died intestate. He could have indicated that the determining of his heirs should be referable to a time different than that of his death, but he did not.

The widow was not an heir of her husband. *Lord* v. *Bourne*, 63 Maine, 368; *Golder* v. *Golder*, 95 Maine, 259. The son and the daughter, and they two only, came within the meaning of the term "my heirs." The daughter is dead, but her will lives, and it is for

these trustees to pay over that which primarily was intended for the daughter, to the authorized representative performing her will.

It is different in the case of the second trust, thus to refer in convenience to the other relation. Here, the testator gives the interest on two thousand dollars, so long as the woman lives, whether in widowhood or no. "Then to go to my children or their heirs." Or, in the emphasis that repetition tends to give, "then to become the property of my children or their heirs."

The intent of the testator is not problematical. The estate is in trust to the death of his widow. If the children are then living the property is to be theirs, but if a legatee should die in the lifetime of the intervening life beneficiary, then property is to go over to the heirs of the dead son or daughter. While the precedent beneficiary was living, the daughter of the testator died. Her gift went, not to the testator's heirs, but by substitution to the daughter's heirs, as an executory interest under the daughter's father's will. *Buck* v. *Paine*, 75 Maine, 582.

The rule is well established that personal property, as well as real estate, is a proper subject of executory interests and limitations. In wills the strictness of the common law, that the gift of a chattel for an instant was a gift forever, and that a limitation over was void, was mitigated in order to carry out the obvious intention of the testator, where the contingency on which the limitation depends is not more remote than the law allows. *Buck* v. *Paine*, supra; *Smith* v. *Bell*, 6 Pet. 68, 8 Law ed., 322; *Doe* v. *Considine*, 6 Wall., 458, 18 Law ed., 869; *Burleigh* v. *Clough*, 52 N. H., 267, 273; 2 Bl. Com., 172 et seq; 11 R. C. L., 473; 40 Cyc., 1644.

The adverb of time—"then"—"then to go to my children"—ordinarily would be construed to relate merely to the time of the enjoyment of the gift, but this word in connection with the disjunctive conjunction—"or,"—and with regard to the wording of the residuary clause, makes it quite impossible to read the will and collect meaning, without perceiving a clear intention to give the two thousand dollars to the children if they survived the widow; otherwise, to the heirs of either non survivor in the stead of the one dead. Such was the sense in which the legator wrote, uncontroverted by any positive rule of law, in willing his property for those he wanted to have it when he got through. The same words, when taken independently, will frequently authorize a construction totally at war with that which

will be at once acknowledged as the legitimate meaning when considered in connection with the whole thought on the same subject.

Of the second or two-thousand-dollar trust, Frank L. Marston, the son, or his assignee, is entitled to share to the extent of one half of the net amount for distribution. The remaining part passed, directly by Charles L. Marston's will, at the moment of his daughter's death, to her "heirs."

As a general proposition wills are supposed to speak in reference to the domicillary laws of the testator. *Houghton* v. *Hughes*, 108 Maine, 233; *Lincoln* v. *Perry*, 149 Mass., 368. Accordingly, the widower of the deceased daughter of the testator is not an heir of his deceased wife. *Morse* v. *Ballou*, 112 Maine, 124, 127.

Immediately upon his sister's decease, leaving no issue, father, or mother, nor brother nor sister dead, nor sister living, Frank L. Marston, her only brother, became that sister's sole heir. It follows that the remaining part is his by substitution. *Buck* v. *Paine*, supra; *Gittings* v. *M'Dermott*, 2 Myl. & K., 69; *Brokaw* v. *Hudson's Executors*, 27 N. J. E., 135. And the assignment to the bank is inclusive of this part.

Bill sustained.
Decree as indicated.

ARTHUR G. SPEAR, Appellant *vs.* CITY OF BATH.

Sagadahoc. Opinion October 15, 1925.

Equality and uniformity are the cardinal principles to be observed in tax levies. Where it is impossible to secure both the standards of true value and the uniformity and equality required by law, the latter requirement is to be preferred as the just and ultimate purpose of the law.

A taxpayer has no grievance when it is shown that all property in the taxing district is assessed on the same basis. If the appraisement of all estates in the district is uniform and equal, though magnified, an abatement would produce not equality but inequality.

But when (nothing else appearing) it is shown that property is assessed substantially in excess of its just value inequality is presumed and the taxpayer is prima facie entitled to relief. He is not bound to produce evidence of discrimination.

Under our statute it is not necessary for the taxpayer asking an abatement to prove fraud or intentional overvaluation. If he is found to be overrated he may be granted such abatement as the court deems reasonable.

But, discrimination not appearing, he must prove that the valuation having reference to just value is manifestly wrong. He must establish indisputably that he is aggrieved.

A sale by auction is not a true criterion of just or market value.

Proof that property was sold by public auction at a price lower, even much lower, than the assessed valuation does not alone show that the assessors were manifestly wrong. It does not establish indisputably that the taxpayer is aggrieved.

On report. Appellant applied to the assessors of the city of Bath for an abatement in part of taxes assessed against him on real estate situate in Bath for the year of 1924, who refused to grant an abatement, and an appeal was taken to the Supreme Judicial Court under R. S., Chap. 10, Sec. 79. By agreement of the parties the cause was reported to the Law Court. Appeal dismissed.

The case is fully stated in the opinion.

Edward S. Anthoine, John T. Fagan and Frederick W. Hinckley, for appellant.

Walter S. Glidden, for respondent.

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

DEASY, J. The real estate of the appellant in Bath was valued by the tax assessors of that city as of April 1st, 1924 at $175,000. A tax was assessed upon this valuation. The property taxed is a Government Housing Project established during the World War. It consists of some twenty-six acres of land with improvements, including sixty-five brick buildings, forty-five of them being double dwellings. The cost to the Government was about $900,000. The character of the buildings is perhaps indicated by Appellant's Exhibit No. 3, a circular, from which we quote: "These homes were not built for sale. No flimsy make-shifts were used to catch the eye. The element of profit was not considered . . . . only one requisite was demanded . . . . the very best."

In 1922 the buildings were offered separately at auction. The bids, aggregating only $76,000, were rejected. In 1923 after a further effort to sell the buildings separately at public auction the petitioner's bid of $112,000 for the whole was accepted. Some expenses were required to be paid by the purchaser, making the entire cost to him about $118,000. As of April 1st, 1924 the assessors of Bath appraised the property at $175,000. From the assessors' refusal to make an abatement an appeal is taken to this court.

No discrimination is proved or claimed. Appellant contends that his property was overrated and that it was appraised at some $75,000 in excess of its just value or market value.

The vexed questions that sometimes arise from "intentional and systematic under-valuation" (*Iron Company* v. *Wakefield, U. S. S. C.*, 62 L. ed., 1156) or (synonymous terms)—"general and designed under-valuation" (*Fibre Company* v. *Bradley*, 99 Maine, 266) are not involved here, the petitioner's only contention being that his property is absolutely overrated with reference to its just value.

But even if this be true and were admitted it does not necessarily follow that an abatement should be granted. If it should appear that all property in the city of Bath is valued on the same basis the petitioner has no grievance.

Equality and uniformity are the cardinal principles to be observed in tax levies. Constitution of Maine, Amendment, Article XXXVI.; *Manufacturing Company* v. *Benton*, 123 Maine, 128; *Chicago* v. *Fishburn*, 189 Ill., 377, 59 N. E., 793; *Mineral Company* v. *Commis-*

sioners, 229 Penn., 436, 78 Atl., 991; *Bow* v. *Farrand*, 77 N. H., 451, 92 Atl., 926; *Phosophate Company* v. *Allen*, (Fla.), 81 Southern 503. The Supreme Court of the United States has said through Chief Justice Taft "Where it is impossible to secure both the standards of the true value and the uniformity and equality required by law the latter requirement is to be preferred as the just and ultimate purpose of the law." *Bridge Company* v. *Dakota County, U. S. S. C.*, 67, L. ed., 343.

If the appraisement of all estates in a taxing district is uniform and equal, though magnified, an abatement would produce not equality but inequality.

But when (nothing else appearing) it is shown that property is appraised substantially in excess of its just value inequality is presumed and the taxpayer is prima facie entitled to relief. He is not bound to produce further evidence of discrimination.

"Whatever may be the remedy, if there be any, when it is shown that the assessors have intentionally assessed the property of a part or all of the inhabitants at less than its fair cash value, we are of opinion that, in a petition for the abatement of taxes on the ground of the overvaluation of the property of the petitioner, and the disproportionate taxation arising from such overvaluation, the question is, whether the property has been valued at more than its fair cash value, and not whether it has been valued relatively more or less than similar property of other persons. *Lowell* v. *County Commissioners*, 152 Mass., 375.

But a petitioner claiming to be overrated with reference to actual value must clearly prove his case. In other jurisdictions courts considering other constitutions and statutes hold that the appraisal by the taxing board must stand unless shown to be intentionally discriminatory, and therefore actually or constructively fraudulent, *Gas Light Company* v. *Stuckart*, (Ill.), 121 N. E., 633; *Birch* v. *Orange County*, (*Cal.*), 200 Pac., 649; *Bunten* v. *Grazing Association* (*Wy.*), 215 Pac., 244.

Under our statutes, however, it is not necessary for the appellant to prove fraud or intentional overvaluation. If the taxpayer is found to be overrated "he may be granted such abatement as said court may deem reasonable." R. S., Chap. 10, Secs. 79-82.

But he must prove" that the valuation having reference to just value is manifestly wrong; . . . he must establish indisputably that he is aggrieved." *Manufacturing Company* v. *Benton*, 123 Maine, 131.

Applying this test the appellant fails. It is true that the evidence produced to reinforce the assessors' appraisal is not of a decisive quality. The character and original cost of the buildings are of little significance as bearing upon the pending issue. Several "opinion" witnesses were produced whose estimates varied from $185,000 to $380,000. Upon cross-examination, however, it appeared that their opinions were based upon faith rather than reason. But it was not incumbent upon the city to support the assessors' appraisal. The appellant has the burden of proving the valuation to be manifestly wrong. *Manufacturing* v. *Benton,* supra.

To prove his case the appellant produces no evidence except the auction sale. But a sale by auction is not a true criterion of just or market value. *Chase* v. *Portland,* 86 Maine, 374; *Railway Co.* v. *Vance,* 115 Penn., 325, 8 Atl., 764; *Railway Co.* v. *Walsh,* 197 Mo., 392, 94 S. W., 868.

"Land commonly is not and cannot be sold at a moment's notice. The value of a tract of land for purposes of sale, that is, its fair cash value, is ascertained by a consideration of all those elements which make it attractive for valuable use to one under no compulsion to purchase but yet willing to buy for a fair price, attributing to each element of value the amount which it adds to the price likely to be offered by such a buyer." *Hospital* v. *Belmont,* 233 Mass., 208.

The petitioner presumably bought these sixty-five buildings for resale. He bought them at what he regarded as a bargain. He undoubtedly expected to sell the houses at a price not above but at their market value and to make a speculative profit.

From Appellant's Exhibit 2, a circular issued by the auctioneer employed by the Government we quote: "Come to the sale and pick up some real Real Estate Bargains." It was this invitation that the petitioner accepted. A real real estate bargain price is presumably somewhat less than the market value.

The appraisers' valuation may be unduly high. We cannot, however, substitute the auction sale price. Sales at auction are not the true test of market value. If we should undertake to fix any other valuation it would be a guess, and a guess is not a safe basis for a judgment. It does not appear that the assessors were manifestly wrong. The appellant is not indisputably aggrieved.

Appeal dismissed.

HAROLD W. PRINCE ET AL. *vs.* BRACKETT, SHAW & LUNT COMPANY.

Somerset. Opinion October 17, 1925.

In order to sustain an action of deceit it must appear that the representations alleged to be false and to constitute deceit must be false; known to be false by the party making them; made with an intention and purpose to defraud, and that the other party relied and acted upon such false and fraudulent representations and suffered damage.

The verdict cannot be sustained for the reason that deceit is not clearly and convincingly proven.

On exceptions and general motion for a new trial. An action of deceit and negligence brought to recover damages for the loss of plaintiff's sawmill, machinery, and lumber, by fire communicated from a kerosene engine, by which the mill was being operated, by means of sparks from a "back-fire" of the engine which plaintiffs purchased of defendant. Plaintiffs alleged that the agent of defendant in inducing plaintiffs to purchase the engine made false and fraudulent representations relative to the engine by which they were deceived and induced to purchase. A verdict was rendered for plaintiff and defendant filed a general motion for a new trial, and also entered several exceptions to refusals to give requested instructions. Motion sustained. New trial granted.

The case sufficiently appears in the opinion.

Gower & Shumway, for plaintiffs.

Pattangall, Locke & Perkins, for defendant.

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

WILSON, C. J., concurring in the result.

BARNES, J. In the course of their business sawing logs into lumber the plaintiffs lost their machinery and other property, from fire communicated from a gasoline-kerosene driven engine which they had purchased from the defendant, and brought this action by a writ charging in separate counts deceit and negligence on the part of the defendant in the sale of the engine.

Defendant was not the manufacturer, but a distributor, a mere vendor of the machine, an internal combustion engine; and the flame or spark that ignited the material destroyed appeared in what is commonly known as back-firing on the part of the engine, while being operated by the plaintiffs in person. During the trial plaintiffs introduced, as an exhibit the "order" upon which the engine was shipped, a paper partly in print and partly written by plaintiffs and the agent of the defendant, naming the engine, the price and terms of payment, and containing certain stipulations as to title, repossession by defendant in case of non-payment, claim for damages for non-performance of the machine, replacement of defective parts and an agreement to pay the price, together with other stipulations and some particulars of guaranty. This "order" was signed by plaintiffs and by the agent of the defendant as a witness, but not signed by defendant. It included the following words: "All previous communications between the parties hereto, verbal or written, are hereby abrogated and withdrawn, and this agreement when duly signed, constitutes the only agreement between the parties hereto."

It appears from the evidence that, for a period of only a few days less than seven months, negotiations looking to a contract of purchase had been carried on between plaintiffs and the defendant and its agent, and to plaintiffs' introduction of evidence of representations regarding the peculiar fitness of the engine to do the work required by plaintiffs, defendant seasonably reserved exception.

Defendant further presented fourteen several requests for instructions to the jury, which the Justice presiding refused to give, except so far as given by him in his charge, and to such refusal exceptions were taken. The charge of the Justice is made part of the bill of exceptions. Special findings were submitted to the jury, they returned a verdict for plaintiffs, on the counts charging deceit, and the defendant filed a motion for a new trial, on the usual grounds.

The first exception noted above may have been relied upon through misapprehension of the nature of the action. But, the action being upon deceit and not upon warranty the exception has no merit.

As to the second exception, a careful study of the charge satisfies this court that such of the requested instructions as were correct and pertinent were substantially given, and the defendant is found not to have been prejudiced by the refusal of the Justice to read them in the very words in which they were written.

Upon the motion, however, it becomes our duty to decide that the verdict cannot be sustained, for the reason that deceit is not clearly and convincingly proven. The rule in this State, never departed from, is well expressed in *Strout* v. *Lewis*, 104 Maine, 65: "The vital question is the proof of deliberately planned and carefully executed fraud on the part of the plaintiff's agent, for on no other hypothesis can the verdict be sustained. The charge is a serious one and the law imposes upon the defendant the burden of substantiating it by clear and convincing proof."

The representations alleged to be false, which plaintiffs claim to have been acting on when their sawmill was destroyed by fire, are found in a letter, written by defendant's agent, on January 17, 1920, at the very beginning of the seven months of inquiry and investigation into the fitness of the engine to do the work their immediate business seemed to them to require.

No representations in addition to or differing from those in the letter are satisfactorily proven. In fact Mr. Prince, one of the plaintiffs, expressly admits this, as shown in the following questions and his answers:

Q. "He," referring to defendant's agent who wrote the letter and negotiated the sale, "didn't tell you anything different or change the statements made in his letter in any way?

A. No, sir.

Q. He didn't qualify it at all?

A. No, sir.

Q. Or add anything to it?

A. Just what do you mean by that?

Q. I mean those representations he made in that letter: he didn't change them any? Did he add anything?

A. I probably wouldn't have remembered that so well because we were looking for recommendations. If the recommendations had been against it we would have remembered it. But if it all went to more and more prove that it was the proper thing we wouldn't have remembered it so quick.

Q. But, so far as you remember, it was about the same as in the letter?

A. Yes.

Q. He didn't take back any of it?

A. No, sir.

Q. And you don't recall he added to it?
A. No, sir."

The jury heard this letter read, and must have had it, with the other exhibits of the case in their consultation room.

Some of the representations are but expressions of opinion, such as "This is the pride of our line. We unreservedly claim that this is the best saw-mill power in the American market today."

Some are statements of advantages "obtained" (by others) from the use of this engine.

Certain of the assertions are couched in extravagant language, of the class known to every man of ordinary experience as "dealer's talk," that picturesque and laudatory style affected by nearly every trader in setting forth the attractive qualities of the goods he offers for sale. And mere "dealer's talk" is not actionable. *Bishop* v. *Small*, 63 Maine, 12.

Some of the representations are axiomatic. Of one much is said by plaintiffs. It follows: "They (meaning Avery Gasoline-Kerosine engines) entirely eliminate the fire risk which is always present about a steam mill." Can there be any uncertainty about the meaning of the representation contained in this simple statement?

And is there any doubt that it means that such engines, by the absence of a wood or coal-burning furnace, free the manufacturer from the hazard of communication of the furnace fire to the fuel pile, building or material in the yard?

As to how much lumber the plaintiffs could saw in a day or how many gallons of fuel the engine would consume in sawing a thousand feet of lumber, under their manipulation, plaintiffs testify the agent positively assured them. In his testimony the agent says he gave them the result of observations, of himself or his principal, as similar engines had been operated elsewhere. And it is agreed that before selling the engine the agent took the plaintiffs to a far distant town where such an engine was in operation, and gave them every opportunity, without interference on his part, practical mill-men, as they claimed to be, to satisfy themselves of the capacity and economy of this type of motive power.

Both had had some experience with internal combustion engines, but they ventured to experiment with different oil than that recommended for this engine, and they strained the waste oils and mixed them with their fuel. After more than a year of intermittent opera-

tion, when the engine back-fired, the oil, grease, shavings or sawdust, or all these, which had accumulated on the engine, took fire: it was communicated to other oil or gasoline, in some receptacle of the engine, and the end of another lumber mill was written in flame.

The instruction given the jury by the presiding Justice; "There must be alleged and proved by a fair preponderance of the evidence a material representation, which is false, known to be false by the party making it, or made recklessly as an assertion of fact without knowledge of its truth or falsity, made with the intention that it should be acted upon, and acted upon with damage," was correct.

They had the written representations of the letter. These they must consider, with the testimony as to other representations, under the law as given to them.

We close as in *Parlin* v. *Small*, 68 Maine, 289, "Although the law was accurately stated by the learned judge at the trial, we are not satisfied that it was sufficiently regarded by the jury."

Motion sustained.
New trial granted.

PETER GOODIE *vs.* HENRY E. PRICE.

Penobscot. Opinion October 19, 1925.

Where the defendant is insured, the disclosure of such fact, in defense, as a matter of law, is immaterial, and where the court properly instructs the jury to disregard the evidence of such fact, the effect of the influence that might arise therefrom, is removed.

In the instant case an examination of the evidence does not disclose a verdict that calls for the intervention of the court.

The fact that the defendant was insured would do more harm than good.

On motion for new trial by defendant. An action to recover damages for an injury to a heifer resulting from the alleged negligent operation of an automobile. The heifer while being driven with other cows across the highway from the pasture to the plaintiff's barn, was struck by a car driven by the defendant's son, whose agency is admitted. A leg of the heifer was broken and she had to be killed. A verdict for $63.00 was rendered by the jury and defendant filed a general motion for a new trial. Motion overruled.

The case appears in the opinion.

A. L. Blanchard, for plaintiff.

George E. Thompson and Ross St. Germain, for defendant.

SITTING: WILSON, C. J., PHILBROOK, DUNN, STURGIS, BARNES, JJ., SPEAR, A. R. J.

SPEAR, J. This is an action for the recovery of damages for an injury to a heifer, resulting from the alleged negligent operation of an automobile. The heifer, with other cows, was passing across the highway from the pasture to the plaintiff's barn, when struck by a car driven by the defendant's son, whose agency is admitted. The heifer's leg was broken and she had to be killed. The verdict was for the plaintiff in the sum of $63.00.

The testimony, while conflicting, presented a pure question of fact, and, as has been said so many times, was peculiarly within the

province of the jury to decide. Moreover, a careful examination of the evidence does not reveal a verdict that warrants the intervention of the court.

But the defendant goes further and contends, even though the verdict might be permitted to stand upon the evidence pertaining to the accident and the manner in which it happened that, nevertheless, the case was prejudiced against the defendant by the alleged improper conduct of the plaintiff's attorney, in deliberately pursuing a course of cross-examination of the defendant's son, for the purpose of disclosing the fact that an insurance company was defending the cause. Therefore, it is incumbent upon the court in the present case to consider the contention of the defendant in this regard. The court cannot avoid the conclusion from the testimony that the plaintiff's attorney in pressing the cross-examination which was calculated to disclose the presence of an insurance company deliberately transgressed the bounds of legal ethics in his persistent effort to accomplish that end.

As a matter of law, however, the disclosure of an insurance company is immaterial and should be excluded for that reason, if for no other. While the appearance of such disclosure has "no legitimate bearing" upon the rights of the parties, nevertheless, as a matter of fact, our court has held that "to allow juries, in cases of this kind, to take into consideration the fact that an employer was insured against accident, would do more harm than good." *Sawyer* v. *Shoe Co.*, 90 Maine, 369.

In *McCann* v. *Twitchell*, 116 Maine, 490, the court does not go so far as to say that the appearance of evidence disclosing insurance is error. The language in regard to such disclosure is this: "Assuming though not deciding that it was error for the plaintiff to testify that the defendant . . . . said that he was protected by a liability insurance company."

From these, and other authorities, however, it seems that, whenever the appearance of evidence, whether directly admitted or creeping in by stealth, discloses the presence of an insurance company, it must be regarded as having a prejudicial effect upon the minds of jury sufficient, at least, if not removed by the instructions of the court to warrant a new trial. The justice in the present case, on his own motion, instructed the jury with such force and clarity as to the duty of the jury to absolutely disregard the objectionable evi-

dence that we are convinced that the jury, if possessed of average intelligence and integrity, could not have failed to comprehend his instructions and to have acted upon them. This phase of the case falls clearly within the doctrine in *Sawyer* v. *Shoe Company* and *McCann* v. *Twitchell*, supra.

While the damages are large it does not seem to be within the legitimate province of the Law Court to use the paring knife on a verdict of $63.00 rendered upon the deliberate judgment of a jury which in the end is the only tribunal known to the law to determine questions of damage. We are of the opinion, therefore, that the verdict should stand.

Motion overruled.

ALICE G. EDWARDS ET ALI. *vs.* FLORA B. SEAL.

Cumberland. Opinion October 21, 1925.

A general demurrer will not sacrifice substance to form. Equity looks with a charitable eye, and sees defects in the bill in point of form, only when they are especially set out.

The doctrine of res judicata holds that any right, fact, or matter in issue, directly adjudicated upon, or necessarily involved in, the determination by a competent court, of an action in which a judgment or decree is rendered upon the merits, is conclusively settled by the judgment therein and cannot be litigated again between the parties and their privies whether the subject matter of the two suits is the same or not. Where the second action between the same parties, or those in privity, is on a different cause, the earlier judgment is but estoppel as to those matters which were brought to an end in the previous litigation.

In the instant case the important thing is that the identical issue stands decided before on actual trial. What was in issue in the former action may appear from the record, or may not. Such issues as are evidenced, either by the pleadings or parol, as the particular situation may require, and on which judgment was rendered, or such issues as by reasoning are essential to and necessarily involved in the former judgment, are to be considered as at rest.

The judgment is that which works conclusiveness. In the judgment is the connection of antecedent and consequent. And a judgment dismissing an action on settling the ultimate facts in controversy, as distinguished from a dismissal without prejudice, or for want of jurisdiction, or the like, is conclusive to the same extent as if rendered on a verdict.

On exceptions. A proceeding in equity brought for the purpose of establishing the title of the moving parties to certain real estate situate in the city of Portland. Respondent filed an answer containing a general demurrer and a request that a specified issue of fact be framed to be submitted to a jury. A hearing was had upon the bill, answer, stipulation, and proof, and the demurrer was overruled and the bill sustained, the sitting Justice finding that the issue of fact which respondent requested be submitted to a jury was res judicata, and respondent entered exceptions. Exceptions overruled.

The case is succinctly stated in the opinion.

Carl W. Smith, John T. Fagan and Joseph E. F. Connolly, for plaintiffs.

Benjamin G. Ward, for respondent.

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

DUNN, J. Equity. On exceptions. Effect of general demurrer. Res judicata.

This defendant, now known as Flora Belle Seal, was the wife and became the widow of one Edgar F. Edwards. During marriage Mr. Edwards quitclaimed an undivided interest in Portland real estate to another man surnamed Edwards, whose Christian name was Orlando.

Edwards the grantor died. And Edwards the grantee defended the bill by his grantor's widow, that her inchoate right by statute in the realty was not barred, and is ripened into vested title. Objective was equitable partition of the property, the plaintiff alleging ownership in herself as a tenant in common.

Answer set up that the plaintiff released her right to inherit by joining with her husband in the very deed to his grantee.

The case was heard on bill, answer, stipulation, and proof. Dismissal of the bill was decreed. This involved the finding that the plaintiff in that bill had intentionally signed the deed.

On the death of Mr. Orlando Edwards, title to that which he acquired by the deed from Mr. Edgar Edwards, passed by the statutes of descent to his widow and heirs at law.

Now, they in whom the statutes vested from Orlando Edwards, title to the undivided interest that Edgar deeded to Orlando, (all

but one in immediately successive relationship, and the one through an intervening devise), and who have other undivided interests in the real estate as well, so that common ownership of the whole is in themselves and their joint plaintiff, are proceeding against the widow of Edgar in respect to the extent of the land conveyed within the meaning of the plaintiff's linked-together deeds.

Although entitled in equity, the proceeding begins as if by design it were modeled on R. S., Chap. 109, Sec. 48, summarily to remove cloud upon the title. But later recitals are to establish right to the land, with appropriate prayer, and for subpoena. R. S., Chap. 109, Sec. 52.

Defendant's answer contains a general demurrer. Besides, there is denial that Edgar F. Edward's wife joined in the conveyance to Orlando, and request that this issue be framed for a jury. Hearing was on bill, answer, replication, and proof. The demurrer was overruled. The bill was sustained. It was held, that the issue of fact requested submitted to a jury, was res judicata. The case is up on law points alone.

A general demurrer will not sacrifice substance to form. Equity looks with a charitable eye, and sees defects in the bill in point of form, only when they are specially set out. Heard Equity Pleading, 53. It is the bad beginning left uncorrected that makes ending proverbed bad. Intelligible and consistent description may counteract and supersede earlier inaccuracy in recital. Then, if the end be well, all will be well, on general demurrer. These plaintiffs are in court. The demurrer falls harmless. Read and construed in entirety, the proceeding was begun against a defendant made personally amenable to decree, to establish title to land. R. S., supra.

The doctrine of res judicata, as Corpus Juris clearly and compactly puts it, embodies as the second of its only two main rules, that any right, fact, or matter in issue, directly adjudicated upon, or necessarily involved in, the determination by a competent court, of an action in which a judgment or decree is rendered upon the merits, is conclusively settled by the judgment therein and cannot be litigated again between the parties and their privies, whether the subject matter of the two suits is the same or not. 34 C. J., 743. Where the second action between the same parties, or those in privity, is on a different cause, the earlier judgment is but estoppel as to

those matters which were brought to an end in the previous litigation. *Smith* v. *Brunswick*, 80 Maine, 189; *Corey* v. *Independent Ice Co.* 106 Maine, 485, 495; *Harlow* v. *Pulsifer*, 122 Maine, 472.

The dismissal of the bill filed by Flora Belle Seal is without mention of the allegations in dispute on the pleadings. None is necessary. *Corbett* v. *Craven*, 193 Mass., 30. The important thing is that the identical issue stands decided before on actual trial. What was in issue in the former action may appear from the record, or may not. *Blodgett* v. *Dow*, 81 Maine, 197, 201: *Foye* v. *Patch*, 132 Mass., 105. Such issues as are evidenced, either by the pleadings or parol, as the particular situation may require, and on which judgment was rendered, or such issues as by reasoning are essential to and necessarily involved in the former judgment, are to be considered as at rest.

The judgment is that which works conclusiveness. In the judgment is the connection of antecedent and consequent. And a judgment dismissing an action on settling the ultimate facts in controversy, as distinguished from a dismissal without prejudice, or for want of jurisdiction, or the like, is conclusive to the same extent as if rendered on a verdict. *Franklin County* v. *German Savings Bank*, 142 U. S., 93, 35 Law ed., 948; *Foot* v. *Gibbs*, 1 Gray, 412.

Exceptions overruled.

STATE *vs.* FRANK JONES.

Androscoggin. Opinion November 4, 1925.

In an indictment for an attempt to commit a statutory offense, while it must appear that the overt acts were done with an intent to commit the offense named, the language of the indictment, though not approved as to form, alleging that the acts were done in pursuance of an attempt to commit the offense ex vi termini implies that they were done with the intent to commit the offense.

In the instant case in the indictment the attempt was charged in general terms followed by a description of the overt acts constituting the attempt, according to the usual form of charging such offenses; but it did not set forth in express terms that the overt acts were done with intent to commit the offense, but alleged that they were done "in attempting to commit the offense."

On exceptions. Respondent was indicted for attempting to operate an automobile while under the influence of intoxicating liquor. The respondent filed a general demurrer alleging that the indictment was bad in that it failed to allege that the overt acts were done "with intent to" commit the offense. The demurrer was overruled and exceptions taken by respondent. Exceptions overruled.

The case appears in the opinion.

Benjamin L. Berman, County Attorney, and Elton H. Fales, Assistant County Attorney, for the State.

Herbert E. Holmes, for respondent.

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

DUNN, J., concurring in the conclusion.

WILSON, C. J. An indictment for attempting to operate an automobile on a public way under Sec. 74 of Chap. 211 of Laws of 1921.

The indictment sets out in general terms, according to the usual form for indictments for an attempt, that the respondent "did then and there attempt to commit an offense, to wit: the offense of then and there operating a motor vehicle, to wit, an automobile on Water Street," etc.

It then sets forth the overt acts constituting the attempt, in accordance with the form approved in *State* v. *Doran*, 99 Maine, 331; also see *State* v. *Ames*, 64 Maine, 386, 388; Bishop Crim. Pro. Vol. II., Sec. 86, Par. 2, Sec. 92; Whitehouse & Hill Crim. Pro. Sec. 63; that the respondent "did then and there in attempting to commit said offense insert and turn the key of said automobile and put his foot upon the self-starter thereby operating said self-starter . . . but was then and there interrupted and prevented from carrying said attempt into full execution."

To the indictment a demurrer was filed and overruled. The case comes to this court on exceptions to the overruling of the demurrer.

The ground of the exception is that the indictment does not sufficiently set forth the intent with which the alleged overt acts were committed. It is true that, unless the alleged acts were done with the intent to operate the motor vehicle upon a public way, no offense was committed; but it is set forth that they were done while or "in attempting to commit said offense."

If done in attempting to commit the offense, it follows *ex vi termini* that they were done with the intent to commit the offense.

While not in commendable form, we think it is a sufficient allegation that the overt acts were done with the intent to commit the principal offense.

The mandate will be:

Exceptions overruled.

ANNIE ALLARD *vs.* LILLIE A. LA PLAIN.

Sagadahoc. Opinion November 6, 1925.

Evidence of the wealth or standing of a defendant in actions for alienation of affections is admissible on the question of exemplary damages, but evidence of the amount of taxes paid by defendant is not admissible on that question.

Such exceptions only as are included in the bill of exceptions can be considered by the court. Likewise such facts only as are made a part of the bill of exceptions can be considered by the court.

In the instant case the other exceptions on which defendant relies are grounded on alleged expression of opinion by the presiding Justice in his charge to the jury in violation of Sec. 102, Chap. 87, R. S., and it does not appear from the defendant's bill of exceptions that the presiding Justice exceeded his prerogatives or violated the statute referred to, at least, to the point of prejudicial error.

On exceptions by defendant. An action to recover damages for the alienation of the affections of the husband of plaintiff by defendant. The jury returned a verdict of $10,083.33 for the plaintiff. During the trial the defendant excepted to the exclusion of certain testimony offered by defendant, and also took several exceptions to the charge of the presiding Justice. Exceptions overruled.

The case appears in the opinion.

Ernest L. Goodspeed, for plaintiff.

Frank A. Morey, for defendant.

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

WILSON, C. J. An action based on the alleged alienation of affections of the husband of the plaintiff.

The case is before this court on exceptions to the exclusion of certain testimony offered by the defendant as to the amount of taxes paid by her on certain real estate, apparently for the purpose of showing her financial standing and also to certain exceptions to the charge of the presiding Justice.

The only ground on which the financial condition of the defendant was relevant was on the question of punitive damages. Except in

cases where the injuries complained of are increased by the wealth and standing of the defendant, as in cases of injuries to the character or in actions for breach of promise, or malicious or wanton torts, compensatory damages are the same, whether caused by a prince or pauper; but upon the question of exemplary damages, the financial status of the defendant was relevant. *Johnson* v. *Smith*, 64 Maine, 553; Greenleaf Ev., Vol. II., Sec. 269; 3 R. C. L., 632; 67 Am. Dec., 562, Note.

The exception to the exclusion of the evidence, however, must be overruled. Value of real estate cannot be shown by tax assessments or the amount of taxes paid. *Penobscot Fibre Co.*, v. *Bradley*, 99 Maine, 263. Nor was the defendant aggrieved by the exclusion of the assessed value, if, indeed, any exception was taken to its exclusion by the defendant, inasmuch as the amount was later testified to and allowed to stand as its fair market value.

So far as appears from the bill of exceptions, the amount paid by the defendant for taxes was clearly inadmissible and properly excluded.

Certain instructions were requested, one of which was refused, but the exception to the refusal was not included in the bill of exceptions and is not considered, as this court cannot travel outside the bill of exceptions. *Feltis* v. *Power Co.*, 120 Maine, 101.

The other exceptions relate to certain parts of the charge of the presiding Justice in which it is urged that he exceeded his prerogative under Sec. 102, Chap. 87, R. S., and expressed an opinion as to the facts which the jury should find from the evidence.

Before considering the exceptions in detail, it may be well to state the interpretation which this court has already placed upon this statute. In *York* v. *Railroad Company*, 84 Maine, 117, 128, the court said, "A judge presiding in a court of justice occupies a far higher position and has vastly more important duties than those of an umpire. He is not merely to see that a trial is conducted according to certain rules and leave each contestant free to win what advantage he can from the slips and oversights of his opponent. He is sworn to 'administer right and justice.' He should make the jury understand the pleadings, positions and contentions of the parties. He may state, analyze, compare, and explain evidence. He may aid the jury by suggesting presumptions and explanations, by pointing out possible reconciliations of seeming contradictions and possible

solutions of seeming difficulties. He should do all such things as in his judgment will enable the jury to acquire a clear understanding of the law and the evidence and form a correct judgment. He is to see that no injustice is done." Finally, "He should so conduct the trial that no truth is overlooked and no right forgotten. To do these things he must necessarily have a large discretion."

Also see *State* v. *Day*, 79 Maine, 120; *McLellan* v. *Wheeler*, 70 Maine, 285; *State* v. *Means*, 95 Maine, 364; *Jameson* v. *Weld*, 93 Maine, 345; *Hamlin* v. *Treat*, 87 Maine, 310; *State* v. *Matthews*, 115 Maine, 84; *State* v. *Lambert*, 104 Maine, 394.

Suggestions for the consideration of the jury are not necessarily to be construed as directions to be followed, or expressions of opinion as to inferences or conclusions to be drawn from the evidence.

The jury in the case at bar were at the outset instructed that they were the sole judges of any disputed facts, that they were not to permit sympathy or bias or prejudice to influence them in arriving at their verdict.

The part of the charge covered by the first exception contained an instruction that the jury was entitled to form their own opinion from what they saw and heard on the witness stand. The statement that they could not avoid forming an opinion as to certain facts may have been a mere truism in the light of the testimony, which is not before us. So far as the language objected to is concerned, the opinion drawn might be favorable or unfavorable to the plaintiff.

The second exception is to a statement by the presiding Justice that the jury must decide whether the plaintiff had lost the affection of her husband prior to 1916 and in event she had, the defendant was not responsible.

In and of itself, it is hard to see how it could prejudice the defendant, even though the marriage did not take place until November, 1916. However, it was an obvious *lapsus linguae*. Other parts of the charge sufficiently made it clear to the jury that if the plaintiff had lost the affections of her husband prior to the defendant's coming into the family, or to such time as it was shown her enticements or influence began, the plaintiff could not recover.

The third and fourth exceptions are to portions of the charge in which the presiding Justice specifically called the attention of the jury to certain parts of the evidence, which he may properly do without infringing upon the statute invoked here.

The fifth, sixth, and seventh exceptions related to instructions, that in assessing the damages, the jury were to take into consideration that the plaintiff was entitled not only to the comfort and society of her spouse, but also to his financial aid during their married life. The chief ground of the objection to these instructions appear to be that the husband was still supporting her. Plaintiff's counsel objects to the consideration of this ground, because there is no evidence before this court that her husband was supporting her.

It is true, that there is no evidence before this court as to the nature and extent of the support provided, as it cannot accept statements of counsel in argument to supply facts omitted in the bill of exceptions, but the bill of exceptions, which was allowed by the presiding Justice, states as a fact that her husband was still contributing to her support and that his property was attached in her proceedings for divorce to the extent of $20,000. But even so, it was not improper for the jury to measure the aid she was entitled to receive as his beloved wife and determine to what extent, if any, she had been deprived of it or would be in the future. Support accorded after loss of all affection or in connection with divorce proceedings might differ considerably from the aid she would receive from a contented, loving husband; and likewise alimony, from her lawful share of his estate.

The presiding Justice did no more than call the attention of the jury to this element of damage mentioned in the statute. If the defendant desired additional instructions; that the jury should take into consideration such financial aid as the evidence showed she was receiving, she could have asked for it. None of the requested instructions bore on this question. She was content to let the instruction in general terms go to the jury. We think she cannot, under these circumstances, complain now.

Likewise, if, as the defendant now complains, the charge did not adequately place before the jury her contentions, she could have requested additional instructions. Such instructions as she requested with one exception, were given in substance. The one refused was not made a part of her bill of exceptions.

The eighth exception relates to an instruction that plaintiff was entitled to be reimbursed in case the jury found the defendant had alienated the affections of the husband and had held her or her child out to the taunts of the neighborhood. The right of the plaintiff to recover in this form of action for such humiliation and shame as she

may have suffered by reason of another woman having gained the affection of her husband is clear. There may also follow humiliation from having lost the affection of her husband by the enticement or persuasion of a relative, especially if the evidence showed that she was held up to the reproach of the community for the failure to retain her husband's affection.

It is very difficult for the Appellate Court to pass on the exceptions in this case without the evidence before it. The burden is on the defendant, however, to show she was aggrieved. She does not come to this court on the ground that the verdict was too large or was against the evidence, but rests her case on her bill of exceptions, by which this court is governed and limited in its consideration of the case. *Feltis* v. *Power Co.*, supra.

Language of the nature set forth in the portions of the Judge's charge objected to may have been amply justified by the evidence, or, at least, may have carried no special significance to the jury in the light of the evidence, except to pointedly call their attention to certain evidence and certain issues which they must decide.

It is not made clear to this court by the defendant's bill of exceptions that the presiding Justice violated the injunction placed upon him by Sec. 102 of Chap. 87, R. S., at least, to the point of prejudicial error.

Exceptions overruled.

ANNE MARTIN'S CASE.

Aroostook. Opinion November 6, 1925.

Where there is any competent evidence on which the findings of fact by the Chairman of the Industrial Accident Commission may rest, this court cannot disturb them on appeal.

In this case, although the petitioner's claim was based on an injury to the hip, there being some evidence on which the Chairman may have found that an injury to the leg below the knee also resulted from the same accident and the case having been fully heard without objection as to the effect of both injuries as a probable cause or source of the infection resulting in the death of the petitioner's husband, the petition may be treated as amended to cover both injuries.

On appeal. A compensation case. Gilbert Martin, the deceased husband of claimant who petitions as a dependent widow, while in the employ of Edward Lacroix, Ltd., loading cars with pulpwood at Van Buren, slipped and fell and injured his left hip. On November 28, 1923, about six weeks after the injury, the employee died in a hospital. The petitioner contended that her husband died from peritonitis from infection from the injury, while the respondents alleged that his death did not result from the injury. Compensation was awarded and respondents entered an appeal from an affirming decree. The question involved was as to whether the evidence warranted the finding of fact by the Chairman that the employee died from peritonitis resulting from the injury. Appeal dismissed with costs. Decree below affirmed.

The case appears in the opinion.

Cyrus F. Small and John B. Pelletier, for petitioner.

Strout & Strout and James C. Madigan, for respondents.

SITTING: WILSON, C. J., PHILBROOK, DUNN, DEASY, STURGIS, BASSETT, JJ.

WILSON, C. J. The husband of the petitioner, while in the employ of the respondent, fell and received one or more traumatic injuries. Later, peritonitis developed from which death resulted.

The Chairman of the Industrial Accident Commission found that the peritonitis was the direct result of the injuries received from an accident arising out of and in the course of his employment and awarded compensation to the petitioner as his dependent widow.

Facts found by the Chairman, if they have any competent evidence on which to rest, though it be slight, provided the inferences therefrom be such as a reasonable person might draw, must, according to the Act and abundant authority, be accepted by this court on an appeal from a decree based on his findings.

No question is raised that such injuries as were received by the deceased from the accident did not arise out of or were not received in the course of his employment. The injuries set forth by the claimant in her petition as having resulted from the accident were to the hip. The evidence, however, also disclosed a cut or abrasion below the knee, one or both of which it is contended proved a source or cause of infection from which peritonitis finally developed.

The respondents urge, as grounds why the appeal should be sustained: that it was not made sufficiently clear by the evidence to take it out of the realm of conjecture that peritonitis, which was the immediate cause of death, was the result of the accident and not of disease.

Two reputable physicians, however, who attended the deceased during the last three weeks before his death while in a local hospital and who made careful examinations to determine the nature of the infection, performing an abdominal operation and after death a post mortem, gave as their unqualified opinion that the infection was not the result of typhoid fever or of other so-called internal causes, but was the direct result of the accidental injuries received.

It may appear to the layman that the inference that the infection resulted from the injury to the hip is not a reasonable one, as there was no open wound as a source of infection. One of the attending physicians gave it as his opinion that the injury below the knee was the original source of the infection, which the respondents insist, if resulting from either, is the only reasonable inference which could be drawn. The respondents, however, also insist that the evidence did not warrant a finding by the chairman that the injury to the lower leg was received at the time of the accident and, further, it is not made a basis of the petitioner's claim, her petition only setting forth an injury to the hip.

It is true that there is testimony that the deceased did not complain of any injury below the knee to his fellow workmen at the time of the accident, or later to his wife or his physicians. This may have been due to the fact that the injury to the hip was the more painful, while the injury below the knee apparently was little more than a superficial cut or an abrasion of the skin, but for that very reason, it may have been the more dangerous of the two, there being no open wound at the hip.

There is some evidence, however, from which it may be reasonably inferred that the injury to the leg was received at the same time as the injury to the hip. In cross-examination, the petitioner testified that her husband did speak of it when he returned home the evening following the accident, that she examined it, that it had been bleeding, indicating a comparatively fresh wound, and treated it as well as the injury to the hip. Without her testimony, also drawn out in cross-examination, that she learned from her husband that it was received at the same time as the injury to the hip, which answer was responsive and allowed to stand, there is still sufficient evidence on which a finding by the Chairman that it was so received could rest.

If the objection that the petitioner has failed to base her claim upon any injury to the leg were to prevail, this court might, if necessary, order the case remanded to the Chairman of the Commission for an amendment to her petition and rehearing. The case, however, was fully heard on evidence as to both injuries and their relation to the infection, which resulted in the employee's death. No surprise or disadvantage to the respondents was claimed at the hearing or is apparent from the printed record by reason of the testimony offered as to the injury to the lower leg.

The petition may, therefore, be considered amended, *Morin's Case*, 122 Maine, 338, 342, whereupon, the Chairman's findings having some competent evidence to support them, the mandate of this court must be:

Appeal dismissed with costs.
Decree below affirmed.

GEORG G. HAARLAND (HOLLAND)

vs.

MAINE CENTRAL RAILROAD COMPANY.

Cumberland. Opinion November 11, 1925.

The duty owed by a railroad corporation and its servants to the employees of a terminal corporation is to use due care to avoid injuring him. It is under no obligation to warn him of latent perils or as to the safety of his working place.

A plaintiff struck and injured by a railroad train while standing between or upon the tracks, or so near thereto as to be in reach of the train's ordinary and standard overhang is presumptively, no excuse appearing, guilty of contributory negligence.

The last clear chance rule does not apply when the plaintiff's negligence was operative to the last moment and contributed to the injury as a proximate cause.

On motion for a new trial by defendant. An action to recover for personal injuries sustained by plaintiff by being struck by a train operated by defendant while being in the employ of the Portland Terminal Company in its yard at Portland as a section hand. Plaintiff recovered a verdict and defendant filed a general motion for a a new trial. Motion sustained. Verdict set aside.

The case fully appears in the opinion.

Harry H. Cannell, for plaintiff.

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

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

DEASY, J. On February 13th, 1924, near Thompson's Point in Portland, the plaintiff was struck and injured by the defendant's west-bound train. He has recovered a verdict and the case comes to the Law Court on general motion.

The plaintiff was at the time of the accident employed by the Portland Terminal Company as section hand. He was not an employee of the defendant corporation. No duty rested upon it to provide him with a reasonably safe place to work or to warn him of latent perils.

The legal duty owed to the plaintiff by the defendant and its servants was to use due care to avoid injuring him.

At the place where the accident occurred the Portland Terminal Company has two parallel tracks, one used by east-bound and the other by west-bound trains. On February 13th, 1924, while the plaintiff in the course of his employment was engaged in shovelling snow at and about the scene of the accident two trains came at about the same time in opposite directions on these parallel tracks. The plaintiff was knocked down and injured by the west-bound train.

The principal and indeed the only conflict of testimony is as to the spot where the plaintiff stood when he received his injury. The tracks are eight and three fourths feet apart. At a point practically midway between the two is a switch standard. The plaintiff says that he stood "close to the switch on the inside to the west-bound track." On the other hand, three witnesses, Ashnault, the engineer of the west-bound train, Trueland, the fireman, and Smith, trainman, all testify that the plaintiff at the time of the accident was standing between the rails of the west-bound track.

We are convinced that the testimony of these three witnesses, confirmed and corroborated by circumstances and probabilities, is true, and that the plaintiff was in a place of obvious danger so absorbed in watching the train on the other track that he gave no thought to the peril of his position.

Circumstances support this theory; it is undisputed that when the train was three or four hundred feet from the plaintiff the engineer gave the danger signal consisting of short blasts of the whistle, that the engine bell was rung, and as the train approached nearer to the plaintiff the whistle was blown continuously; that at a distance of three or four hundred feet the engineer began shutting off steam, that on nearer approach the service brakes were used, and at a distance of about one hundred and twenty-five feet the emergency brake applied.

These warnings and precautions are significant for several reasons: They tend to show due care on the part of the engineer; if heard and not heeded by the plaintiff they aggravate his negligence.

But we stress this evidence for another reason. It tends to show that what the engineer testifies to now was what he saw at the time. It is inconsistent with the plaintiff's memory that he stood close to the switch. The almost frantic attempts of the engineer to give warning by bell and whistle, his efforts to slow and stop the train, his application of the emergency brake show that the plaintiff must have

been seen in a position of obvious danger which would not have been true if he had been as he testified "close to the switch."

Moreover, if he had been close to the switch we think that the accident could not have happened.

But counsel for the plaintiff says that granting the plaintiff's negligence, the defendant's engineer had the last clear chance to save him from its consequences. This, however, is plainly not so. Up to about the moment when the emergency brake was applied either could have averted the accident, the defendant's engineer by using the brake sooner, the plaintiff by crossing the track and, notwithstanding some difficulty, finding refuge at a point clear of both tracks, or by stepping to the switch standard from which he was only a few feet distant. But when the engineer with bell ringing and whistle sounding applied his emergency brake he had exhausted his resources. The plaintiff could have, even then, saved himself by taking a few steps. But the engineer was powerless to do more than he had done. The plaintiff and not the defendant's engineer had the "last clear chance."

To state the same thing in another form, the last clear chance rule does not apply because the plaintiff's negligence was "operative to the last moment and contributed to the injury as a proximate cause." *Philbrick* v. *Railway,* 107 Maine, 434; *McCafferty* v. *R. R. Co.,* 106 Maine, 284; *Dyer* v. *Power & Light Co.,* 120 Maine, 415.

It is quite probable that the warning sounds of bell and whistle were drowned by or merged in the noise of the passing east-bound train. If the jury found that the plaintiff did not hear these warnings they were justified in so finding. But the plaintiff standing between the rails or, at all events, so near as to be within the reach of an on-coming train's ordinary and standard overhang was presumptively negligent. This presumption he has clearly failed to overcome.

The verdict is upon the evidence manifestly wrong. The jury must have misunderstood the facts or misinterpreted the law or been influenced by something other than sober reason.

To sustain the verdict in this case would go far toward establishing the liability of every corporation and every person by whose agency another comes to harm through his own fault. The plaintiff's injuries are severe, his condition pitiful. But hard cases cannot be permitted to "make shipwreck of the law."

Motion sustained.
Verdict set aside.

LILA EVERETT, Complainant *vs.* JOHN M. ALLEN.

Kennebec. Opinion November 18, 1925.

It is error for a presiding Justice in a bastardy proceeding to direct a verdict for respondent on the specific ground that complainant had not shown "constancy in her accusation," the sufficiency of the evidence being a question of fact for the jury.

On exceptions. A bastardy proceeding. At the conclusion of the evidence of the complainant, on motion by the respondent, the presiding Judge directed a verdict of not guilty for the respondent, on the ground that the complainant had not shown that she had been constant in her accusation against the respondent, and complainant excepted. Other exceptions were taken to the exclusion of certain testimony offered by complainant. Exception sustained. New trial granted.

The case fully appears in the opinion.

Andrews, Nelson & Gardiner, for complainant.

Benedict F. Maher, for respondent.

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

BARNES, J. Prosecution of a complaint in bastardy under Chap. 102, R. S., comes to this court on exceptions by complainant to rulings on evidence and to the direction of a verdict in favor of the respondent. Upon the record it is uncontradicted that complainant was married to Fred Everett in 1908 and, in 1922, had for a year been living apart from her husband, when she met and became acquainted with the respondent. She continued living in Vienna and her husband in the city of Augusta, until after the child whose paternity is in question was born, on June 10, 1924.

September 27, 1924, she made before a magistrate, as required by statute above cited, a voluntary accusation declaring the respondent to be the father of such child, with such recitals as the law prescribes, and in due season filed in the Superior Court for Kennebec County a

declaration in form sufficient to meet the requirements of the statute in that behalf. At the last April term of the same court trial before a jury was begun, the issue, the paternity of the child.

Complainant and witnesses testified and were subjected to cross-examination by counsel for respondent.

In the course of her testimony complainant was asked certain questions but not permitted to reply thereto, and exceptions were noted for her. Decision upon these rulings need not now be rendered because, at the close of testimony in behalf of complainant, counsel for respondent moved for a directed verdict in behalf of his client, setting forth several grounds, and the court granted the motion, stating to the jury, "I have ruled that the evidence produced by the complainant here lacks one necessary element required by the statute;" and from the transcript of colloquy of court and counsel, in the absence of the jury, we find that the court directed the verdict because not satisfied that complainant had produced evidence to meet the requirement of the statute that a complainant must continue constant in accusation of the paternity of the child.

There was a time when the court considered the qualifications of a woman who presented herself as complainant in a bastardy action, and unless he was satisfied that she had met all the requirements of the statute to qualify her as a witness, it was his duty to refuse her the privilege of testifying. At that time parties to actions generally could not testify in court. The statute specified what the mother of a bastard child must do before the man she accused of the paternity of such child could be put upon trial, and provided that when the complainant had done these acts she might be a witness in the trial.

It was then necessary for the court to inform himself, before admitting complainant as a witness, that she had made full compliance with the terms of the statute. But the legislation of 1864 allowing parties to be witnesses in their own behalf qualifies this woman to recite her story. It was for the jury to determine whether or no she had continued constant in such accusation, and in taking this question from the jury the court erred. The entry must therefore be.

Exception sustained.
New trial granted.

ABRAHAM ISENMAN *vs.* HENRY E. BURNELL.

Cumberland. Opinion November 18, 1925.

Where there is a variance between evidence and the declaration when an amendment could have been made, if the question of a variance is not raised at the trial, it is too late to raise it after judgment.

In an action against a deputy sheriff for wrongful release of an attachment, it would be a useless formality to require the plaintiff to demand goods of an officer which he knew the officer had already released.

In such cases proof of the negligent acts and the attachment of property of sufficient value to discharge the debt when sold on execution and of the amount of the judgment recovered makes out a prima facie case and damages to the amount of the judgment, and the burden of showing facts in mitigation of damages rests on the defendant and not on the plaintiff.

In the instant case the mere fact the mortgagee, summoned as trustee in the original suit, was discharged as trustee affords no ground for concluding that the mortgage on the goods attached was valid or that the endorsement it was given to secure had become absolute.

The proceedings under Chapter 162, Public Laws 1917, bear little analogy to those under the ordinary trustee or garnishment process. Under this statute the goods attached are in the hands of the principal defendant and mortgagor, while under the ordinary trustee process the property sought to be attached is alleged to be in the hands of the trustee.

If the attaching creditor loses his attachment against the goods in the hands of the mortgagor, there is no ground on which the case can proceed against the mortgagee; and a disclosure of the mortgagee's interest in property already released from attachment and the lien thereby acquired lost could avail the creditor nothing under this statute. The discharge of the mortgagee as trustee in the original action followed the release of the attachment as a matter of course and has no significance on the question of whether the mortgage was a valid one or whether anything was due under it.

On exceptions. A suit brought against a deputy sheriff to recover damages for releasing personal property from attachment without first obtaining the bond prescribed by the statute. The case was heard by the Justice presiding without a jury, all rights of exceptions reserved. To the refusal to make certain rulings defendant excepted. Exceptions overruled.

The case very fully appears in the opinion.

Israel Bernstein and Joseph E. F. Connolly, for plaintiff.

Maurice E. Rosen, for defendant.

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

WILSON, C. J. An action to recover damages of a deputy sheriff for releasing personal property from attachment without first obtaining the bond prescribed by Sec. 79 of Chap. 86, R. S.

The declaration contains two counts,—the first alleging the attachment and a wrongful and negligent release, no bond being given; the second count alleging the attachment and wrongful and negligent release and a failure to keep the property attached for thirty days after judgment, whereby the plaintiff lost his whole debt and costs.

The case was heard by the Justice presiding at *nisi prius* without a jury, with right of exceptions reserved.

The evidence shows, and the presiding Justice found as facts, that the plaintiff placed in the hands of the defendant a valid writ of attachment in favor of the plaintiff against one Filler on which the defendant as a deputy sheriff was commanded to attach Filler's stock of goods. The defendant made the attachment and placed a keeper in charge, and summoned certain alleged mortgagees of the goods attached as trustees under Chapter 162, Public Laws, 1917.

It further appears that, without the consent of the plaintiff, the defendant accepted a bond in which the mortgagees alone were named as principals, and released the attachment. The plaintiff subsequently recovered judgment in the action against Filler, including costs, for seven hundred and sixty-seven dollars and eighty-five cents on which judgment and execution was issued and returned in no part satisfied, the defendant Filler having left the country, leaving no property behind him liable to seizure on execution.

The mortgagees named as trustees in the original suit appeared at the return term and filed a disclosure showing a mortgage on the stock of goods and fixtures of the defendant Filler as security to save the mortgagees harmless from any liability as indorsers or guarantors of notes of Filler, on which notes at the time of the attachment there was a liability of not exceeding twenty-six hundred dollars. It does not appear from the disclosures or evidence, however, that such liability was other than contingent.

At a later term, the trustees so named were defaulted. The default was thereafterward stricken off by order of court, as improvidently made, and the trustees were then discharged.

The defendant in the case now at bar made the following requested ruling:

(1) That upon all the evidence, the plaintiff is not entitled to recover.

(2) That upon all the evidence, if the plaintiff is entitled to recover at all, he is not entitled to recover more than nominal damages.

(3) That the burden of proof throughout is on the plaintiff.

(4) That the burden of proving that damages were sustained by the plaintiff is on the plaintiff.

(5) That the measure of damages is what the plaintiff might have realized upon the sale on execution of the goods attached on the writ of *Isenman* v. *Hyman L. Filler*.

(6) That the finding of the Superior Court for Cumberland County in the original action of *Isenman* v. *Filler* and Robinson and Siegal mortgagees and trustees, discharging the trustees upon the disclosure by them filed and in evidence in this case, is *res adjudicata* in this suit, and that the plaintiffs are estopped to deny the validity of the mortgage in question given by Filler to Robinson and Siegal.

(7) If the goods attached by the defendant as deputy sheriff on the original writ of *Isenman* v. *Filler* and Robinson and Siegal, trustees, were mortgaged, the plaintiff would not be entitled to recover any more than the interest which the defendant Filler had in said attached property, and the burden of showing what that interest is, or was, at the time of the attachment is upon the plaintiff.

(8) That the burden of showing that the mortgage given by Filler to Robinson and Siegal was invalid or has been satisfied is on the plaintiff.

The Justice hearing the case refused to make the requested rulings numbered (1) and (2); but adopted the requested rulings numbered (3), (4), (5), (6), and also the requested ruling contained in the first part of (7). In effect, he also refused to rule that the burden was on the plaintiff of showing what the defendant Filler's interest was in the mortgaged property at the time of the attachment, or that the mortgage given by Filler to Robinson and Siegal was invalid or had been satisfied and held upon the evidence that

the plaintiff had established a prima facie case and awarded judgment for the plaintiff for the amount of his judgment and costs in the original suit.

To the several refusals to rule, the defendant excepted and the case is before this court on the defendant's bill of exceptions.

The defendant at the outset contends that the first requested ruling should have been made, inasmuch as the evidence does not sustain the allegation on the first count, that no bond was given; and that he cannot recover under the second count, because no demand was made on the officer within thirty days after judgment.

No contention appears to have been made at the trial below, when an amendment could, if necessary, have been made, that, since a bond was taken, though not conforming to the statute, the evidence did not support the first count. We think it is too late to raise this question now. In any event, the objection to the failure of the evidence to support the second count is untenable. The plaintiff was not obliged to go through the useless formality of demanding goods which the officer had released, and of which the evidence shows he never afterward took possession. *Townsend* v. *Libby*, 70 Maine, 162.

The defendant's requested ruling that the plaintiff could only recover nominal damages, if any, was properly refused. The true rule, as the court below held, at least where the negligence is not wilful, is that the plaintiff may recover the actual damages suffered by him through the officer's negligence. *Eaton* v. *Ogier*, 2 Maine, 46; *Ware* v. *Fowler*, 24 Maine, 183; *Dyer* v. *Woodbury*, 24 Maine, 546; *Shirk Ex rel* v. *Mullen*, 50 Ind., 598; *Sheldon* v. *Upham*, 14 R. I., 495; *Goddard* v. *Baden et al.*, 11 Md., 317.

The rule laid down by the Justice below as to the burden of proof is also approved. The burden is on the plaintiff to show the negligent act and the damages suffered, but proof of property attached of sufficient value to satisfy the judgment when sold on execution, of the negligent act of the officer by which an attachment lien is lost, and of the amount of the judgment recovered on the writ makes out a *prima facie* case and of damages to the amount of the judgment. The burden is then on the officer to produce such evidence as may exist in mitigation of the damages. *Sheldon* v. *Upham*, 14 R. I., 493; *Blodgett* v. *Town of Brattleboro*, 30 Vt., 579; *Patterson* v. *Westervelt*, 17 Wend., 543; *Brooks* v. *Hoyt*, 6 Pick., 468; *Danforth*

v. *Pratt*, 9 Cushing, 318; *Clark* v. *Smith*, 10 Conn., 1; *Whitney* v. *Wagener*, 84 Minn., 211; Sedgwick on Damages, 8th Ed., Vol. II., Sec. 545-548; 24 R. C. L., 933.

In the case at bar, the evidence shows an attachment of property valued by the officer, according to his testimony, and found by the court below to be fifteen hundred dollars and a wrongful, or unwarranted, release of the attachment, though the officer undoubtedly acted in good faith. Nothing else appearing, the plaintiff was entitled to judgment against the officer for the amount of his judgment in the original suit and cost.

It is urged by the defendant that the plaintiff did nothing to reduce the damages; that he made no effort to again attach the property when he learned that it had been released without a proper bond. Under the familiar rule that the injured party must use all reasonable efforts to reduce his damages, if it had been shown that the property was still subject to attachment when the plaintiff learned of its release, such a defense might have prevailed. *Blodgett* v. *Town of Brattleboro*, supra; *Clark* v. *Smith*, supra; but again, the burden is on the defendant to show that the plaintiff might thus have reduced his damages. Such neglect is not contributory negligence, but only goes to mitigate the damages. The burden of furnishing evidence negativing the former is on the plaintiff; but the burden of showing facts in mitigation rests on the defendant. *Crosby* v. *Plummer*, 111 Maine, 355.

It is further urged by the defendant in support of his exceptions, that the property being subject to a mortgage to indemnify the mortgagees against an obligation much larger than the value of the property attached, and the mortgagees having been discharged as trustees by order of the court on the original suit, it must follow that the mortgage was valid and there was nothing to which the plaintiff's lien by attachment could apply, and, therefore, he was not damaged by the release.

The plaintiff contends in answer to this, that (1) there was not sufficient evidence warranting a conclusion of fact that the mortgage covered the goods attached, and (2) that it does not appear that anything was due on the mortgage, both of which contentions were sustained by the court below.

It might well be questioned whether the evidence did not show that the mortgage in question covered the goods attached, but upon the

point that the evidence does not sustain the burden resting on the defendant to show that the plaintiff was not injured, because the contingent liability under the mortgage had not become absolute, the ruling of the court below must be upheld.

The mortgage admittedly was given to indemnify only against a contingent liability as indorsers. Whether the liability ever matured, or, if so, that it was not fully met, does not appear. It does not follow because the defendant Filler did not meet his obligations to the plaintiff, that he failed in his obligations to others.

The mere fact that the mortgagees were discharged in the Superior Court affords no ground for concluding either that the mortgage was valid or that the obligations under it had become absolute. The proceedings under Chapter 162, Public Laws 1917 bear little analogy to those under the ordinary trustee, or garnishment process. Under this statute, the goods attached are in possession of the mortgagor who is the principal defendant; the mortgagee is summoned in to disclose, not whether he has any property in his possession, but his interest in the property attached in the possession of the principal defendant.

If no goods were attached in the hands of the mortgagor or the property attached was for any reason released, there is no ground upon which the case could proceed against the mortgagee. If a bond was taken, the plaintiff relies on the bond. If for any reason the plaintiff has lost the lien acquired by his attachment, a disclosure of the mortgagee's interest in the property released could avail the plaintiff nothing under this statute.

The discharge of the mortgagees as trustees in the action against Filler, the attachment, having been released, followed as a matter of course. Not because there was anything due the mortgagees under their disclosure, but because no action could be taken under the statute affecting mortgaged property when the attachment has been released.

The defendant, therefore, having failed to sustain the burden upon him to overcome the plaintiff's prima facie case, his exceptions must be overruled.

So ordered.

MAINE MOTOR COACHES, INC., Petitioner

vs.

PUBLIC UTILITIES COMMISSION.

Penobscot. Opinion November 18, 1925.

Exceptions will not lie to a refusal to issue a writ of mandamus to compel the Public Utilities Commission to issue the certificate provided for in Sec. 4 of Chap. 211, Public Laws, 1923, unless it appears that the decree of the Justice denying the writ was based on some erroneous ruling of law or there was an abuse of judicial discretion.

In view of the well recognized control over highways by the state and the possible menace to public safety and the destruction of the highways by the operation over them of heavy high-powered motor busses, the authority of the Legislature to prohibit such operation cannot be questioned.

In view of the history of this class of legislation and its obvious purpose, the certificate permitting such operation cannot be viewed as intended solely for the purposes of registration and its issuance a mere ministerial act. If such had been the intention of the Legislature, it is inconceivable that the statute authorizing its issue could have been couched in the terms in which we find it. If more was intended, then a large measure of discretion must be involved in the issuance of such certificates.

No abuse of discretion appearing either on the part of the Public Utilities Commission in refusing to issue a certificate or of the court below in refusing to issue the peremptory writ of mandamus, or any erroneous ruling of law on which the court's decree was based, the exceptions must be overruled.

On exceptions. A petition for writ of mandamus to compel respondents to issue a certificate to operate motor busses for carrying passengers for hire on a regular route between Waterville and Bangor. The petitioner contended that the act of issuing the certificate by the Public Utilities Commission under Chapter 211 of the Public Laws of 1923 was a ministerial act only and that the Commission had no discretion in the matter. A hearing was had upon the petition and the presiding Justice refused to issue the peremptory writ and exceptions were taken by petitioner. Exceptions overruled.

The opinion states the case sufficiently.

Charles D. Bartlett and George F. Eaton, for petitioner.

Raymond Fellows, Attorney General, for respondents.

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

WILSON, C. J. The petitioner under Chap. 211 of the Public Laws of 1923 applied to the Public Utilities Commission for a certificate to operate motor busses on certain highways of the state over prescribed routes for the carriage of passengers for hire. After hearing, a certificate was refused by the Commission. The petitioner then applied to a justice of this court for a writ of mandamus to compel the issuance of a certificate on the ground that it was a ministerial act and no discretion is vested in the Commission in the issuing of such certificates.

The justice below, after hearing, refused to issue the peremptory writ, and the case is before this court on the petitioner's exception to the decree of the justice below. Unless it appears that the decree below was based on some erroneous ruling of law or there was an abuse of judicial discretion, exceptions do not lie. *Day* v. *Booth*, 122 Maine, 91.

No complaint is made of any abuse of judicial discretion. The sole issue being the interpretation of the Act above referred to and particularly of Section 4 thereof.

At the time of the enactment in the different states of nearly, if not all of the Acts regulating Public Utilities, the transportation of passengers for hire by automobiles had not reached a stage where they were classed as common carriers in the Acts and were not made subject to the regulations imposed on street and steam railroads.

Within the last decade, however, motor vehicles have in various ways entered the field of common carriers, in some cases to the great financial detriment of the long established transportation systems. They have finally compelled recognition as an important factor in transportation. The first indications of recognition of their importance was legislation in nearly all the states regulating or imposing restrictions upon the operation of the so-called jitney busses; and later in the enactment of statutes regulating the operation of motor busses carrying passengers for hire over regular routes and imposing upon them conditions similar to those imposed upon other public utilities.

Such in general has been the history of the legislation in this state relating to the use of motor vehicles for the carriage of passengers

for hire over regular routes. In 1917, the Legislature took the first step, Chapter 254, Public Utilities, by authorizing the Highway Commission to grant permits for the operation of jitney busses, so-called, but only with a view to protecting the highways by regulating the loads and the public by regulating the speed.

In 1921, Chapter 184, the automobile had so far entered the field of common carriers that their regulation and control was vested in the Public Utilities Commission and the operation of motor vehicles on the highways of the state in such manner as to afford a means of transportation similar to that offered by street railroads and over regular routes was prohibited unless a certificate permitting such operation was first obtained from the Public Utilities Commission.

Again in 1923, Chapter 211, the law was still further extended and the operation of such motor vehicles brought more completely under the control of the Public Utilities Commission, the Commission being authorized to revoke a certificate at any time for failure to comply with any of its regulations.

And in 1925, Chapter 167, the authority of the Commission over them was still further enlarged. As the law now stands, the Legislature has vested in the Public Utilities Commission jurisdiction over all motor vehicles carrying passengers for hire and operating over regular routes, with power to establish regulations covering routes, schedules and rates of fare and safeguarding both the rights of the passengers and others using the public ways.

The Legislature has further prohibited every person, firm or corporation from using the streets and highways of the state for the operation of motor vehicles for such purposes until a certificate has been obtained from the Commission permitting such operation.

In view of the well recognized control over highways by the Legislature and of the public moneys spent in building permanent thoroughfares throughout the state and the possible menace to public safety and the rapid destruction of the road-bed by the operation of heavy, high-powered motor busses over them, the authority of the Legislature to prohibit the use of the public ways for such purposes cannot be doubted. *State* v. *Mayo*, 106 Maine, 62; *State* v. *Phillips*, 107 Maine, 249.

This brings us to the question of the legislative intent in vesting in the Public Utilities Commission the issuing of "certificates per-

mitting such operation." Was this provision intended as a mere requirement of registration or as vesting in the Commission a quasi judicial discretion?

Similar legislation appears to have been enacted in nearly all the states. In many, the issuing of such certificates is prohibited, except as based upon public convenience and necessity, as in case of other public utilities when seeking to establish themselves, especially in a competitive field. Such certificates have come to be known as "certificates of necessity and convenience." In no case, of which we are aware, have such certificates been viewed as a provision for registration.

The contention of the petitioner here is that since no such provision basing the issue of such certificates upon public convenience and necessity expressly appears in our statute, the issuing of the certificate is a mere ministerial act and the object solely one of registration in order that the Public Utilities Commission may be apprised of those who are subject to its control under the Act.

We cannot assent to this view. The design and scope of these Acts is much broader than that contemplated by such a construction. In view of the history and apparent purpose of such legislation, both here and in other states, the end sought could not be attained by construing the provision in question as intended merely to secure registration and as compelling the issuance of such a certificate upon request, and as of right. Such a construction would permit the operation of as many motor busses, of whatsoever size and power, as chose to apply for a certificate over the same route to the obvious inconvenience of the rest of the traveling public, endangering its safety and measurably increasing the wear and tear on the highways used and their consequent depreciation and early destruction; and would also result in the anomalous situation of compelling the Commission to issue on demand a new certificate to a company, a certificate of which it had just revoked for refusal to comply with its regulations.

We are, therefore, of the opinion, in view of the general trend of legislation on this subject, that the legislative intent as expressed in these several acts was, instead of limiting the Public Utilities Commission in issuing such certificates to instances only where public convenience and necessity required, to vest in the Commission a broader discretion, having in view not only the necessity and convenience, but the general welfare of the public.

This court also approves the construction by the court below in holding that the phrase, "certificate permitting such operation" itself signifies something other than a mere ministerial act and indicates rather a voluntary assent after due consideration of the public needs and welfare.

If the Legislature had intended this provision solely for the purpose of securing registration of motor busses, we cannot conceive its being couched in the terms found in the statute. If more was intended, then it must involve a large measure of discretion.

No abuse of discretion appearing either on the part of the Public Utilities Commission in refusing to issue a certificate or of the court below in refusing to issue the peremptory writ of mandamus, or any erroneous ruling of law on which the court's decree was based, the exceptions must be overruled.

It is so ordered.

LELAND J. ANDREWS *vs.* INHABITANTS OF HARTFORD.

Oxford. Opinion November 18, 1925.

Under Sec. 110 of Chap. 4, R. S., no judicial inquiry and finding is required, either that the sheep were killed by dogs or as to the number and value. The statute only requires an investigation by the municipal officers, and if satisfied that the injuries were caused by dogs or wild animals, they must either agree with the owner upon the damages, which would involve an agreement as to the number and value of the sheep within thirty days after notice of the loss or must select a referee to represent the town.

In this case there being evidence from which the presiding Justice who heard the case without a jury could have found all the facts essential to the maintenance of the action, the exceptions must be overruled.

On exceptions. An action of debt to recover the amount of an award of referees alleged to have acted under Sec. 110 of Chap. 4, R. S., which relates to the determination of damages caused by killing or injury of sheep by dogs or wild animals. The case was heard by the presiding Justice without a jury who sustained the award of

the referees. The defendant contended that the referees were not selected and acted in accordance with the statute, hence their finding was unauthorized. To the ruling of the presiding Justice that the action was maintainable defendant excepted. Exceptions overruled.

The case fully appears in the opinion.

Harry Manser and F. O. Purington, for plaintiff.

Frederick R. Dyer, for defendant.

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

WILSON, C. J. An action of debt to recover the amount of an award of referees alleged to have acted under Sec. 110 of Chap. 4, R. S. By the terms of the statute, an award of referees under it is final. The only question in the court below, therefore, was whether the referees were authorized to act in the premises, and were selected and acted in accordance with the Statute.

The action was heard below by the Justice presiding without a jury, with the right of exceptions reserved. The court held the action to be maintainable and gave judgment for the amount of the award, plus one half the expenses of the referees. To this ruling the defendant excepted and the case is before this court on the plaintiff's bill of exceptions.

The grounds upon which the defendant asks that its exceptions be sustained are: (1) that no notice of the loss of the sheep was given to one of the municipal officers of the defendant town within seven days after knowledge of the loss came to the plaintiff; (2) that any agreement by the selectmen to waive such notice was void and of no effect; (3) that the municipal officers made no investigation and finding, that they were satisfied that the damages were committed by dogs or wild animals; (4) that any agreement by the municipal officers to adopt the count of the plaintiff as to the number of sheep killed and injured could not bind the town, and (5) that the court's finding, that the only point on which the parties failed to agree was upon the average value of the sheep killed, is not sustained by the evidence.

This is not an action against the town based upon any contractual relations, or the neglect of any of its officers or agents; but is grounded upon the duty imposed by the Legislature upon cities and towns to pay in the first instance the amount of such awards.

The ruling of the court below, that the action was maintainable, necessarily involved the finding of the facts essential for the selection of referees under the statute. So far as the court's ruling involved findings of facts, the only question of law raised by the defendant's exception is whether there was any evidence on which the findings of the court may rest.

No questions are raised as to the procedure of the referees who were selected. The defendant's contentions relate entirely to what it claims is a lack of proof of the necessary grounds for the submission of the question of damages to referees under the statute.

The facts necessary to be found to warrant the selection of referees to determine the damages in such cases are: a notice of complaint by the owner of sheep or other domestic animals claimed to be killed by dogs or wild animals to one of the municipal officers within seven days after knowledge of the killing or injuries; a conclusion arrived at by the municipal officers after investigation that the killing or injuries were due to dogs or wild animals; and a failure to agree with the owner upon the damages within thirty days after notice of the claim.

The only specific finding made by the court below bearing upon either one of these essential facts was a finding that the municipal officers failed to agree upon the "average value" of the animals killed. This finding, however, though urged as a ground for sustaining the defendant's exceptions, it not being the "average value," but the "full value" which, under the statute, is to be agreed upon, was not prejudicial, as the evidence discloses that no agreement on any basis was ever arrived at; nor does it appear that the "average value" was ever made the basis of such negotiations as were entered into.

The defendant's contention, however, that one of the municipal officers could not waive notice of the killing or injuries within seven days of its coming to the owner's knowledge, we think, has merit, and, upon the evidence, requires consideration. In fact, the crux of this case, as viewed by this court, is whether there was evidence upon which a finding by the court below may rest, that notice of injuries to the plaintiff's sheep within seven days of its coming to his knowledge was given to one of the municipal officers of the defendant town.

The award of the referees does not disclose how many sheep were included in their award, whether thirty-one or some less number,

nor the value they placed on any single animal. If then, there appears to have been a statutory notice of the killing of and injuries to such a number of sheep that this court cannot say as a matter of law that the award of the referees may not have been founded upon that number, then it must be treated by this court as final and allowed to stand, provided, of course, other statutory requirements were complied with.

It is undisputed that sometime about the first of September, 1923, the plaintiff notified one of the municipal officers of the defendant town of injuries to a lamb by dogs, and about a week later of the finding of seven sheep lying dead in his pasture which had apparently been dead some little time and six others so badly injured that they had to be killed.

Upon receiving this notice, the board of selectmen of the defendant town visited the plaintiff's farm, heard his story and examined the dead sheep, and from the evidence it cannot reasonably be contended that they were not satisfied that the cause of the injuries to the plaintiff's sheep was dogs.

No judicial inquiry and finding is required by the statute. Only an investigation. This they did, and it is apparent, from their own testimony, that they were fully satisfied that the injuries were caused by dogs.

In fact the Chairman of their Board that very day went to the owners of the dogs suspected of the depredations, and notified them of what had occurred and ordered them to keep their dogs confined.

Other dead sheep were found later to the number of at least eleven, or a total accounted for of twenty-four; and when the flock was taken up from the pasture about the tenth of October, there were thirty-one sheep missing, including the twenty-four already accounted for.

The defendant contends, assuming apparently that the killing of the eleven found after the visit of the selectmen to the plaintiff's farm the first part of September, and whatever caused the disappearance of the seven later discovered to be missing and never accounted for, occurred after the notice given during the first week in September; that no statutory notice is shown to have been given of the loss of more than thirteen sheep; that the award of the referees must have been based on more than that number; and, therefore, the ruling of the court below that this action was maintainable for the full amount of the award was error.

But the court below may have found that the injuries to the plaintiff's sheep all occurred prior to the notice admitted to have been given in the early part of September and that the later discovery of dead sheep was the result of prior depredations; and while the evidence may not be conclusive or even preponderate in support of such a finding, there is some evidence upon which we think a finding to this effect may have been based.

The plaintiff testified that at the time of the visit of the selectmen to his farm following his complaint, there were missing from his flock fifty-four sheep, which he had been unable to find, or forty-one in addition to those already found dead or killed, and he refused to settle at that time until he had determined the extent of his loss.

Soon afterward, he found eleven more dead sheep. When asked how soon, his reply was: "Oh, right off after that; (referring to the finding of the seven carcasses). The next time I got a chance, I looked around and tried to find what live ones we could, and we found twenty-four carcasses which had been killed." This number apparently included the thirteen already found at the time of the visit of the selectmen.

Bearing in mind that a larger number of sheep could not be found at the time of the complaint the first of September, that at that time the owners of suspected dogs were ordered to confine them, and that only dead carcasses appear to have been found after this notice, while before, sheep merely lacerated or torn were also found, it cannot be said that an inference was wholly unwarranted that the damages to the plaintiff's sheep all took place prior to the complaint made early in September.

It is not necessary to state the number of sheep killed or injured in the notice or complaint required under the statute. That is a matter to be investigated or agreed upon when the question of damages comes up for consideration. There would have been no legal objection to the municipal officers in estimating the damages, if they had arrived at that point, taking the count of the plaintiff of the number of sheep killed and injured, if they believed his statement, even though they could not enter into a prior agreement to be bound by it.

The only other fact necessary to be proven to warrant the selection of referees is a failure to agree upon the damages. There is no contention that the damages were agreed upon. It matters not upon

whom the blame falls. Having been satisfied that domestic animals have been injured by dogs or wild animals, the duty is then imposed upon the municipal officers by statutory injunction to estimate the damages, and if they cannot agree with the owner, of selecting a referee. If they do not agree or each select a referee in thirty days, either party may proceed as in the case at bar and select two. Because the plaintiff in this case concluded it would avail nothing for him to meet the municipal officers and discuss damages afforded no excuse for the selectmen in failing to select a referee.

The finding of the court below of the essential facts to warrant the selection of referees by the plaintiff and the submission of the damages to them, being supported by some evidence, the defendants' exception must be overruled.

It is so ordered.

ISAAC DANSKY *vs.* EINO KOTIMAKI.

BLANCHE SMALL *vs.* SAME.

ISAAC DANSKY, Admr. *vs.* SAME.

Kennebec. Opinion November 20, 1925.

A violation of the statutory rule of the road, which, at crossings, gives the right of way to vehicles approaching from the right, is prima facie evidence of negligence. Lack of knowledge of an intersecting road on the part of a driver does not justify him in driving as though there were no intersecting roads. The negligence of the driver is not imputable to a passenger.

A motorist approaching to enter upon a highway crossing is not under ordinary circumstances required to stop. To listen may avail nothing. But he must look. There are vastly more automobiles than trains and some at least are less noisy than trains. For this reason the duty of looking upon entering a highway intersection is even more imperative than at a railroad crossing.

The collision which gave rise to these actions was due to the joint negligence of the defendant and the plaintiff's driver. Therefore in the actions brought by the plaintiff as owner of the damaged car, and as administrator of the driver

who was killed by the accident, judgment must be rendered for the defendant. But Blanche Small, the other plaintiff, was a passenger, to whom the negligence of the driver is not imputable, and not being guilty of contributory negligence, is entitled to judgment for twelve hundred dollars.

On report. Three actions to recover damages resulting from an automobile collision which occurred on August 3, 1924, at crossroads on the highway between Norway Lake and Harrison. At the conclusion of the evidence by agreement of the parties the cases were reported to the Law Court. Judgment for defendant in *Dansky* v. *Kotimaki*, and in *Dansky, Admr.* v. *Same*, and judgment for plaintiff in *Small* v. *Same*, for twelve hundred dollars.

The case sufficiently appears in the opinion.

G. F. Gallert and Perkins & Weeks, for plaintiffs.

Pattangall, Locke & Perkins, for defendant.

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

DEASY, J. Between Norway Lake and Harrison a public road running approximately North and South is crossed at right angles by another public road. On August 3d, 1924 at the intersection of these roads the automobile of the plaintiff, Dansky, going West and that of the defendant, going north came into collision. The plaintiff's car was at the time of the accident driven, in his service, by his stepson, a boy of eighteen years named Abraham Smith. Besides the driver there were riding in the car at the time three passengers. Mr. and Mrs. Russell and Mrs. Blanche Small. The last named was riding upon invitation of Smith, the driver. As the result of the collision the driver was killed, all of the passengers injured and the plaintiff's car badly damaged.

With the defendant who was driving his own car were his father, mother, brother and a girl of twelve years.

Three suits are before the court on report. One brought by Isaac Dansky as Administrator of Abraham Smith, one by Dansky as owner of the car and the third by Mrs. Small.

In cases reported to the Law Court because of questions of law involved (R. S., Chap. 82, Sec. 46), this court also passes upon the facts. But it does not deem it necessary to include in its opinion an analysis of the testimony. Detailed reasons for reaching con-

clusions of fact have no value as precedents and uselessly encumber the reports. We shall therefore give reasons for such conclusions only in outline.

Act of 1923, Chapter 9 establishes a rule of the road applicable to this case thus:—"All vehicles shall have the right of way over other vehicles approaching at intersecting public ways from the left and shall give the right of way to those approaching from the right."

As before stated the plaintiff's car was going West and the defendant's North. The plaintiff's car therefore, had the right of way.

The statute required the defendant to "give the right of way" to the plaintiff who was "approaching from the right." This circumstance did not absolve the plaintiff's servant from the duty of exercising due care. It does not establish absolutely the defendant's liability. But, nothing else appearing, it sustains the burden of proving the defendant's negligence, which burden primarily rested upon the plaintiff. It creates a presumption in favor of the plaintiff which the defendant must overcome if he would prevail.

"It has frequently been decided that violation of the law of the road is prima facie evidence of negligence on the part of the person disobeying it." 13 R. C. L., Page 287. See *Brillinger* v. *Ozias,* 174 N. Y. S., 282; *Black* v. *Mark,* (Penn.), 116 Atl., 656; *Gibbs* v. *Almstrom,* (Minn.), 176 N. W., 173; *Harris* v. *Johnson,* (Cal.), 161 Pac., 1155; *Hiscock* v. *Phinney,* (Wash.), 142 Pac., 461. *Neal* v. *Rendell,* 98 Maine, 73.

In his attempt to overcome the presumption against him the defendant has not succeeded. He did not give the right of way to the plaintiff as the statutory rule commands. There is indeed a conflict of evidence as to which car ran into the other. The plaintiff says that the defendant drove out from the intersecting street, on the left, and rammed his car. The defendant's version is that he drove from the left to the center of the East and West road and at the time of the collision was "just coming to a stop" so as to give the plaintiff's car an opportunity to pass by swerving to the side of the road. But this does not satisfy the rule. Upon either theory the defendant was negligent.

A motorist approaching to enter upon a highway crossing is not under ordinary circumstances required to stop. To listen may avail nothing. But he must look. The fact that at least some automobiles do not herald their approach with the rumble of a railroad

train, and the further fact that there are vastly more automobiles than trains, makes the duty of looking upon entering a highway intersection even more imperative than at a railroad crossing.

The defendant was acquainted with the road and with the crossing. He saw or by reasonable vigilance might have seen the plaintiff's car in time to "give the right of way" to it. We are convinced that the defendant either negligently drove upon the crossing without looking, or more negligently drove upon it after looking and seeing the plaintiff's car approaching from the right and near at hand.

Upon the question of the defendant's negligence it is not decisive nor very important if he sounded his horn as he claims, and as some witnesses testify. If he did not sound his horn there might be another reason for charging him with negligence. But in the law requiring motorists to give the right of way to cars approaching from the right there is no exception in favor of those who blow horns.

It is no answer for the defendant to say that until he had almost reached the crossing itself, trees obscured his vision in the direction from which the plaintiff's car was coming. That circumstance should have increased his vigilance. He should have kept, or at all events tried to keep, his car so under control as to be able to "give the right of way to those approaching from the right." This he failed to do.

But the accident was not due wholly to the defendant's failure to observe the rule of the road. The preponderance of evidence shows that the plaintiff's servant was also at fault. He was driving faster than was reasonably prudent.

A rate of speed at which a motorist may safely, properly and lawfully drive over a hard, level and familiar road may be negligent where, as in this case, he is driving down hill over a strange and sandy road.

The driver had no knowledge of an intersecting road, but this fact did not justify him in driving as if there were no intersecting roads.

Despite the evidence of two undoubtedly reputable witnesses, who were passengers in the plaintiff's car, and who estimate the speed at fifteen to twenty miles an hour, we believe that it was moving much faster than that when the brakes were first applied.

From the evidence of a disinterested, though inexperienced eye witness, the testimony of two apparently reliable and intelligent men as to the speed of the plaintiff's car a few minutes before, not showing

negligence at the time of the accident, but contradicting and impeaching the plaintiff's chief witness; the immediate reaction of the impact upon the two cars; the record which the cars themselves inscribed upon the road-bed and the positions and condition of the machines after the accident, we are convinced that want of due care on the part of the plaintiff's driver contributed to the accident.

Contributory negligence on the part of Smith being affirmatively shown, judgment for the defendant must be entered, not only in Dansky's individual action, but in the suit brought by him as Administrator.

But Blanche Small was a mere passenger. Abraham Smith was not her servant. His negligence was not imputable to her. She is the victim of the joint negligence of Kotimaki and Smith.

She was bound to exercise some degree of care. But this duty did not require or empower her to assume control of the car. She could not wholly escape the duty of keeping a lookout and warning the driver of apparent danger.

But the terrain between the two roads along which the two cars approached each other was covered with trees. The defendant testifies that when he first saw the Dansky car it was only twenty feet distant from him. If Mrs. Small discovered the defendant's car at the same time, the collision occurred almost instantaneously after she first saw it. It does not appear that she could have done anything to avert the collision.

While affirmative evidence is slight, we think that she is not chargeable with contributory negligence. Twelve hundred dollars will we think reasonably compensate her.

In 576 *Dansky* v. *Kotimaki* and 578 *Dansky, Admr.* v. *Same.*

Judgment for defendant.

In 577 *Small* v. *Same.*

Judgment for Plaintiff for $1,200.

FRED H. FULLER *vs.* SADIE E. METCALF.

Kennebec. Opinion November 20, 1925.

No liability for damages arises from mere ownership of a negligently driven automobile. A parent is not liable for the negligent operation of an automobile by a minor unless such minor is acting in the service of the parent who must have the right of control.

In the case of a car, negligently driven by a bailee, the owner is not responsible for damage, even though he is riding in the car, because the right of control has been temporarily surrendered to the bailee.

But if the owner of a car, riding in it, entrusts its operation to his (or her) minor daughter, retaining the right and having the opportunity at all times to direct how the car shall go, who shall drive and how it shall be driven, such owner is liable for negligence in the car's operation. No evidence that the driver is acting in the service of the owner is necessary other than the service of driving the car in which the owner is riding.

On motion and exceptions by defendant. An action to recover damages resulting from a collision between an automobile owned and driven by plaintiff with one owned by defendant and her husband being driven by a minor daughter of defendant alleging negligence. The plaintiff contended that the injury to his car was caused by the car of defendant running into his car while he was on his side of the road, and the defendant likewise claimed that her car was run into by that of the plaintiff, and further claimed that she was not liable because her minor daughter was driving the car though she was riding in the car with her daughter. The general issue was pleaded and at the close of the charge exceptions were taken by defendant to certain parts of the charge, and after a verdict was rendered for plaintiff, defendant filed a general motion for a new trial. Motion and exceptions overruled.

The opinion sufficiently states the case.

Pattangall, Locke & Perkins and Burleigh & Williamson, for plaintiff.

McLean, Fogg & Southard, for defendant.

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

DEASY, J. Automobile accident case. Verdict for plaintiff. Brought forward on defendant's motion and exceptions.

The automobile which collided with the plaintiff's car was owned by the defendant and her husband and at the time of the accident was driven by their minor daughter.

It appears that on August 18, 1924 the daughter, Georgia, was planning to go to a dance accompanying a young gentleman named Ridley. He telephoned from Augusta that he had missed the car that he had intended to take. Thereupon, Georgia asked her father's permission to use the automobile to go after Mr. Ridley. The father testified that he consented, "if her mother would go with her." This her mother the defendant consented to do. Upon the return journey, bringing Mr. Ridley, the collision occurred.

These details as to the purpose of the trip are stressed in the briefs but in view of the conclusion reached in this opinion, are not important.

The evidence as to the precise place and cause of the accident is conflicting and confusing. In the briefs of counsel it is fully and exhaustively discussed. An analysis of it in this opinion would serve no useful purpose. It is sufficient to say, after a careful reading of the testimony, that the jury in finding the driver of the defendant's car negligent and the plaintiff free from blame committed no manifest error.

The defendant reserved exceptions to certain portions of the charge. The presiding Justice said, "Mr. Foreman, if you have a car and have a son old enough to have a license to drive a car and you send him off on some business of your own to do an errand, he is your servant and agent, although he may not be hired by you, because of the relation he bears toward you and because of the service which he performs."

It is argued that the phrase "because of the relation he bears toward you" is in effect an instruction that the mere relationship of parent and minor child creates a liability for tort. But read with the context these words are not reasonably susceptible of such interpretation.

The Judge was properly explaining to the jury that a person may be a servant though not hired and paid as such; that a son may in legal contemplation be a servant though he serve not for hire but "because of the relation he bears."

The part of the charge to which the defendant's most formidable objection applies is that paragraph wherein is treated the effect of the presence of the defendant in the car when the accident occurred.

No contention is made and none can with effect be made that ownership of the automobile creates liability or that the mother, merely by reason of her parenthood is legally responsible for the tortious use of the car by her minor daughter. Moreover, in this jurisdiction the "family service rule" so called has never been adopted and a sound automobile is not deemed a "dangerous instrumentality." Nothing in the charge is opposed to these propositions.

The Judge ruled that the defendant might be held liable if her minor daughter "was at the time of the accident the servant or agent of the owner of the car and was at the time in the service of Mrs. Metcalf, or upon business or pleasure in which the defendant was concerned or had an interest."

So far the ruling was clearly, and we think admittedly, sound. Then the Judge using the disjunctive "or" said "or if the defendant riding with her daughter retained such control of the car as gave her the right to direct how it should go and who should drive it and how it should be driven then you may properly find that the defendant is responsible for the negligent acts of the daughter Georgia in driving the car."

The obvious meaning of this language is that the defendant may be held responsible without proof that the daughter was "acting in the service" of her mother other than the service of driving the car in which the mother was riding.

The very numerous cases involving the responsibility of an owner for the negligent operation, in his absence, of a car entrusted by him to his son or daughter or other person are, upon the issue of the correctness of the ruling, irrelevant.

Equally irrelevant are cases relating to cars in the possession of a bailee. In such instances the owner though riding in the car has no right to control its operation. Such right has been temporarily surrendered to the bailee.

An example of this class of cases is *Pease* v. *Montgomery*, 111 Maine, 582.

The only relevant authorities are those wherein is considered the effect of the presence in the car at the time of the accident of an owner having, though not actually exercising, the unrestricted right of direction and control.

Upon this precise issue the authorities which have come to our attention are few and are not in harmony.

A Wisconsin case contains a dictum opposed to the rule as given in the charge. A man found by the court to be the owner of the car was driving it. His father, the defendant was riding with him. The court said, "Even if the father owned the machine, under the evidence he would have to be classed as a guest therein." *Reiter* v. *Grober*, (Wis.), 181 N. W., 739.

In a Kansas case it is held that no liability attached to a car owner riding in his own car "which was in the possession, control and exclusive management of another responsible adult at the time of the tort." *Zeeb* v. *Bahnmier*, 103 Kan., 599, 176 Pac., 326.

To the same effect see *Potts* v. *Pardee*, 200 N. Y., 431.

On the other hand the Supreme Court of Arkansas says:—"If the owner of a car in which he is riding permits some other person to operate it, no matter whether it is his wife or child or friend—there is no reason why the relation of principal and agent should not be held to be subsisting between them." *Johnson* v. *Newman*, (Ark.), 271 S. W., 707.

The Iowa Court in a case somewhat resembling the instant case reasons thus:—"Neither can this appellant escape legal responsibility for the consequences of the collision by proof that he was himself wholly passive and took no part in the driving or management or control of the car. He was admittedly the owner of the car clothed with the right and authority to control it. He was present where had he been so minded he could have exercised such control. The driver was his own minor son, a boy of seventeen years subject to his authority and presumably engaged in his service. If the car was driven without proper lights or if it was being operated upon the public highway in the night-time at a reckless speed or without due care for the safety of others lawfully using such public way, the appellant was consenting thereto, tacitly at least, and the driver's negligence was his negligence." *Daggy* v. *Miller*, (Iowa), 162 N. W., 856. Moreover, the Judge's ruling is founded upon the Maine case of *Kelley* v. *Thibodeau*, 120 Maine, 402. In the case

cited the presiding Justice instructed the jury thus:—"If Mr. Thibodeau the defendant allowed him to drive the car simply for practice he (Thibodeau) having full control all the time of the car, having the right to direct how it should go and who should drive it and how it should be driven then Mr. Thibodeau is liable just the same, if the accident was due to negligence, as if it had been his own negligence that caused it." This ruling was sustained by the Law Court. It supports and justifies that in the pending case.

It is said that the rule enunciated in the Kelley Case, adopted in the instant case by the Judge of the Superior Court and here affirmed does violence to the general principle of non-liability for torts committed by others than one's self or servant. But the apprehension is groundless. The Arkansas Court answering this objection said "We have not departed from the elemental principles." *Johnson* v. *Newman*, supra. The driver of an automobile renders a constant service to those who are riding in the car. This is true notwithstanding the service is sometimes ill-performed. The driver is not the servant of the ordinary passenger because the element of right of control is wanting. But in the passenger who is also the owner (not a bailor) acceptance of service rendered is combined with right of control and opportunity for control. Every reason for the application of the doctrine of respondent superior is present.

The rule as given in the charge is a logical one. It is in line with the principle which runs through all the law of torts, that when one of two persons must suffer it shall be he who is guilty of some fault, though slight, rather than he who is blameless. The rule is a salutary one. It says to the passenger-owner of an automobile, the reckless driving of which has caused injury or perhaps death, "You shall not be permitted to 'shuffle yourself down to the bottom of the pack' as a 'mere passenger' and turn up a probably impecunious and irresponsible driver as the only person subject to legal liability."

There being no error in the charge it is not necessary to consider whether the car was being used in part for the defendant's pleasure. She was riding in her own car and the jury was justified in finding that "she retained such control of the car as gave her the right to direct how it should go and who should drive it and how it should be driven."

Motion and Exceptions overruled.

WILLIS H. ROLFE ET AL. *vs.* ANGELINA M. ROLFE.

Cumberland. Opinion November 21, 1925.

Adequate provision must result for the spouse in ante-nuptial contracts, otherwise a gross disproportion of such adequacy may invalidate such contracts, but the test of such disproportion must be made in the light of property conditions at the time of making the contract.

As affecting ante-nuptial contracts the cardinal principles of law are well settled and universally obtain. Among such principles may be found those which declare that adequacy in provision for the spouse must result, and that gross disproportion of such adequacy may invalidate such contract.

But so far as disproportionate result may arise, in this class of contracts the test must be made in the light of property conditions at the time when the contract was made.

On appeal. A bill in equity brought by complainants as sole heirs of Lemuel Rolfe, and as executors under his will, against respondent, his widow, to enforce the performance of an ante-nuptial agreement entered into by the said Lemuel Rolfe and said Angelina M. Rolfe, seeking to restrain the widow from prosecuting a claim for widow's allowance against the estate of her late husband. A hearing was had upon bill, answer, replication and proofs and the bill was sustained and the respondent was perpetually enjoined from prosecuting her petition for a widow's allowance from the estate of her husband, and from interfering in any way with any property belonging to said estate, and from the decree respondent appealed. Appeal dismissed. Decree below affirmed with one bill of costs for the appellee.

The case is stated in the opinion.

Samuel L. Bates and John J. Devine, for complainants.

Frank P. Preti and Ralph M. Ingalls, for respondent.

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

PHILBROOK, J. This is a bill in equity brought by Willis H. Rolfe and Lula B. Currier as heirs at law of Lemuel Rolfe, late of Portland deceased and as executors of the last will and testament of said

Lemuel Rolfe, to compel the performance by said Angelina M. Rolfe of a certain ante-nuptial agreement alleged to have been executed by said Lemuel Rolfe and said Angelina M. Rolfe under the name of Angelina C. Marsters. The case was heard by a single justice, without jury, upon bill, answer and proof.

The defendant admits that on the third day of June, A. D., 1912, she signed the ante-nuptial contract, but says that her signature thereto was obtained fraudulently, deceitfully and by gross misrepresentations of the true nature and effect of said agreement and that solely because of such fraudulent, deceitful and gross misrepresentations of the conditions and effect of said document, she was induced to sign the same; that at the time of the signing of said document by herself and by said Lemuel Rolfe she relied upon the confidence and trust which she had theretofore placed in said Lemuel Rolfe.

The agreement thus referred to was executed on June 3d, A. D., 1912 and is apparently drawn under the provisions of R. S. Chap. 66, Sec. 8, which allows husband and wife, by a marriage settlement executed in the presence of two witnesses before marriage, to determine what rights each shall have in the other's estate during marriage and after its dissolution by death, and may bar each other of all rights in their respective estates not so secured to them. The marriage was on the fourth day of June, A. D., 1912, one day later than the date on which the agreement was executed.

The defendant admits that the law applicable to the facts in the instant case is well settled in Maine and generally so throughout the country; that certain cardinal principles universally obtain, such as the principle that there shall be no fraud or imposition practiced, that full and complete disclosure shall be made and that adequacy in provision for the spouse shall result; that gross disproportion of such adequacy may invalidate such agreement; that the natural confidence of the relations of the parties shall not be violated; that where gross disproportion results fraud will be presumed, and that the burden is upon him who sets up an ante-nuptial agreement to prove fairness, notice, understanding and adequacy.

The defendant sets up no claim that the appeal should be sustained upon legal principles which have been violated by the sitting Justice in his finding, but relies wholly upon questions of fact involving fraud, deceit and gross misrepresentation or gross disproportion arising to affect the ante-nuptial agreement.

Ante-nuptial agreements are to be considered, so far as disproportionate results may arise, by an examination of the property holdings at the time when the contract is executed. If the rule were otherwise no ante-nuptial agreement could be safely made. Suppose months or years after the execution of the contract and after the date of marriage following the execution of the contract, the party whose estate is to be effected should, by gift from another, by inheritance from another, or through some sudden and unexpected turn of business affairs, have that estate greatly increased in value. Could it be said that this increase reverts back to an agreement entered into before the marriage tie bound the parties together? We must examine this case and the findings of the sitting Justice in the light of what the testimony clearly shows to have been the financial condition of Mr. Rolfe at the time of signing the ante-nuptial agreement.

The findings of the sitting Justice are exhaustive and show much painstaking examination of the testimony. A rehearsal of his findings or an analysis of the testimony would not enlighten the result, nor be of value to any except those who are immediately connected with the case.

It is sufficient to say that the justice below found as a matter of fact that there was neither actual nor constructive fraud practiced by Lemuel Rolfe in obtaining the signature of his intended wife to the ante-nuptial contract. Nor, taking into consideration the amount of his estate at the time when the contract was executed, and taking into account the provisions made in the contract for both parties and the financial condition of the wife, can it be said that there was such disproportionate results as would authorize an overturn of the findings of the justice below. This case illustrates the familiar rule 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.

The case of *Denison* v. *Dawes*, 121 Maine, 402, is relied upon confidently by the appellant. While sound in its law and its logic, that case contained elements which clearly differentiate it from the case at bar. The mandate will accordingly be

Appeal dismissed.
Decree below affirmed with one bill of costs for the appellees.

JOSEPH M. TROTT ET AL., Trustees, In Equity

vs.

CLARA GOODWIN KENDALL, ET ALS.

Sagadahoc. Opinion November 23, 1925.

Under a will containing the following language, "the whole of my property and estate to be paid to and divided equally between my two children, if living, at or after the time previously herein specified, or if not then living to their legal heirs or guardians," the interest of each of such two children is a contingent interest only and not devisable, and upon the death of such two children before the termination by death of a certain life estate ("the time previously herein specified") created under the provisions of the will, their legal heirs take the remainder of the estate as devisees, neither spouse of two such children being a legal heir of his testator.

On report. A bill in equity seeking the interpretation of a certain clause in the will of Gilbert E. R. Patten, a resident of Bath, who died in 1882, brought by testamentary trustees, wherein Richard E. Goodwin, widower of Clara M. Goodwin, a daughter of testator, Irene E. Patten, widow of John O. Patten, a son of testator, and Clara Goodwin Kendall, a granddaughter of testator, are respondents. A hearing was had on bill and answers, the facts therein alleged being admitted to be true, and by agreement of the parties the cause was reported to the Law Court to render such decision upon so much of the admitted facts as are legally admissible, as law and justice may require. Decree according to the opinion.

The case is stated in the opinion.

William H. Newell, for complainants.

Walter S. Glidden and Andrews, Nelson & Gardiner, for respondents.

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

MORRILL, J., concurring in the result.

BARNES, J. By bill in equity the testamentary trustees of the estate of Gilbert E. R. Patten, late of Bath, pray for the construction of the will of their testator.

The will was approved and allowed by the Probate Court, in March, 1882, and since then all legacies have been paid, or otherwise removed from our consideration, except that expressed as follows: "Should my said wife Emma, not survive me, or if she should survive me, then at her decease after my death, I give and bequeath the one-third of the income of the balance of my property and estate herein appropriated for her benefit during her lifetime, to my two said children, John and Clara, and to the said Mrs. Jenks during her natural life, in equal proportions to each; thus in the event of my said wife's decease, giving to the other three devisees herein named, one-third each of the income of all my property and estate; and at the decease of the said Mrs. Jenks the whole of my property and estate to be paid to and divided equally between my two said children, if living, at or after the time previously herein specified, or if not then living to their legal heirs or guardians."

The wife and Mrs. Jenks have been removed by death.

Testator's only son died childless, leaving his widow, one of the respondents, as his residuary legatee; his only daughter died leaving an only child, Clara Goodwin Kendall, and a widower, one of the respondents, as her residuary legatee.

The last of the blood of Gilbert E. R. Patten is Clara Goodwin Kendall. The question for determination is whether the balance in the hands of the Trustees is to be divided between the two herein mentioned as residuary legatees, or is to go en bloc to Clara Goodwin Kendall, who is the only grandchild of the testator, and who claims the whole as next of kin and sole heir of both her mother and her uncle, the late John O. Patten.

It is the expressed will of the testator that under the conditions now existing the whole of the property and estate shall be "paid to and divided equally between my two said children, if living, at or after the time previously herein specified, or if not then living to their legal heirs or guardians."

Under the decisions of this court neither spouse of the deceased children can qualify as a legal heir of his testator.

Neither of the children of Gilbert E. R. Patten had while living a devisable interest in that part of the estate which now remains for distribution. During their lives they had nothing other than contingent interests, which never ripened into vested interests. They had nothing of this portion of the Gilbert E. R. Patten estate which they

could devise or bequeath. *Robinson* v. *Palmer*, 90 Maine, 246. It is urged, that this case is in every particular similar to that last cited.

Quite the contrary, however, in the case cited a portion of the estate of the testator was undevised: in this case, as we view the determination in the paragraph of the will herein quoted, nothing is left to be distributed as intestate property.

In a later paragraph of the will the Trustees are directed "to transfer, assign, and pay over all this trust property or the proceeds thereof then remaining, to such person or persons as at that time would be, under this will, entitled to receive the same."

According to the well considered and oft cited cases, *Buck* v. *Paine*, 75 Maine, 582, and *Morse* v. *Ballou*, 112 Maine, 124, the residuum of the trust fund is to be paid to Clara Goodwin Kendall.

Taxable costs and reasonable counsel fees of the trustees to be allowed from the estate.

Decree in accordance with this opinion.

AXEL GEORGE JOHNSON

vs.

BANGOR RAILWAY AND ELECTRIC COMPANY.

Penobscot. Opinion November 24, 1925.

When the pleadings, all the testimony and exhibits are made a part of a bill of exceptions, under a stipulation that they are to control any statements thereof in the bill, such statements must be deemed to be true, and no corrections are to be made by the Law Court by a search of the record.

A refusal to order a portion of an answer stricken from the record is not exceptional error when it appears that the portion of the answer objected to is immaterial, and, if irresponsive, is not prejudicial.

The admission of a question put to an expert witness on cross-examination is not exceptional error, when it appears, although the subject matter of the inquiry was immaterial, the answer was harmless.

The fact that the testimony of a witness expressed his opinion or inference does not necessarily render it objectionable. He may thus summarize many facts within his knowledge without specifying them. It is his manner of stating them. Such testimony is admitted from necessity.

An expert surgeon, who had examined the plaintiff at a time subsequent to the injury for the purpose of giving an opinion as to plaintiff's injuries, may give the history of the case as he learned it from the plaintiff. Such statements of the plaintiff, being a narrative of past events, are not admissible as evidence of the facts stated; but are admissible as part of the basis for the opinion. The reasons for an expert's opinion may be given upon his examination in chief.

In the instant case that the jury was properly instructed as to the competency of the statements of the plaintiff to the witness and the purpose for which they are admissible must be assumed, nothing appearing to the contrary.

On exceptions and motion by defendant. An action to recover damages for personal injuries alleged to have been sustained by plaintiff by reason of a collision between a street car of the defendant and the team of the plaintiff resulting in the plaintiff being thrown from his team and landing on his back. A verdict of $11,000.00 was rendered for the plaintiff and the defendant filed a general motion

for a new trial, and also entered during the trial several exceptions on the admission of testimony. Motion and exceptions overruled.

The case appears in the opinion.

Pattangall, Locke & Perkins, and Freeland Jones, for plaintiff.

Ryder & Simpson, for defendant.

SITTING: WILSON, C. J., PHILBROOK, MORRILL, DEASY, BARNES, BASSETT, JJ.

MORRILL, J. This action to recover damages for personal injuries is before the Law Court upon motion for a new trial in the usual form, and upon exceptions to rulings upon the admission of evidence. The argument upon the motion has been confined to the contention that the damages are excessive.

An examination of the record shows that the trial developed a decided difference of opinion between the expert witnesses summoned by the respective parties, as to the injuries which the plaintiff sustained. The writ alleged, and the medical testimony for the plaintiff tended to show that the plaintiff sustained a fracture of the tenth dorsal vertebra. The witnesses for the defendant denied that there were any indications of such fracture. A large part of the record before us is taken up with the testimony of the expert witnesses. The counsel for defendant contends that the evidence so greatly preponderates in favor of his client, that the court should be satisfied that the jury manifestly erred, and that the damages are excessive. No claim of bias or prejudice on the part of the jury is made. The argument is largely confined to the proposition that the jury did not give sufficient weight to the medical testimony in the light of plaintiff's condition before the accident.

In considering a case so presented it must be borne in mind that the testimony of the expert witnesses is only an expression of opinion, and is received upon the theory that their special learning and skill may render their opinions of service to the jury; that thus the jury may obtain some assistance, not otherwise available to them. 3 Wigmore on Ev., Sec. 1923, Page 2558. The evidence may be stated as an assertion in the negative, as when a witness, examining an X-ray film of plaintiff's back taken by another, asserts that he perceives no indication of a fracture; yet the testimony is but the expression of the witness' opinion; his interpretation of what this highly scientific

aid to diagnosis shows; and its accuracy, or the weight to be given to it is quite dependent upon the skill of the operator who took the film, and the clearness which he has obtained, as well as upon the witness' own scientific skill.

The assistance which testimony of this character,—we refer to expert testimony in general,—may afford is, like other testimony, wholly for the consideration of the jury. They may fairly come to the conclusion that none of it, or a part only is entitled to weight in their deliberations. The testimony in this case well illustrates the limitations in the value of testimony of this kind. It was conceded by expert medical witnesses on both sides that at the date of the injury, January 29, 1923, Mr. Johnson was suffering from a condition of the back known as arthritis deformans, a progressive disease; it is the claim of the defendant that the plaintiff suffered no permanent injuries on account of the accident.

An eminent surgeon who first saw the plaintiff on December 19, 1923, testifying for the defendant, frankly gave this testimony at the close of the cross-examination:

"Q. Don't you think there was a pretty rapid progression in the trouble with his back that went on about January 29, 1923?

A. That I cannot answer.

Q. Caused by the accident?

A. I should not think it shows that there was an active process; I should not think it shows; I cannot tell that. *I don't know what happened.*

Q. That is the real fact, isn't it?

A. Yes, sir.

Q. That you could not tell because you don't know what did happen?

A. No, sir."

Another specialist in orthopedic surgery, who first saw plaintiff on May 8, 1924, a few days before the trial, testifying for defendant said:

"Q. If it was true that prior to January 29, 1923, Mr. Johnson was capable of doing heavy laborious work about his farm and did do that heavy laborious work every day and that since that time has been unable to do it and can only do light work, have you found anything in his condition which would account for that change?

A. I have not.

Q. That is, the mere presence of arthritis would not account for it, would it?

A. No, I do not think so.

Q. That is of long standing?

A. That is of long standing.

Q. And if there is that change, if he is in fact unable to do heavy laborious work at the present time and has been since the 30th of January, 1923, and was able to do heavy laborious work prior to that time, how would you account for it?

A. I do not account for it at all."

It will serve no useful purpose to analyze at length the testimony printed in the record. We have endeavored to point out the character of the testimony on which defendant relies, and the inherent limitations of its value as aid to the jury.

It is apparent that after listening to the extended recital of the views of the expert witnesses the jury did not lose sight of the fact that the plaintiff was seriously injured, a fact which they were fully justified in finding, without undertaking to determine the precise injury, if they believed the evidence submitted in his behalf. So finding, we cannot say that they manifestly erred in the award of damages. We do not perceive any ground on which, under the motion, we are warranted in interfering with the verdict.

EXCEPTIONS.

The bill of exceptions contains the following statement: "The pleadings and all testimony and exhibits are hereby made a part of these exceptions and are to control any statements thereof in this bill."

The court on several occasions has expressed disapproval of the practice of making the entire record a part of bills of exceptions to rulings on the admission or exclusion of evidence. The essential requirements of a bill of exceptions, presented in a "summary manner" (R. S., Chap. 82, Sec. 55) have been clearly indicated. *McKown* v. *Powers*, 86 Maine, 291, *Salter* v. *Greenwood*, 112 Maine, 548, *Dennis* v. *Packing Co.*, 113 Maine, 159, *State* v. *Howard*, 117 Maine, 69, *Small* v. *Wallace*, 124 Maine, 366. Nor should the Law Court be expected to correct statements in a bill which has been allowed and signed by the presiding Justice, by a search of the record. The

exceptions should not be allowed unless found to be true; "when found true they shall be allowed and signed by such justice." Section 55, supra. The exceptions must be deemed to be true, and will be considered as stated without reference to the pleadings, exhibits and testimony, except as the latter is quoted in the bill.

FIRST EXCEPTION.

"Plaintiff's son, Harold Dixon Johnson, was called as a witness by plaintiff and was asked by plaintiff's counsel, among other things, the following questions, and gave the answers indicated:

Q. When you came to harvest your corn, did your father do anything about that?

A. No, sir.

Q. Had he, so far as you could judge, in observing him, tried to do all that he could in the way of work?

A. He has.

The last question was objected to by defendant as calling for witness's opinion or inference. The presiding justice, however, admitted same over the objection."

The exception must be overruled. The fact that the testimony expressed the witness' opinion or inference does not necessarily render it objectionable. *Snow* v. *B. & M. Railroad*, 65 Maine, 230. *Stacy* v. *Portland Pub. Co.*, 68 Maine, 279, 285. "The witness in effect describes the facts when he gives his opinion. It is his way of stating them. Such testimony is admitted from necessity. A witness can seldom give in detail all the points and particles which go to make up his belief, but he can characterize them. Practically the rule admitting such quasi opinion is convenient and safe." PETERS, J. in *Stacy* v. *Portland Pub. Co.*, supra. The practice of admitting quasi opinions from non-expert witnesses in such cases is in harmony with the rule which admits the best evidence. Doe, J. dissenting in *State* v. *Pike*, 49 N. H., 423. The test to be applied is thus stated by Professor Wigmore: "Such a witness' inferences are inadmissible when the jury can be put into a position of equal advantage for drawing them,—in other words, when by the mere words and gestures of the witness the data he has observed can be so reproduced that the jurors have those data as fully and exactly as the witness had them at the time he formed his opinion." 3 Wigmore on Ev., Sec.

1924, Page 2559. The learned author adds: "It is in the application of this test that the opinion rule really breaks down, as an aid in the investigation of truth. In the vast majority of rulings of exclusion, the data observed by the witness could not, in any liberal and accurate view, be really reproduced by the witness' words and gestures. The error of the judges consists in giving too much credit to the possibility of such reproduction."

In the instant case the son, in testifying, in effect said: "My father, so far as I could judge in observing him, had tried to do all that he could in the way of work." He thus summarized in one sentence many facts, within his own knowledge, without specifying them. Such a manner of expression is not objectionable. *Stacy* v. *Portland Pub. Co.*, supra. 3 Chamberlayne on Ev. Sections 1850-1855. *Hardy* v. *Merrill*, 56 N. H., 241. In this state the tendency "has been to allow witnesses who are not experts a good deal of latitude in the expression of opinion, *short of declaring their judgments upon the point mainly and directly in issue.* . . . . . A witness under the direction of the court, may be permitted to describe peculiarities, conditions and situations, conduct and changes." *Fayette* v. *Chesterville*, 77 Maine, 28, 34. *Bridgham, Aplt.*, 82 Maine, 323, 326.

SECOND EXCEPTION.

Dr. Purington, a witness for plaintiff, was asked upon cross-examination:

"Was there anything broken so far as you could discover by examining his shoulder?" He answered: "No, sir. There was shadows that was discussed—." The witness was here interrupted by the examining counsel, but was allowed by the presiding Justice to complete the interrupted sentence, which he did as follows: "relative to a crack below the spine of the scapula." It appeared that the condition referred to had been observed on examination of an x-ray film, not taken by witness and not produced in court. The counsel for defendant then moved that the portion of the answer relative to the crack be stricken out, and has exception to the refusal so to do.

The exception must be overruled. The answer was entirely harmless, did not in the least qualify his direct denial, and was immaterial

because no claim of injury in that locality was made by plaintiff. We fail to see how the portion of answer objected to, if irresponsive, was in the least prejudicial.

The THIRD EXCEPTION is stated thus:

"Dr. William C. Peters was called as an expert surgeon to testify in behalf of plaintiff. He examined plaintiff at the request of the latter's attorneys to give an opinion relative to plaintiff's injuries, but he did not treat plaintiff. Dr. Peters was allowed to state: 'He (plaintiff) described his accident much as he has here,' and again: 'Now, Mr. Johnson's accident, as he described it to me, had been one in which he had been pitched on to his head and shoulders and his legs had been doubled up—'

Defendant objected to the admission of what plaintiff told Dr. Peters relative to the happening of the accident, on the ground that plaintiff's statement of such matters to Dr. Peters who was examining plaintiff with a view to testifying as an expert witness and not for the purpose of treatment was not admissible in evidence. But the court admitted the evidence subject to the objection."

Just what evidence was admitted does not clearly appear. The witness began a statement and was interrupted; he did not complete it, and so far as appears the incident was closed. No motion was made to have the language now regarded as objectionable stricken from the record.

Considering the exception as stated, we may assume that Dr. Peters' examination of the plaintiff was made at some time subsequent to the injury, and that whatever the plaintiff said to him was narrative of a past event. Such statements by the plaintiff were clearly inadmissible as evidence of the facts stated. *Asbury Ins. Co.* v. *Warren*, 66 Maine, 523. The cases cited by defendant fully sustain that proposition. It is very clear that Dr. Peters did not make the statements objected to for any such purpose. He examined the plaintiff that he might be in a position to give an opinion as to the plaintiff's injuries; it was very desirable, perhaps necessary, that he should obtain a history of the case; he obtained that from the plaintiff, and that history so obtained, he was stating to the jury when interrupted. If the history which he obtained coincided with the facts as proved by competent evidence, his opinion would be entitled to a certain degree of weight; if his opinion was based upon an erroneous history of the case, the basis of his opinion fails, and his opinion becomes of

less weight. The exception does not disclose an instance where the plaintiff is endeavoring to support his case by incompetent evidence of the substantive fact which he alleges, under the guise of fortifying the opinion of an expert. The testimony so far as given falls within the reasoning of *Barber* v. *Merriam*, 11 Allen, 322, 324, and *Cronin* v. *Street Ry.*, 181 Massachusetts, 202. In this state the reasons for an expert's opinion may be given upon his examination in chief. *Steam Mill Co.* v. *Water Power Co.*, 78 Maine, 274.

If counsel for defendant had considered his client aggrieved by this statement of Dr. Peters, he should have requested that its application be properly limited in the charge. We must assume that the jury was properly instructed as to the competency of the statements of the plaintiff to Dr. Peters. The defendant takes nothing by this exception.

FOURTH EXCEPTION.

The answer of Dr. Sanger to the question put on cross-examination, conceding as the plaintiff claims, that the subject of the inquiry was immaterial, was clearly harmless. It did not support any claim made by plaintiff.

Motion and exceptions overruled.

ROBERT L. HATCH *vs.* PORTLAND TERMINAL COMPANY.

Cumberland. Opinion November 27, 1925.

The carrier's liability for personal injury must be determined by the Federal statute if both employer and employee were engaged in interstate transportation. Negligence under the Federal statute is determined under the rule of the common law. Contributory negligence and assumption of risk are not an issue under our workmen's compensation act, but where the Federal statute controls assumption of risk may be an issue, except where the negligence of a fellow servant caused the injury, or, unless the injury was caused by the violation of some statute enacted to promote the safety of employees.

Contractual assumption of risk, and voluntary assumption of risk, are distinct. Assumption of risk is a question of fact for the jury where the evidence is conflicting.

In the instant case the last work performed by plaintiff before the injury occurred was interstate in character, and unfinished, and work of a different character not begun. Disassociation had not been reached and there had not been any break in the continuity of service.

The jury were warranted in finding that there was liability on the part of the defendant, but the verdict was clearly excessive.

On exceptions and motion by defendant. An action to recover damages for personal injuries sustained by plaintiff while in the employment of defendant as switchman in its yard at Portland. One question raised at the trial was whether the Federal statute, known as the Employers' Liability Act, controlled, or whether the case was governed by the Workmen's Compensation Act of this State, that is, as to whether the plaintiff and defendant were engaged, at the time of the injury, in interstate or in intrastate commerce. At the close of the evidence the defendant requested the directing of verdict which was denied, and exception saved. Defendant also requested the instructing of the applicability of the Federal act, which was refused and exception taken. The jury rendered a verdict of $24,486.20 for plaintiff and defendant filed a general motion for a new trial.

Exceptions overruled.

If within thirty days from filing of the rescript a remittitur of all of the verdict in excess of $15,000 be filed, motion for a new trial overruled; otherwise motion sustained and new trial granted.

The case fully appears in the opinion.

Bradley, Linnell & Jones, for plaintiff.

Charles B. Carter, for defendant.

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

DUNN, J. Personal injury action. Counts at commom law as aided by the Workmen's Compensation Act of Maine, and count under the legislation of the Congress of the United States commonly known as the Federal Employers' Liability Act (R. S., Maine, Chap. 50 and amendments; 35 U. S. Stat. at L., 65, Chap. 149). Plea general issue with brief statement: (1) the Federal act governs the case; (2) the risk assumed contractually; (3) plaintiff's contributing negligence.

The trial presiding judge overruled the motion, advanced as evincible in all the evidence, to direct verdict for the defendant, and refused the request preferred during the charging of the jury, to instruct the applicability of the Federal act. Exceptions were noted and allowed.

Special answers by the jury found the plaintiff free from negligent conduct proximate to the harm, and held that if the Federal act be pertinent, there should be no proportionate diminishing of reparation for the injury sustained. Plaintiff verdict, $24,486.20. Usual-form motion to set it aside.

In the evening of 27 October 1923, while at his employment by the Portland Terminal Company, this plaintiff, Robert L. Hatch of name and aged 23 years, was hurt.

The defendant has a railroad terminal in Portland. This terminal links the Maine Central and Boston & Maine railway systems. The terminal company provides yard trackage for, and does the switching and classifying of, freight cars and their commerce, for hire. It is both an interstate and intrastate carrier of goods.

Mr. Hatch was a switchman. His job was to set switches, as his superior in rank would indicate tracks, in distributing cars from arrived trains. No work called him on trains.

In the terminal on track 4 was a train. Some of its cars were "at home," and some were billed or destined "west," or beyond this State.

At half past seven o'clock, as witnesses judge the time, Hatch aligned the switch for track No. 11, and onto it two of the cars with interstate lading were shunted. Foreign-bound cars, laden or empty, classify the same. *North Carolina R. R. Co.* v. *Zachary*, 232 U. S., 248, 58 L. ed., 591. Duty at the switch done, plaintiff walked to and stood at a point near switch post 4, between tracks 3 and 4, that requisitely he would be near his train, as he says. He stood facing the train, with vision slightly averted to see the train and the track ahead, awaiting further orders, doing nothing. An oil burning lantern was in his hand, and electric lights were on in the yard, but it was dark where Hatch was; he could not distinguish a man fifty or or sixty feet away; that the whole yard was dark is of the negligence alleged.

The train was in movement along track 4. The cars were empty rack or slatted ones. A car hit Mr. Hatch. He fell beneath the trucks and in consequence lost his left foot and ankle.

The injured man alone saw the accident. He does not know absolutely how it occurred. Dizziness may have caused him to fall under the train. Inadvertently, in the darkness of that night, he may have gotten close by the rail and been struck by the corner or side of the car, the car being in normal condition. He may have been standing where he had the right to stand, and have been knocked down by a car door left unfastened, swung outward by the motion of the train, no attributable fault on his part concurring. Evidence tends to show that the unfortunate occurrence may have been in any of these ways, and also tends to show the contrary. Direct evidence that a door, hanging loose on a rod at the top and unsecured at the bottom, which swung towards him as the train rounded a curve, comes from the plaintiff. He testifies he saw the door, or the button of the door, swinging out just before it threw him. The button is the wooden latch that holds the door when closed, somewhat after the manner of a fastening on an old-time barn door.

Defendant tacitly recognizes the competence of joining counts under the State law and the Federal act, that recovery may be had as the jury shall find. *Davis* v. *Green*, 260 U. S., 349, 67 L. ed., 299; *New York C. & H. R. R. Co.* v. *Kinney*, 260 U. S., 340, 67 L. ed., 294; *Osborne* v. *Gray*, 241 U. S., 16, 60 L. ed., 865; *Wabash R. R. Co.* v.

Hayes, 234 U. S., 86, 58 L. ed., 1226; *Corbett* v. *Boston & Maine Railroad*, 219 Massachusetts, 351; *Koennecke* v. *Seaboard Air Line Ry.*, (S. C.), 85 S. E., 374.

The Federal act, in the constitutionally committed field plenarily covered by it, supersedes all State laws. *Mondou* v. *New York, N. H. & H. R. Co.*, 223 U. S., 1, 56 L. ed., 327; *Michigan Central R. R. Co.* v. *Vreeland*, 227 U. S., 59, 57 L. ed., 417; *Seaboard Air Line Ry.* v. *Horton*, 233 U. S., 492, 58 L. ed., 1062. Hence, if the employee of a railroad engaged in both interstate and state transportation is injured, while both were engaging in interstate, the carrier's liability must be determined by the Federal statute. *Industrial Acct. Com.* v. *Davis*, 259 U. S., 182, 66 L. ed., 889; *Shanks* v. *Deleware, L. & W. R. Co.*, 239 U. S., 556, 60 L. ed., 436; *Wabash R. R. Co.* v. *Hayes*, supra; *Foley* v. *Hines*, 119 Maine, 425. But the facts, and not the pleadings, determine whether the wrong done in any given case confers a right to recover under the law of this State or the Federal act. When the evidence unfolds in which employment the injury occurred, then is it that the form of action appropriate in the orbit of authority defines what is submitted for judicial inquiry. A precise ruling, one that the eye could catch at a glance and which might be instantly applied, has not been attempted to be laid down. *Industrial Acct. Com.* v. *Davis*, supra. At the time of the injury, the employer and employee must be in interstate business, or in work so closely related to transportation of this sort, or so directly connected with it, as substantially to form a part of it. *Industrial Acct. Com.* v. *Davis*, supra; *New York C. & H. R. R. Co.* v. *Carr*, 238 U. S., 260, 59 L. ed., 1298.

In State and Federal cases alike liability is predicated upon negligence to be proven by the plaintiff, together with his own resulting injury. *Watkins* v. *Hustis*, 79 N. H., 285. Negligence, in an action under the Federal enactment, means such acts of commission or omission as would, by the rule of the common law, be sufficient to take the case to the jury. *Helm* v. *Cincinnati, N. O. & T. P. Ry. Co.* (Ky.), 160 S. W., 945; *Western Maryland Ry. Co.* v. *Sanner* (Md.), 101 Atl., 587. Contributory negligence is unimportant in our State law. Assumption of risk, also taken from nonassenting employers by the Maine workmen's statute, is still open to the employer as a substantive issue where the Federal act is controlling, unless the injury was caused by the violation of some statute enacted to promote the

safety of employees. *Chicago, R. I. & P. Ry. Co.* v. *Ward,* 252 U. S., 18, 64 L. ed., 430; *Seaboard Air Line Ry. Co.* v. *Horton,* supra; *Norton* v. *Maine Central Railroad Company,* 116 Maine, 147. But this doctrine has no application where the negligence of a fellow servant, which the injured one could not have foreseen or expected, is the sole and immediate cause of the injury. *Reed* v. *Director General,* 258 U. S., 92, 66 L. ed., 480. The fellow-servant rule is abrogated in both jurisdictions. The rules of evidence and the elements of damages, so far as they are of moment here, are identical in the two laws.

The assignment of the exceptions, of the want of evidence of negligence on the part of the defendant, is already dispelled by the previous statement that the tendency of the one line of evidence is for the plaintiff, and that of the other for the defendant. Disputed questions of fact are within the province of a jury. *Foley* v. *Hinds,* supra. And, by this same token, contributory negligence is eliminated.

In the relationship of employer and employee, aside from the Safety Appliance Act, Chap. 196, 27 U. S. Stat. at L. 531 as amended, the natural risks of the employment are those which the law implies as assumed, and in regard to which the employer owes the employee no duty. *Ashton* v. *Boston & Maine Railroad,* 222 Massachusetts 65. Contractual assumption of risk, to use an everyday but not strictly accurate phrase, and voluntary assumption of risk, are distinct. The danger that it might be said an employee was hired to incur, as injury from repairing defective electric wires, is contractual. *Ashton* v. *Boston & Maine Railroad,* supra. Failure by an employer to exercise reasonable care to provide a reasonably safe and suitable place for his employee to work in, or reasonably safe and suitable appliances with which to do the work, not so obvious that an ordinarily prudent person, mindfully going about work with his eyes open, would observe and appreciate them, is negligence. But a defendant may avoid the consequences of this negligence by showing that the plaintiff, with full knowledge and fully aware and without objection, and without the promise that the defect will be remedied, continued in the service in disregard of the failure to provide, and continuing assumed the risk. Arkansas epitomizes well: " 'Where one voluntarily enters into a contract of hiring with a railroad company, he assumes all the risks and hazards ordinarily

and usually incident to such employment, and will be presumed to have contracted with reference to such risks and hazards.' But while an employee assumes all the risks incident to the service he enters, he does not assume a risk created by the negligent act of his master, and only such risks as he knows to exist, or may know by ordinary care." *St. Louis, I. M. & S. Ry. Co.* v. *Tuohey*, 54 S. W., 577, 77 Am. St. Rep., 109. He does not assume the risks arising from unknown defects in engines or appliances. *Central Vermont Ry. Co.* v. *White*, 238 U. S., 507, 59 L. ed., 1433.

The risk of injury from a car door, held in position above by the track designed for it to travel on, but through negligence, loose below and swinging out, on a train moving in the night, would be for voluntary assumption. And whether the risk was assumed would depend upon conjoined facts of knowledge and appreciation and other things. Assumption of risk, where the evidence is conflicting, like other disputed questions of fact, is for the jury. *Norton* v. *Maine Central R. R. Co.*, supra.

What this plaintiff actually worked at last was interstate, but the working shift or trick was not yet past, the day's work was not done, and plaintiff stood for call to do that which the train conductor might direct the next. Work of substantial connection to interstate commerce was not finished and work of a different character begun. Disassociation had not been effected; there was no break in the continuity of serving. The train had interstate character when it came into the yard. It retained it to the time of the doing of personal injury, for all the cars had not been distributed to their appropriate places. *Reed* v. *Director General*, supra. And Hatch's duties although he had no occasion to board any train, were with and related to that train. His work was so closely connected therewith as to be part of it. *Pederson* v. *Deleware, L. & W. R. R. Co.*, 229 U. S., 146, 57 L. ed., 1125. He was under orders, "liable to be called upon at any moment, and not at liberty to go away. (He was) none the less on duty when inactive. (His) duty was to stand and wait." *Missouri, K. & T. Ry. Co.* v. *United States*, 231 U. S., 112, 58 L. ed., 144. The test of interstate controlment seems to be employment of such kind once established and the absence of transition. Liability is created where the service being rendered is of general, indiscriminate character, not segregated and tied to shipments within the State,

but applicable at least as well to the interstate commerce which the carrier is conducting. *Pittsburgh, C. C. & St. L. Ry. Co.* v. *Glinn*, 219 Fed., 148.

If the single aspect were that of employment, the refusal to instruct would appear material and harmful error, the reason being that where the facts are undisputed, whether the injured servant was in interstate commerce is for the court. But this problem has another phase. There is no feature of contributory negligence, and the rule of comparative negligence is without bearing, if the case be within the Federal act, said the jury. There is not nor could not be complaining of the rejection of evidence. State law or Federal, on either hypothesis, the company's position was made no worse on the theory of the trial. *Chicago & Northwestern Ry. Co.* v. *Gray*, 237 U. S., 399, 59 L. ed., 1018. The exceptions fail.

Approaching the motion from the angle of liability, first: Was the verdict of the jury influenced by prejudice, mistake, bias, passion? Is inherent error plainly visible in the record? Do the pages that printing made possible, and the inferential circumstances and probabilities, tell that the plaintiff's case is essentially and openly erroneous? Or, though certain testimony apparently was disbelieved, is the verdict supported by evidence which was believed, evidence which is believable, consistent, and tendering fair presumption of its truth, albeit that as a whole the evidence may seem to preponderate against the finding of the triers of fact? These questions this reviewing court must meet. And the credibility of every witness and the weight and probative value of evidence are to be determined by the jury, where the testimony and the justifiable inferences are diverse. *Baltimore & O. R. R. Co* v. *Groeger*, 266 U. S. 521, 69 L. ed., 419; decided January 5, 1925; *Bragg* v. *Hatfield*, 124 Maine, 391; *Jannell* v. *Myers*, 124 Maine, 229, *Daughraty* v. *Tebbetts*, 122 Maine, 397; *Mears* v. *Biddle*, 122 Maine, 392. The mere stating of the standard to which the motion must measure shows this ground to be unfirm. With regard to liability the verdict is not awry from the testimony and wide of the mark.

The most serious question of all presented is that the verdict is palpably excessive. Plaintiff's foot gone, the amputation was performed at the point of least loss, and an artificial limb substituted. Urinary and other troubles, incident to confinement to bed, strike one as having yielded promptly to the approved technique of medical

science. One year had gone since the accident when the case was tried. If Mr. Hatch had not been injured, and had worked constantly at the same wage, his earnings would have been $1586.00 Add the aggregate of the bills for hospitals, nurses, medicines, appliances, dentists, doctors, and subtract the grand total from the amount of the verdict, the remainder is more than $22,000.00.

Other elements of damages are to be measured in terms of money, not by any certain consequence or dependence of one thing upon another, as in the instance of those computable by arithmetic, but by deductive reasoning. One human being alone could picture the sufferings, mental and physical, endured by Hatch since calamity befell him. His portrayal bespeaks mastery and mental nimbleness. But it does not more than glimpse the future, because it cannot. Outstanding is not hopelessness, nor utter weariness, nor resigned abandonment, nor a person dead to rapture and despair. No, it is the injured man made strong in character by his own will power, directing his own destiny, following the rules of prudence, and subjecting himself to medical prescription. Scientific skill supplements nature. And nature puts responsibility on the individual.

Mr. Hatch is entitled to be made whole, to the extent that money damages can make him whole, at the expense of his former employer. This is but justness for him. Little beyond his majority in years, he must fit himself into a new job, now. Accident has freed him from the old kind of muscular toil. And with this freedom may come increase in mental activity. No one knows what the future stores; clouds and darkness rest upon it.

Twenty-two thousand dollars, which is less than the verdict, time loss and expenses out, would purchase for Mr. Hatch from an underwriter, at 4% yield, on the basis of his age at the time of the trial, an annuity of $1147.30 for life. Computation at 5% would give approximately $1300.00 annually throughout Hatch's expectancy of living, and at 6%, $1475.00. Uninjured, Mr. Hatch earned $1586.00 a year. He is far from being totally incapacitated. Average capability cannot be defined. No average man exists. But many a soldier returned to the pursuits of civil life, maimed as seriously as Mr. Hatch is, has faced the facts and adjusted himself, compensated by his Government for the estimated degree of physical disablity, and geared a world to a new efficiency.

Obviously, there is excessiveness in the amount of damages awarded by the jury. On this the court is a unit. The minority of the members would have sustained the motion for new trial, and remanded the case solely for the determining of indemnity over again. But the greater number of the personnel has voted that the assessment be divided, and that the part which, as matter of law, is considered wrong and unjustifiable, be defined; in the hope that thereby this litigation might come the sooner to an end. In obedience to their will, and in the acquiescence that reflection upon the arguments of the majority at least compels, it is recorded without disagreement, that all the verdict above $15,000.00, is so deemed.

If, on the part of the plaintiff, within thirty days from the rescript, there is formal remission or surrender of the excess of damages, the motion for a new trial will fail, and the mandate will be, motion overruled. And:

If no remittitur, motion sustained. New trial.

LINCOLN E. CLEMENTS *vs.* I. J. MURPHY.

Androscoggin. Opinion November 28, 1925.

If parties enter into an express oral contract, the terms of which are mutually understood and assented to, with an agreement that a written contract shall be drafted which is viewed only as a convenient memorial, the oral contract is binding upon the parties, though the written draft never be signed.

On the contrary, if the parties continue only in negotiation, contemplating the drafting of a written contract which is viewed as a consummation of their negotiations, if the written contract is not executed, no express contract exists.

In the instant case, the jury failed to find an express contract, oral or written. Hence, inasmuch as the furnishing and value of labor and materials was not questioned, the verdict for the plaintiff upon his account annexed was proper.

On motion for new trial. An action on account annexed to recover a balance alleged to be due for labor and materials furnished by the plaintiff in constructing a section of the State Highway in the town of Turner. The general issue was pleaded with a brief statement alleging that the work was done and materials furnished under an expressed contract and not on account. The defendant contended that an oral contract was entered into by which it was agreed that plaintiff was to receive for labor and material on the basis of $2.00 per cubic yard of stone base laid, with an agreement that the oral contract was to be put in writing. The plaintiff denied that an oral contract was made and contended that the parties continued only in negotiations, contemplating the drafting and executing of a written contract as a consummation of their negotiations. A verdict of $3,671.91 was rendered for the plaintiff and the defendant filed a general motion for a new trial. Motion overruled.

The case appears in the opinion.

Frank A. Morey, for plaintiff.

Clifford & Clifford, for defendant.

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

STURGIS, J. During the Summer of 1924 the plaintiff worked for the defendant, a road contractor, building a section of the State

Highway through the town of Turner. He began work August 4th, and continued furnishing men, trucks and sundry supplies until October 4th, of the same year. At that time, controversy arising as to whether the employment was by the day or on the basis of cubic yards of stone base laid, the plaintiff withdrew from the work with his men and trucks, and within a few days thereafter brought this suit.

The defendant claims that following several conferences held in the previous July, he accepted the plaintiff's offer to lay about two miles of stone base and gravel the same for $2.00 per cubic yard and, with the understanding that this agreement was to be reduced to writing, and that his employment was under and in accordance with this contract, the plaintiff began and carried on his work.

This claim of the defendant is stoutly denied by the plaintiff, who says that at preliminary conferences he discussed with the defendant the work to be done, and whether it should be by contract on a cubic-yard basis or by the day, and asserts, that while several counter-proposals were made, no agreement was reached nor contract made. He admits that at a conference at the DeWitt Hotel at Lewiston the latter part of July, the defendant and his attorney had with them and discussed between themselves a draft of a contract to be executed by the plaintiff and defendant, but states that this contract was neither read, explained, nor presented to him for signature, and he has no knowledge of its terms or conditions. Following this conference he says, receiving no further suggestion of a contract, on August 3d, he sought out the defendant, inquired of him as to whether he should go to work without a contract, and received an affirmative reply directing him to "come and bring his crew." He began work the following Monday. He says no further reference was made to a contract by the defendant until October 4th, when the defendant presented a contract providing for payment at the rate of $2.00 per cubic yard of stone base laid, and stated that the work of the plaintiff and his crew had been performed under the contract and payment would be made accordingly. The plaintiff says he promptly repudiated this statement, refused to sign the contract and, insisting that the work had been done on a day basis and actual costs of labor and material furnished, terminated his employment.

The defendant admits that no written contract was signed by the plaintiff, and that the draft prepared by his attorney was not pre-

sented for signature. He insists, however, that a contract in accordance with the oral agreement was drawn and signed by him early in August, and the delay in presentation until October 4th, was due to the necessity of rewriting the draft and the neglect of himself and his bookkeeper.

Upon this issue the jury found for the plaintiff and the defendant files a general motion for a new trial.

The defendant urges in argument that an oral contract was made as stated, the terms of which were mutually understood and assented to, and while it was agreed that a written contract should be drafted, it was viewed by the parties only as a convenient memorial of their previous completed oral contract, and the plaintiff is bound by this oral contract, even though the written draft was never signed.

If the facts were found to sustain the defendant's contention, his argument would prevail. If, on the contrary, the facts warrant a conclusion that the parties continued only in negotiation contemplating the drafting of a written contract which was viewed as a consummation of their negotiations, the plaintiff not having signed the instrument, no contract existed. *Berman* v. *Rosenberg*, 115 Maine, 19, 25; *Steamship Co.* v. *Swift*, 86 Maine, 248.

The jury evidently gave credence to the plaintiff's version of the incidents and conversations leading up to and resulting in his beginning and carrying on the work upon the highway, and found either that no oral contract binding the plaintiff to work and be paid on the cubic-yard basis was in fact made, or that the parties continued only in negotiation in their several conferences and the written contract contemplated was viewed not merely as a convenient memorial but as a consummation of their negotiations, and the plaintiff not having signed the instrument, the contract claimed by the defendant never came into existence. We cannot say that either finding was clearly wrong.

Finding that there was no contract on the cubic-yard basis, it was the duty of the jury to find for the plaintiff and award him a fair and reasonable compensation for the labor he and his men performed, for the use of his trucks, and for such supplies as he furnished. This they could do under his account annexed. *Cape Elizabeth* v. *Lombard*, 70 Maine, 399.

The amount of the verdict not being questioned, the entry must be

Motion overruled.

HENRY GILMAN *vs.* F. O. BAILEY CARRIAGE CO., INC.

Cumberland. Opinion December 5, 1925.

A corporation note signed by its treasurer in behalf of the corporation payable to himself does not carry a presumption of authority to use it in payment of his own debt; the authority to so use it must be shown as a part of plaintiff's prima facie case.

The liability of a drawer of a check is conditional upon presentment and dishonor. There can be no recovery against him until nor unless this condition is satisfied or waived.

Omission to file an affidavit denying signature and execution of note sued, is a waiver of proof of signature and also of authority to sign in behalf of the corporate maker. But, in case of a note signed by the treasurer of a corporation and made payable to himself individually, such omission does not waive proof of his authority to use the note to pay his own debt.

Regularity within the meaning of the Negotiable Instruments Act (Section 52) cannot be predicated of a note whereof the payee is, in a trust or quasi trust capacity, the maker.

Specifications of defense required and filed under rule of court limit defenses that may be set up under the general issue.

Brief statements under the statute enable the defendant to introduce what he could not properly prove under that pleading.

In the instant cases a verdict should have been ordered for the defendant in the check case, and in the other the question of fact as to whether the notes were used to pay the treasurer's individual obligation should have been submitted to the jury.

On exceptions by defendant. Two actions brought by Henry Gilman against the F. O. Bailey Carriage Co., Inc., of Portland, to recover on several notes, some of which were signed in its corporate name by its treasurer and made payable to himself and by him endorsed, and some of which were customer's notes made payable to defendant and by it endorsed, and given to plaintiff, and the second case was to recover on several checks signed likewise by defendant in its corporate name by its treasurer, being made payable to himself and by him endorsed and given to plaintiff. At the conclusion of the evidence by plaintiff a motion to direct verdicts for defendant was

denied, but a motion for directed verdicts for plaintiff was granted and defendant excepted. Among other things the defendant contended that the plaintiff must prove that the treasurer had authority to use the notes in payment of his own debt, and also that the checks must be presented and dishonored before liability attaches to drawer. Exceptions sustained.

The cases are fully stated in the opinion.

Clifford E. McGlauflin, for plaintiff.

Clement F. Robinson and Forrest E. Richardson, for defendant.

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

DEASY, J. In January, 1925, Henry Gilman of Portland brought these two actions against the defendant corporation. In one (No. 5353) he sued the defendant as maker of seven promissory notes payable to and endorsed by W. A. Gilman or (in one instance) W. A. Gilman Co., and as indorser of four so-called customer's notes payable to the defendant.

The other action (No. 5354) sought recovery upon seven cheques drawn by the defendant running to and indorsed by said W. A. Gilman. All of the corporation's notes and cheques were signed "F. O. Bailey Carriage Co. Inc., by W. A. Gilman, Treas." The customer's notes were indorsed in the same manner. W. A. Gilman, treasurer and also payee, is the plaintiff's brother.

The plaintiff introduced the notes, cheques and also oral testimony that he paid value for the paper. The defendant offered no evidence. The presiding Justice refused the defendant's motion for directed verdicts. A similar motion by the plaintiff was allowed. Verdicts were ordered for the full amounts of the notes and cheques. Exceptions were reserved by the defendant.

It is contended that this situation—the situation created by a motion by both parties for a directed verdict—is tantamount to a submission of the whole case to the court with authority to decide both law and facts. Not so in this jurisdiction. Notwithstanding such motions issues of fact are to be submitted to a jury.

The defendant asks that its exceptions be sustained for several reasons, only two of which need be discussed.

(1) For the reason that the corporation's notes signed by W. A. Gilman as treasurer, and payable to himself individually, were negotiated and used to pay his personal obligations to the plaintiff.

No affidavit was filed as authorized by Superior Court Rule XII. (identical with S. J. C. Rule X.). The effect of such omission is to waive proof of the signing and also of the authorization of the instruments "declared upon." *Bank* v. *Merriam*, 114 Maine, 439.

But for such waiver the plaintiff would have had the burden of proving not general authority merely, which general authority was shown, but (by by-law, vote or usage) specific authorization for the issuance of notes payable to himself. *McLellan* v. *File Works*, 56 Mich., 582; *Park Hotel* v. *Bank*, 86 Fed., 744; *West St. Louis Bank* v. *Shawnee Bank*, 95 U. S., 559. The waiver, however, dispenses with all proof either of general or specific authority. We start thus with the presumption, proof being waived, not only that W. A. Gilman signed the notes and cheques in suit, but that he was authorized by the corporation to do so. Moreover, the case shows that the treasurer was authorized by vote to issue and indorse notes and cheques.

But while the treasurer's authority to *sign* the notes and cheques in suit cannot be questioned, he presumptively had the right to *negotiate* them for corporate purposes only.

Even his authority given by vote to issue and indorse paper gave him no right to use it to pay his individual debts. "If such a power is intended to be given, it must be expressed in language so plain that no other interpretation can rationally be given it." *Bank* v. *Trust Co.*, 143 N. Y., 559—38 N. E., 713; *Ward* v. *Trust Co.*, 192 N. Y., 61—84 N. E., 588.

If he indorsed the notes to the plaintiff in settlement of a personal obligation the plaintiff presumptively acquired no title to such notes enabling him to maintain actions upon them against the defendant.

There is evidence in this case having some tendency to prove that the notes, or some of them, were used for such private purposes. The plaintiff testified that he made advances to his brother from time to time in cash. These advances he charged upon a memorandum as "Loans to W. A. Gilman." Then as a "settlement" of several such advances he received one or more of the notes or cheques in suit. All of these advances the plaintiff now says were for the corporation's purposes. The notes were, he contends, given to settle corporate obligations.

But the defendant claims that the corporation's notes and cheques were in some cases, if not in all, used to pay personal "Loans to W. A. Gilman." The evidence supporting the claim "giving to it all its probative force would authorize a jury to find in his (the defendant's) favor." *Heath* v. *Jaquith*, 68 Maine, 436.

Thus a question of fact is presented which we think should have been submitted to the jury.

If found as a fact that the notes or cheques, or some of them, were used to pay the treasurer's personal debts a defense in whole or in part is made out, good until it is shown that the instruments were properly used for such purpose. *Wheeling Ice Co.* v. *Connor*, 61 W. Va., 111—55 S. E., 987; *Pelton* v. *Lumber Co.*, (Wis.), 112 N. W., 33.

We assume that the plaintiff paid value for the notes. "A pre-existing debt constitutes value." (1917, Chap. 257, Sec. 25). But such defense is open against the plaintiff. The form of the notes is such that he cannot claim immunity as an innocent holder.

"The very form of the paper itself . . . . is sufficient to put him on his guard." *West St. Louis Bank* v. *Shawnee Bank*, 95 U. S., 557.

"A bona fide holder of a promissory note executed by an officer in the name of the corporation and payable to the officer executing it as an individual in legal contemplation cannot exist." *Luden* v. *Lumber Co.*, (Georgia), 91 S. E., 102.

"Such a note is a danger signal which the discounter or purchaser disregards at his peril." *Hotel Co.* v. *Bank*, 86 Fed., 744. See also *Stough* v. *Ponca Mills*, 54 Neb., 500—74 N. W. 868; *Campbell* v. *Bank*, 67 N. J. L., 301—51 Atl., 497; and *Randall* v. *Lumber Co.*, 20 R. I., 625—40 Atl., 763; *Thornton* v. *Navigation Co.*, 165 N. Y. S., 682.

The above reasoning takes no cognizance of the statute.

But if we apply the rules established by the Uniform Negotiable Instruments Act (1917, Chapter 257) the same conclusion is reached. A note like those in suit is not "regular upon its face." (Section 52). The plaintiff is therefore not a "holder in due course." (Section 52). He has not the rights of a holder in due course. (Section 57). Such note is "subject to the same defenses as if it were non-negotiable." (Section 58). If the first of these propositions is correct the others necessarily follow.

Regularity, within the meaning of the statute, cannot be predicated of a note whereof the payee is, in a trust or quasi-trust capacity, the maker.

"No person can be a bona fide holder of a promissory note executed by an officer in the name of the corporation and payable to the officer executing it, as an individual." 3 R. C. L., 1085. "It is out of the ordinary course of business." *Rubber Co.* v. *Pinkey*, (Wash.), 170 Pac., 584.

With exceptions hereinafter noted the facts involved in the authorities presented by the learned counsel for the plaintiff differ from those in the pending case in one of two vital particulars:

In most instances the notes under consideration in the cases cited were regular in form. But a note which is in a form "sufficient to put him (the discounter) upon his guard" (*Bank* v. *Shawnee Bank*, supra); a note which flies a "danger signal" (*Hotel Co.* v. *Bank*, supra) presents a different problem.

In other cases cited there was no claim that the notes were used to pay the payee's personal debts.

Massachusetts cases seem to present an exception to this rule. Under the doctrine adopted in that Commonwealth, if a treasurer of a corporation makes two corporate notes or cheques, one payable to his own creditor and the other payable to himself, and uses both to pay his own individual debt, the former note in the hands of the creditor is held prima facie bad and the latter prima facie good. *Johnson* v. *Longley Co.*, 207 Mass., 56, and cases cited. This distinction, while not illogical, finds little support in other jurisdictions. In either case the treasurer has the presumptive right to use the note or cheque for corporate purposes. In neither case can he be presumed to have the right to use the corporate obligation to pay his own debt.

(2) That the cheques sued in action No. 5354 were not dishonored.

Neither of the cheques sued was ever presented to the drawee bank for acceptance or payment. Nothing appears in evidence to excuse this failure. The liability of the drawer of a cheque is conditional upon presentment and dishonor. There can be no recovery against him until nor unless this condition is satisfied or wavied.

"The drawer . . . . engages that on due presentment the instrument will be accepted or paid or both, according to its tenor, and that if it be dishonored and the necessary proceedings on dishonor

be duly taken he will pay the amount thereof to the holder." Negotiable Instruments Act, Section 61.

It is contended that this defense is not available because not specified as a ground of defense. Superior Court Rule XI. (identical with S. J. C. Rule IX.). But this defendant did not file and was not required to file specifications under such rule.

The plea was the general issue with a brief statement under R. S., Chap. 87, Sec. 35. Specifications required and filed under the rule limit defenses that may be set up under the general issue. Brief statements under the statute do not have this effect.

"Such brief statements cannot prevent either party from offering testimony appropriate under the general issue." *Trask* v. *Patterson,* 29 Maine, 502.

"The office of a specification of defense differs from that of a brief statement in this, that the former is in part designed to limit the matters that are controvertible under the general issue—the latter to enable the defendant to introduce what he could not properly prove under that pleading." *Camden* v. *Belgrade,* 75 Maine, 128.

Presentment lies at the root of a drawer's liability. Unless presentment or excuse for non-presentment is shown, no promise is proved. This defense is clearly available under the general issue.

The other points made do not require extended discussion:—

(3) It is contended that action upon two of the notes is barred by limitation. But payments of interest made within six years removes the bar.

(4) It is said that as to the customers' notes whereon the liability of the defendant, if any, is as indorser, there was no presentment, demand and notice. But these requirements were waived in writing by W. A. Gilman who was, we think, shown to be sufficiently authorized for this purpose.

(5) Demand at the place of payment of the corporation's notes was not proved. Such demand is required by R. S. of 1916, Chap. 40, Sec. 39. But the later Act of 1917, Chap. 257, Sec. 70. (The Uniform Negotiable Instruments Act) places the burden upon the defendant to show ability and willingness to pay at the time and place specified.

We are of opinion that the exceptions to the ruling of the learned Justice must be sustained. In the cheque case verdict should have been ordered for the defendant. In the other the question of fact

as to whether the notes were used to pay the treasurer's individual obligation should have been submitted to the jury. If so used no recovery could be had without evidence of the treasurer's authorization to make such use of the notes, or proof of ratification of his act.

In both cases the mandate must be,

"Exceptions sustained."

GEORGE K. COOK *vs.* DANIEL S. CURTIS ET ALS.

Waldo. Opinion December 11, 1925.

The legal title and right of possession are vested in the mortgagee, subject to defeasance, upon delivery of a mortgage of real property, unless otherwise agreed, and mortgagee may take possession either before or after breach of condition, in absence of any express or implied stipulation to the contrary.

Unlawful breaking and entering is the gist of the action of quare clausum and the burden of proof is upon the plaintiff; hence a mortgagor not entitled by agreement, expressed or implied, to retain possession, cannot maintain trespass quare clausum against the mortgagee who enters under his mortgage, and the motive or purpose of entry is immaterial.

In the instant case the mortgage was in usual form containing no agreement for possession by the mortgagor. The defendants had the right to enter as mortgagees, and the law presumes their entry to be in that character and under that title. The fact that the mortgagees obtained a void deed of the timber cut does not rebut this presumption.

If the cutting of timber be waste, recovery cannot be had in this form of action, nor can this declaration be amended to sound in case.

On exceptions. An action of trespass quare clausum to recover damages to real property by cutting and removing trees by defendants. A plea of the general issue was filed, with a brief statement alleging justification for two reasons: (1) that they were mortgagees and had a right to enter as such: (2) that they were justified in entering and cutting the trees under a bill of sale of the standing trees given by James H. Cook, father of the plaintiff, who was the mortgagor in the mortgage under which the defendants claimed they had a right to enter. At the conclusion of the evidence by the plain-

tiff the presiding Justice ruled that the defendants were not justified in entering and defendants excepted. Exceptions sustained.

The case sufficiently appears in the opinion.

Andrews, Nelson & Gardiner, for plaintiffs.

Clyde R. Chapman, for defendants.

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

STURGIS, J. Trespass quare clausum for entering and cutting trees on land owned by the plaintiff as purchaser of the equity of redemption from the original mortgagor. The defendants are mortgagees under a purchase money mortgage given by the plaintiff's grantor, and in their brief statement set up this fact as a bar to the action. At the trial the presiding Justice ruled, for the purpose of the trial, that the fact the defendants were mortgagees did not justify this alleged trespass, and the case is before this court on the exception taken to this ruling. Other exceptions taken at the trial are not pressed and need not be considered.

The bill of exceptions discloses that on November 14, 1921, James H. Cook, of Montville in Waldo County, bought a parcel of land with the buildings thereon, situated in Montville, and on the same day mortgaged the premises to the three defendants in this suit. The mortgage, in the usual form, but containing no agreement as to possession by the mortgagor, was duly recorded in Waldo Registry of Deeds. On April 10, 1922, the mortgagor conveyed the premises, subject to this mortgage, to the plaintiff in this action, and that deed was duly recorded on the same day. Nearly twenty months later the mortgagor, without any authority from his vendee, the owner of the equity, conveyed to the defendant, Daniel S. Curtis, by deed dated December 1, 1923, all soft wood and poplar standing on the premises. The consideration of this conveyance was fifty dollars, and was paid by crediting that sum upon the mortgage. Two weeks later, December 15, 1923 according to the declaration, the defendants entered the premises and cut and carried away thirty-five (M) thousand feet of standing timber. The bill of exceptions states, and we must therefore assume, the entry was peaceable, the conditions of the mortgage had been broken, and the breach continued at the time of the entry.

It is familiar and settled law in this State, that upon the delivery of a mortgage of real property, the legal title and right of possession, unless otherwise agreed, vest in the mortgagee subject to the defeasance, *Allen Co.* v. *Emerton et al.*, 108 Maine, 221, 224; *Am. Ag. Chem. Co.* v. *Walton*, 116 Maine, 459. Hence, in the absence of any express or implied stipulation to the contrary, the mortgagee has the right to take possession of the mortgaged property at any time either before or after breach of condition. *Brastow* v. *Barrett*, 82 Maine, 456; *Bank* v. *Wallace*, 87 Maine, 28; *Am. Ag. Chem. Co.* v. *Walton*. supra; R. S., Chap. 95, Sec. 2. The gist of the action of quare clausum is the unlawful breaking and entering, and all other allegations are simply laid as aggravations of the trespass. It is, therefore, incumbent upon the plaintiff to prove such unlawful entry. *Dingley* v. *Buffum*, 57 Maine, 379; *Hatch* v. *Rose*, 107 Maine, 184; *Rangeley* v. *Snowman*, 115 Maine, 412, 416.

It is also settled law in this State that a mortgagor, not entitled by agreement, express or implied, to retain possession, cannot maintain trespass quare clausum against a mortgagee who enters under his mortgage. *Blaney* v. *Bearce*, 2 Maine, 132; *Gilman* v. *Wills*, 66 Maine, 273; *Jones* v. *Smith*, 79 Maine, 446. The same rule obtains in New Hampshire. *Chellis* v. *Stearns*, 22 N. H., 312; *Furbush* v. *Goodwin*, 29 N. H., 321. Also in Massachusetts. *Lackey* v. *Holbrook*, 11 Met., 458. As is said in Jones on Mortgages, 3d. Ed., Vol. 1, Sec. 675: "The gist of the action is unlawful entry, but the entry of the mortgagee in such case is lawful."

The motives or purposes for which the entry is made are not material. In the instant case the mortgagees had a right to enter the premises for breach of condition, or regardless of breach under the statute. (R. S., Chap. 95, Sec. 2). "If (they) had a right to enter for such purpose, the entry was lawful, though (they) entered without executing their purpose or even for other purposes." *Blaney* v. *Bearce*, supra. Breaking and entering by the mortgagee to effect a real estate attachment was held to be justified by the mortgage in an action of quare clausum by the mortgagor in *Lackey* v. *Holbrook*, supra. In *Chellis* v. *Stearns*, supra, it is held, "no beneficial results are likely to follow from holding that a man may justify his entry upon mortgaged premises or not according to the motives or purposes which lead to it."

The decision in *Marden* v. *Jordan,* 65 Maine, 9, is not in conflict with these conclusions. In that case the evidence clearly indicated that the mortgagor was in possession of the mortgaged premises, not under the mortgage, but by virtue of a contract with the mortgagee creating the relationship of landlord and tenant between the parties. The action of quare clausum fregit was sustained as an action by a tenant against his landlord, not as mortgagor against mortgagee.

In this case, the deed from the original mortgagor to the defendants, attempting to convey the standing timber was a nullity. They acquired no rights or relationships under it. They remained as before, mortgagees only. The plaintiff's rights were not affected by it, and his status in this action is that of a mortgagor and no more. The rule in *Marden* v. *Jordan* does not apply. The defendants had the right to enter as mortgagees, and the law presumes their entry to be in that character and under that title. *Benson* v. *Bowles,* 8 Wend. (N. Y.), 175; *McGrady* v. *Miller,* 14 Vt., 128. The case as stated in the bill of exceptions is barren of facts rebutting this presumption. We think the fact that the defendants were mortgagees is a defense to the action, and the ruling in the court below to the contrary is error.

The plaintiffs, however, contend that though the entry be lawful, the cutting of the timber was waste, for which an action on the case will lie, and urge that the suit be treated as case in the nature of waste, and recovery allowed. This transformation cannot be accomplished. A mortgagee is undoubtedly liable for waste; *Whiting* v. *Adams,* 66 Vt., 679; 25 L. R. A., 598; Jones on Mortgages, Vol. 2, Sec. 23; 19 R. C. L., 331; Not. 4 Am. St. Rep. 69; and if the cutting of the timber in this case be waste, which cannot be determined from the facts stated, the defendants would be liable in a proper action. Not in this action, however. The declaration cannot be amended to sound in case. Such an amendment would be more than a matter of form. It would change the nature of the action which is not allowable. *Lawry* v. *Lawry,* 88 Maine, 482.

Upon the foregoing conclusions, the entry must be,

Exception sustained.

HOPKINS BROTHERS COMPANY

vs.

AMERICAN RAILWAY EXPRESS COMPANY.

Aroostook. Opinion December 11, 1925.

In the transportation of live stock the carrier is bound to maintain, from point of shipment to point of destination, cars suitable for reasonably safe conveyance of its live freight.

In the case at bar the jury found that defendant, or its agents, were negligent in their handling of the horses and car while the car was at Northern Maine Junction in this State, and the evidence justifies that finding.

The jury heard the evidence and it is assumed that they were properly instructed as to the element of negligence. It is agreed that the cost of the horse found dead in the car at the Junction was not included in the verdict, but the jury must have included in the verdict the cost of the mare found lying on the floor of the car in a crippled condition. The evidence seems to justify a finding that the crippling of the mare was due to her "condition," as the word is used in the contract of shipment, and to her own acts and that of the other animals, and that her loss is one of inevitable accident and not recoverable against the defendant.

On motion for a new trial by defendant. An action of assumpsit to recover damages for not safely transporting a carload of horses from Watertown, Mass., to Fort Fairfield, Maine. The horses were shipped under the usual contract for the transportation of live stock. On arrival of the car at Northern Maine Junction in this State, one of the horses was found dead and another in a serious condition, and within a week after the shipment reached Fort Fairfield six of the horses died from pneumonia, alleged to have resulted from exposure at the Junction due to the negligence of defendant. A verdict of $1,251.43 was rendered for plaintiff and defendant filed a general motion for a new trial. If plaintiff, within thirty days from filing of rescript, files a remittitur of all damages in excess of $1,086.43, motion overruled: otherwise motion sustained and a new trial granted.

The case is fully stated in the opinion.
Powers v. *Mathews*, for plaintiff.
Ryder & Simpson, for defendant.

SITTING: WILSON, C. J., PHILBROOK, DUNN, DEASY, BARNES, BASSETT, JJ.

BARNES, J. The defendant, a common carrier of goods and chattels for hire, by its written contract with plaintiff, on March 6, 1924, undertook and agreed to transport twenty-eight horses from Watertown, Massachusetts, to Fort Fairfield, Maine. The contract is in the form in common use in the shipment of livestock, and for a complete understanding of the liabilities of the parties thereto need not be set out in full. Under the contract, however, the defendant agreed to furnish a suitable car, and did furnish an express car, sufficiently commodious, and of such construction as to protect its load from exposure so long as it was kept closed. It stipulated non-liability for damage to the horses arising from any "conduct or act of the animals to themselves, or to each other, ... or arising from the condition of the animals themselves, or which results from their nature or propensities . . . . for delay, injuries to or loss of said animals and paraphernalia, from any cause whatever, unless such delay, injury or loss shall be caused by the Express Company or by the negligence of its agent or employees." The plaintiff, by its president, a man of more than thirty years' experience shipping horses into Aroostook County, inspected the horses, himself taking the temperature of each, and substituting a horse carrying normal temperature for each beast that registered above normal.

He supervised the loading, signed the contract of shipment, and furnished an attendant who was privileged to ride and did ride in the smoking-cars of the railroads employed.

The car was transported with reasonable dispatch, except for an unavoidable delay at Northern Maine Junction, in this State, to destination, one horse, however, dying before arrival at the Junction, from causes attributable to what is termed in the contract his "condition." For the loss of this horse the defendant could not, under the contract, be held liable.

It is apparent that the defendant transported the car of horses by virtue of contracts with the various railroads over whose lines it

moved, contracts of whose nature there is no evidence in the case; but, so far as plaintiff's rights are concerned, the railroads employed by defendant in the transportation of the car were agents of the defendant.

After arrival at Fort Fairfield, between dates March 18 and March 22, six of the shipment of horses died.

Plaintiff claimed damages, to the amount of the purchase price of the six horses, on the ground that they died of pneumonia, following cold or influenza caught or aggravated by undue exposure resulting from negligence of defendant, or its agents, during the delay at Northern Maine Junction, and the Express Company defended, on the theory that the first to die at Fort Fairfield was a mare whose condition when found in distress at the Junction was such as to render her valueless, and without liability on its part, and that the other five died from the effect of disease to which horses in shipment are subject, called acclimating or shipping disease, or from other causes for which defendant is not liable.

Upon this issue the case was tried, and the result was a verdict for the plaintiff.

The case comes to this court upon motion, and the question for decision is whether the jury was justified in finding negligence on the part of the defendant, and, if so, whether or not the amount of the verdict is excessive.

There was evidence that the defendant had its agent, the express messenger, on the Maine Central train that moved the horses to Northern Maine Junction, for he testified that he accompanied the shipment to that point and turned the bill of lading over to the messenger of the connecting train, and further that he did not inspect the car and contents there, but had to put out express for the connecting train, and that from the Junction he went on to Bangor, not having seen the horses after leaving Waterville.

There was evidence that the defendant had its messenger on the connecting train at the Junction, and that he did not attend to the horses but went on to the end of his trip, leaving the car in the Junction yard.

There was evidence that the head transfer man at the Junction was in charge of matters concerning the defendant at the Junction, and that he had a crew there; evidence that two express men and helpers were about the car during the delay; that the yard-master

of the Bangor and Aroostook R. Co. was on duty with his crew at the Junction, and that the yard clerk, the car inspector of the B. & A., and others, noticed evidence, at the Junction, that the car of horses was received there in serious disorder.

The car was set for the Bangor and Aroostook train, but its conductor refused to receive it in the condition in which it was offered to him, and his train pulled out on its way northward, leaving the horses on the track. The attendant was notified and he testified fully what he attempted to do and what he was able to do for the horses during the delay, from two forty-seven A. M. until about seven o'clock, when the car was connected and moved out with the next regular train for Fort Fairfield.

The jury found that defendant, or its agents, were negligent in their handling of horses and car during this period of about four hours, and the evidence justifies that finding.

It was the duty of defendant to maintain throughout the trip a car suitable for reasonably safe conveyance of its live freight.

Notified that two of the horses were down on the floor of the car, under the feet of their mates in the rear compartment, the men in charge of the yard at the Junction, agents of defendant, determined, as was their duty, to refit the car for further passage by retaining it and causing or allowing the fallen and helpless beasts to be removed therefrom. All witnesses agree that the horses were pounding and trampling within, and were hot and steaming, as horsemen say.

The car was moved over to the stock yard, and regular employees at the Junction opened the car, removed to the unsheltered yard the horses that were standing, found one dead horse on the floor, and another so grievously crippled that, after working over her for a half hour or more, they abandoned their attempt to get her on her feet.

It was a March morning, the temperature at about the freezing point, and the attendant was busied in keeping the unloaded animals moving about the yard, with the purpose of safeguarding them from injury by exposure to the cold air while in their heated condition.

He had protested against unloading them in the cold, had urged that the car be taken in to Bangor, and had wired to that city for the services of a veterinarian.

In disregard of the suggestions and recommendations of the attendant, during the interval from about three till nearly seven o'clock,

the employees of the railroad or of the express company, or, more likely, employees of both companies acting together, at various times proceeded to put the car into reasonable condition to again receive the unloaded horses and go on its way. During all this time, so far as the evidence shows, the door of the car was left open and the horses in the middle and forward compartments were subjected to the inrush of cold air.

When delivered to the shipper at Fort Fairfield, six of the horses so exposed as above set forth, were found to be ailing, sickened, and in the space of fifteen days, though ministered to by a veterinarian, died.

The jury heard the evidence. It is assumed they were properly instructed as to the element of negligence. They found the defendant, or its agents, negligent, and were so far right. It is agreed that they did not include in the amount of their verdict the cost of the horse found dead in the car at the Junction. They must have included the cost of the mare that lay on the car floor in crippled condition. The evidence seems to justify a finding that the crippling of the mare was due to her "condition," as the word is used in the contract of shipment, and to her own acts and that of the other animals, and that her loss is one of inevitable accident and not recoverable against the defendant.

Some testimony was given as to the value of the animals at loading point. The jury, in estimating this value, may have considered that the loss of one horse, out of a pair, bought as a pair, was more than one half the cost of the pair. They brought in a verdict for $1,251.43.

The pair, of which the crippled mare was one, cost plaintiff $330.

If plaintiff, within thirty days from filing of rescript, files a remittitur of all damages in excess of $1,086.43, motion overruled; otherwise motion sustained and a new trial granted.

OLD TAVERN FARM, INC. *vs.* CLEMENT V. FICKETT.

Cumberland. Opinion December 16, 1925.

Milk may be sold in other vessels than bottles containing quarts, pints, and half pints, if sealed and stamped according to law, bottles of other sizes being included within the general term of "other vessels" as used in the statute.

While quart, pint, and half pint bottles may be sealed by apothecaries' liquid measure, having as its unit the fluid ounce, the sealing of all other vessels must be according to their cubical contents; and while the cubical content may be determined by the application of the apothecaries' liquid measure, as the United States fluid ounce is readily transposable into wine measure based on cubical content, every other vessel, except bottles of the sizes above mentioned, must be sealed and stamped according to their exact content, unless the State Sealer of Weights and Measures has established a tolerance in such cases, and in the units of wine measure, viz.: gills, pints, quarts, and gallons, or fractional parts thereof. In the instant case if the petitioner's bottles contain ten ounces, they may be stamped as containing two and one half gills.

On exceptions. A petition for a writ of mandamus to compel the defendant as sealer of weights and measures of the city of Portland to seal certain bottles to be used in the sale of milk containing about ten ounces. A hearing was had and the presiding Justice ordered the peremptory writ to issue, and the defendant excepted, and the case was certified to the Chief Justice under Sec. 18, Chap. 107 of the R. S. Exceptions overruled.

The case fully appears in the opinion.

Chaplin & Burkett, for petitioner.

H. C. Wilbur, for defendant.

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

WILSON, C. J. On application for a writ of mandamus to compel the defendant as sealer of weights and measures of the city of Portland

to seal certain bottles to be used in the sale of milk and alleged to hold approximately ten ounces, or two and one half gills, the Justice below after hearing ordered the peremptory writ to issue, and the case was certified to the Chief Justice under the statutes on defendant's exceptions.

The issue is confined to the construction of Secs. 14, 15 and 20 of Chap. 37, R. S.: Whether a sealer of weights and measures is obliged to seal any bottle other than quarts, pints, and half pints to be used in the sale of milk and cream or any vessel not containing one of the recognized units of measure and stamp them with the quantity which they actually hold.

A review of the legislation upon the subject will aid in determining the construction which must be placed upon the law as it now stands. Ordinarily it is true the duty of the sealer of weights and measures is confined to sealing measures containing the recognized units, and according to some standard adopted by the Legislature with such tolerances as may have been determined upon by the State sealer of weights and measures, Secs. 3, 13, Chap. 48, R. S. The Legislature, however, has seen fit to make special provisions as to the sealing, not only of measures by which, but of all cans and other vessels, including bottles, in which milk and cream is sold.

The general practice of the sale of milk and cream in bottles for household consumption is of comparatively recent origin; and until 1909 the Legislature had not made any special provision for the sealing of bottles used in the sale of milk. The earlier statutes related solely to the standard by which measures, cans or other vessels used in the sale should be sealed, whether by wine or the ale and beer measure. Public Laws 1869, Chap. 25, Sec. 3; Public Laws 1872, Chap. 68; Public Laws 1887, Chap. 20.

In the revision of 1903, the only provision relating to the sealing of measures, cans or other vessels in which milk is sold is found in Sec. 11, Chap. 39, which reads as follows:

"All measures, cans, or other vessels used in the sale of milk shall be sealed annually by the sealer of weights and measures by wine measure, and shall be marked by the sealer with figures indicating the quantity which they hold."

In 1909 the Legislature first recognized the practice then becoming general of the sale of milk in bottles. Two acts were passed in 1909, Chapters 242 and 254. Though approved on the same day, Chapter

242 did not take effect until January 1st, 1910, while Chapter 254, which amended Sec. 11 of Chap. 39 above quoted, took effect sometime in July, 1909.

After the date on which the latter act took effect until January 1, 1910, Sec. 11 of Chap. 39, R. S., (1903) read as follows:

"All measures, cans or other vessels used in the sale of milk shall be sealed by the sealer of weights and measures by wine measure containing thirty-two ounces to the quart and all quart bottles containing less than thirty-two ounces or more than thirty-two ounces and six drams, all pint bottles containing less than sixteen ounces or more than sixteen ounces and four drams, and all half pint bottles containing less than eight ounces or more than eight ounces and two drams shall be condemned. All bottles within the above limits shall be passed as containing full measure, and all other measures, cans or other vessels shall be marked with figures indicating the quantity which they hold," clearly indicating by its terms that the Legislature regarded bottles as included in the general class of measures, cans or other vessels.

Prior to the passage of this act all measures, cans or other vessels used in the sale of milk were sealed by wine measure which is based on the cubical contents, though it is readily transposable with the apothecaries' liquid measure based on the fluid ounce which in the United States contains one one hundred twenty-eighth of a wine gallon or one thirty-second of a wine quart. The use of the fluid ounce was, no doubt, deemed by the Legislature as a more convenient unit of measure for determining the contents of bottles, and owing to the difficulty of manufacturing bottles of exactly the same size a certain tolerance was established for the sizes then most commonly in use; and bottles falling within that tolerance could be sealed as quarts, pints and half pints, respectively, though in fact holding more; but all other measures, cans or vessels except such quart, pint and half pint bottles must be stamped with the exact quantity which they held.

Chapter 254 cannot be construed as prohibiting the sale of milk and cream in other vessels, than bottles containing quarts, pints and half pints, but when other sizes are used, the actual contents of the vessel or bottle must be stamped thereon. If the Legislature had intended to prohibit the use of two-quart bottles or bottles containing one gill or any other quantity, it would, undoubtedly, have said so in plain

terms, and not having done so, except in the case of bottles purporting to be quarts, pints, and half pints that were not within the tolerance fixed, other sizes containing any amount could, under this act, be lawfully used if properly sealed and their contents stamped thereon.

When Chapter 242 of the Laws of 1909 went into effect, it to some extent modified Sec. 11 of Chap. 39 as amended by Chap. 254, in that it returned to the cubical content as the basis of the units of wine measure; but being enacted on the same day, and not expressly repealing Chapter 254, the two acts must stand together in so far as they are not inconsistent with each other.

The only other act essentially affecting the sealing of bottles used in the sale of milk is contained in the Public Laws of 1913, Chap. 81, which expressly repealed Chap. 254, Public Laws 1909, and permitted quart, pint and half pint bottles to be sealed by the manufacturer upon filing a bond with the state sealer of weights and measures, and fixed a penalty for the sale or use of bottles not sealed and stamped in accordance with its provisions. We find nothing in this act, however, that prohibits the use of bottles of other sizes, if sealed and stamped according to law. The prohibitions contained therein with the penalties for violations apply only, we think, to the improper use of bottles of the sizes specifically mentioned.

The Legislature in enacting these statutes may not have had in mind the use of bottles of other sizes than quarts, pints and half pints, and hence made no express provisions governing their use, but not having expressly forbidden their use, and a bottle being included within the general term "vessel," the use of bottles of any capacity other than those mentioned in Sec. 20 of Chap. 37, R. S. is lawful if sealed in the manner prescribed for "other vessels" under Sec. 15, Chap. 37, R. S.

While under Chap. 254, Public Laws 1909 the quantity a vessel or bottle holds might be expressed in fluid ounces, the capacity of a bottle other than the sizes mentioned in Sec. 20 of Chap. 37, R. S. must now be expressed, when sealed, in terms of one of the units of wine measure or fractional parts thereof, viz., gills, pints, quarts, or gallons. Applying this construction to the instant case, assuming the bottles of the petitioner hold ten fluid ounces, they must be stamped as holding two and one half gills.

While in theory this construction may involve some inconvenience in computing the amount a vessel or bottle actually holds, it is a

matter to be corrected by the Legislature and not by this court. The instant case on its face, however, presents no complicated problem of gauging, as the alleged contents of the vessels in question in fluid ounces are readily transposable into its equivalent in wine measure.

Exceptions overruled

FLORA HARRIS, In Equity *vs.* OLIVER D. AUSTIN ET ALS.

Androscoggin. Opinion December 16, 1925.

In the interpretation of a will in ascertaining the rights of legatees, intention of the testator, as collected from the whole will and all the papers which make up the testamentary act, examined in the light of attendant facts, which may be supposed to have been in the mind of the testator, must govern, unless it conflicts with some positive rule of law, or violates some rule of interpretation so firmly established as to have become a fixed rule of law governing the transfer of property by will, then legal rules must prevail.

A devise to heirs, whether to one's own or to heirs of another, carries a presumption that the heirs take by the rules of descent, that is, per stirpes, not per capita, unless such presumption is controlled by words in the will indicating a different intention of the testator.

In the instant case without indicating that the words "to be divided equally" and similar phrases may not in some cases be satisfied by a division among certain individuals named and a class described as the heirs of a deceased person, it is held that the testator's intent was to divide his estate equally between the children of Ursula Austin though described in the will as her heirs and the several other persons named, each taking one eleventh of the residue.

On report. A bill in equity seeking the interpretation of a certain paragraph in the will of Cyrus A. Caswell. A hearing was had upon bill and answers and by agreement of the parties the cause was reported to the Law Court. Bill sustained.

The case fully appears in the opinion.

Tascus Atwood, for complainant.

Harry Manser and Charles F. Adams, for respondents.

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

MORRILL, J., non-concurring.

PHILBROOK, J. In this case we are to construe the will of Cyrus A. Caswell, and particularly to discover and apply the meaning and intention of the testator when he used the following language:

"4th. I give, bequeath and devise all the remainder of my estate both real and personal to be divided equally among the following, the heirs of Ursula Austin, Verda Caswell, Melvin J. Caswell, Mrs. Eda Judd, Mrs. Ada Smith, Mrs. Flora Harris, and Mrs. Flora May Parker and Frank Caswell."

The plaintiff is Flora Harris, both in her individual capacity and in her representative capacity as executrix of the will of Mr. Caswell. The defendants are Oliver D. Austin, Mildred E. Andrews, Edna Bubier, Ada Smith, Frank Caswell, Mertelle Day, Verda Caswell, Melvin J. Caswell, Eda Judd, and Flora M. Parker. These ten defendants, together with the plaintiff, are the eleven persons who are interested in the decision of this case. Oliver D. Austin, Mildred E. Andrews, Edna Bubier and Mertelle Day are the children and heirs of Ursula Austin, deceased. They claim that the residue should be divided into eleven equal parts and that each of them should be entitled to one of those parts. Admitting all the allegations in the bill they pray judgment of this court as to whether the residue is to be shared by them per stirpes or per capita. The other six defendants, in their joint answer, also admit all allegations in the bill and join in the prayer for interpretation. The case comes up on report.

Ursula Austin, was a cousin to Cyrus A. Caswell. Excepting the heirs of Ursula, and Flora May Parker, all the other legatees whose names appear in the paragraph of the will now under consideration were also cousins of the testator.

In a recently decided case, *Perry* v. *Leslie,* 124 Maine, 93, 126 Atl., 340, observing the well-nigh universal rule of law, it is held that in ascertaining the rights of legatees the intention of the testator, as collected from the whole will and all the papers which make up the testamentary act, examined in the light of the attendant facts which may be supposed to have been in the mind of the testator, must

govern. If the intention of the testator 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. Thus it will be seen that the intention of the testator, in the interpretation of wills, is the controlling factor, which intention is to be gathered from the entire instrument, interpreted in the light of existing and surrounding circumstances. True it is that when such intent cannot be ascertained or, when ascertainable cannot be carried out without conflicting with some positive rule of law, or is so expressed that it cannot be carried into effect without violating some rule of interpretation so firmly established as to have become a fixed rule of law governing the transfer of property, then legal rules must be our guide. *Gregg* v. *Bailey*, 120 Maine, 263.

In the case at bar we think the intention of the testator is ascertainable, and that it can be made effectual without violating any rule of law or canon of interpretation.

Mr. Chief Justice Shaw, speaking for the Massachusetts Court in *Daggett* v. *Slack*, et ali., 8 Met., 450, holds that according to the established rules of law a devise to heirs, whether it be to one's own heirs or to the heirs of a third person, designates not only the persons who are to take but also the manner and proportions in which they are to take; and that when there are no words to control the presumption of the will of the testator the law presumes his intention to be that they shall take as heirs would take by the rules of descent; or in other words they would take per stirpes and not per capita; but that such presumption would be easily controlled by any words in the will indicating a different intention of the testator; as if, after a devise to heirs it be added "in equal shares," or "share and share alike," or "to them and each of them," or "equally to be divided," or any equivalent words intimating an equal division, then they will take per capita, each in his own right. These views were adopted by our own court in a thorough and learned opinion by Mr. Justice SPEAR in *Doherty* v. *Grady*, 105 Maine, 36, and are applicable to the case at bar. Here the testator declares that the residue of his estate, both real and personal is "to be divided equally among the following, the heirs of Ursula Austin, Verda Caswell, Melvin J. Caswell, Mrs. Eda Judd, Mrs. Ada Smith, Mrs. Flora Harris and Mrs. Flora May Parker and Frank Caswell."

Without indicating that the words "to be divided equally," and similar phrases, may not in some cases be satisfied by a division among certain individuals named, and a class described as the heirs of a deceased person, as in *Balcom* v. *Haynes*, 14 Allen, 204, we hold in the instant case that the testator's intent, in the light of the circumstances shown to exist, was to divide his estate equally between the children of Ursula, though described in the will as her heirs, and the several other persons named, each taking one eleventh of the residue.

Bill sustained.
Decree to be prepared in accordance with this opinion.
Reasonable fee for counsel on each side to be determined by the sitting Justice and paid out of the funds in the hands of the executrix.

MORRILL, J. Non-concurring.

I am unable to concur in the opinion. I do not discover any intent to bestow upon the four children and heirs of Ursula Austin any greater mark of the testator's affection than their parent would, if living, have received. He remembers them not in their own persons, but as representatives of their parent, designating them as her heirs, and substituting them in her place. The words "to be divided equally" may be satisfied by being applied to the division between the classes, and not to that between the individuals. *Balcom* v. *Haynes*, 14 Allen, 204, *Allen* v. *Boardman*, 193 Mass., 286, *Holbrook* v. *Harrington*, 16 Gray, 102. I think that this case is not distinguishable in principle from these cases.

CORINNA SEED POTATO FARMS, INC.

vs.

CORINNA TRUST COMPANY.

Penobscot. Opinion December 22, 1925.

A mortgage of chattels said to have a potential existence, as a crop to be grown by the mortgagor, stating the season when such crop is to be grown, and definitely describing the area of land on which the crop is to be grown, properly recorded, is a valid mortgage, creates a valid lien on the crop, and under such mortgagee has the right of possession after foreclosure, and in some cases before.

But an agreement which fails to state the season or fails to definitely describe the land on which the crop is to be grown, is nothing more than an executory agreement creating no lien on the crop.

In the case at bar the agreement is an executory agreement only, under and by virtue of which the relation of the plaintiff to Buck Brothers is only that of an unsecured creditor.

On report. An action of trover to recover the value of one thousand barrels of potatoes alleged to be the property of plaintiff but converted by defendant. Plaintiff relied upon a written agreement given to it by Buck Brothers of Corinna to secure the payment of a debt for fertilizer sold by it to them, claiming that such written agreement was a chattel mortgage, or crop-mortgage, so-called, on the potatoes to be planted and grown by Buck Brothers subsequent to the date of the agreement. Defendant contended that such agreement was not a chattel mortgage but an executory contract only, in that the area of land on which the crop was to be planted was not definitely stated in the written agreement, hence no lien on the potatoes was created under the agreement, and that the right of possession and title to the potatoes were in defendant at the time of the alleged conversion under two mortgages given it by said Buck Brothers. Judgment for defendant.

The case sufficiently appears in the opinion.

William B. Peirce and John S. Williams, for plaintiff.

Benjamin W. Blanchard, for defendant.

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

BARNES, J. On the eighth of April, 1924, Buck Brothers of Corinna, were indebted to both plaintiff and defendant in this case.

Indebtedness to the plaintiff was incurred for the purchase price of commercial fertilizer, spraying materials and insecticide, purchased and used to make a crop of potatoes during the season of 1923.

By a payment on October 19, 1923, debtors had reduced the debt to plaintiff to about $3,500.00 and had one thousand barrels of potatoes, more or less.

These they mortgaged to defendant by their mortgages, dated November 24, 1923 and January 30, 1924; and at the date first above written the potatoes appear to have been in the possession of the defendant, were demanded of the defendant by the plaintiff; delivery was refused, and this suit, an action of trover then brought. What is defendant's title is of no moment. A plaintiff in trover must prove title in himself or fail in the action.

Plaintiff claims title to the potatoes as mortgagee after having foreclosed a chattel mortgage, and offers in evidence a copy of the alleged mortgage, as follows:—"This memorandum of agreement made this sixth day of March, 1923 by and between the Corinna Seed Potato Farms, Inc., a corporation of Corinna, Maine, and Buck Brothers of Corinna, Maine, witnesseth:—

"1. That the said The Corinna Seed Potato Farms, Inc., agree to sell and have this day bargained and sold to the said Buck Brothers, seventy-seven and one half tons of their Corinna Farms Special Potato Grower, guaranteed analysis, five per cent. Amm. eight per cent. available phos. acid and seven per cent. potash, for the sum of forty-nine dollars and fifty cents per ton in one hundred and twenty-five pound bags and two and one half tons of sixteen per cent acid phos. in one hundred and sixty-seven pound bags, at the price of twenty-four dollars per ton, all to be hauled by said Buck Brothers, from the premises of said corporation at said Corinna, Maine, at their convenience.

"2. And the said corporation agrees to accept in payment for the said fertilizer and acid phos. so furnished, a certain number of barrels of Green Mountain potatoes grown from the strain of seed that Buck Brothers had from said corporation in the year 1922, which figured at two dollars per barrel of one hundred sixty-five pounds net

weight per barrel will equal the full purchase price of said fertilizers as set forth above, said potatoes to be dry and sound, free from frost, rot, scab, or wire worm holes and to be graded for grade U. S. Grade No. 1 and to be delivered on board cars or storehouse at said Corinna, Maine, at digging time, as said corporation may direct, said corporation agreeing to furnish a man to help load the cars or to take said potatoes in at storehouse, when so delivered, but the same are not to be delivered until they are suitable for shipping or storing and to have skin set and be ripe enough for shipment and are not to be delivered before September 20th, in any event, unless it is mutually agreed upon otherwise between the parties hereto.

"3. And the said Buck Brothers hereby agree to purchase and accept delivery of the said fertilizer at the place mentioned and the time stated, and further agree in payment of the same that they will sell and deliver to the said corporation the Green Mountains as above stipulated at the time and place mentioned f. o. b. cars or storehouse as above stated, the same to be dry and sound and to be free from rot, scab or frost and wire worm holes and to be graded for Grade U. S. No. 1.

"And it is further agreed and mutually understood that in case of failure of the crop or if Buck Brothers fail to deliver to the above corporation a sufficient number of barrels of potatoes to pay the full purchase price of the said fertilizer as set forth, then the said Buck Brothers agree to pay on or before December 1st, 1923, a sufficient sum of money to make up for any deficiency between the full amount of the purchase price of said fertilizer as set forth above and the amount represented by what potatoes they have delivered from the crop they raise on their farms in 1923, to equal the full purchase price of the said fertilizer as agreed to above.

"It is agreed, however, by said Buck Brothers that they will deliver the required amount of potatoes specified if they raised the sufficient amount to fulfill this contract out of the 1923 crop."

If the above were a mortgage of the potatoes made the subject matter of this suit in trover, the plaintiff could have sat secure in the knowledge that no holder of a mortgage made subsequent to date of record of the above could convert the property without being answerable in damages.

But the agreement is not a chattel mortgage. A mortgage of chattels said to have a potential existence, as a crop to be grown by

the mortgagor, during a season named and on a definite area of land, may by a properly written, executed and recorded conveyance give right of possession to the mortgagee after valid foreclosure, and under certain circumstances even before foreclosure. But a mortgage of a crop to be grown, to be thus effective, must so definitely and so certainly state that a lien is given and describe the crop to be grown that the mortgage is notice to the world that another than the grower is the owner of the crop until defeasance is accomplished. Otherwise the holder of the faulty conveyance has no title by virtue of the conveyance.

The agreement in evidence is nothing more than an executory agreement; and under and by virtue of such agreement the relation of the plaintiff to Buck Brothers is only that of an unsecured creditor.

By their undertaking, so far as shown by the contract in evidence, the growers gave no lien on any potatoes and did not apprize all others that they had sold the potatoes in question to the plaintiff. Hence the judgment must be for the defendant.

So ordered.

HULL'S CASE.

Knox. Opinion December 31, 1925.

A finding by the chairman of the Industrial Accident Commission, if supported by rational and natural inferences from facts proven or admitted, is final.

In the instant case the finding of the Chairman of the Commission, that the cerebral hemorrhage from the effects of which Mr. Hull died was an accident arising out of and in the course of the employment of the decedent, is supported by a rational and natural inference from facts proven.

On appeal. Petition of dependent widow of Frederick J. Hull who was stricken with cerebral hemorrhage on July 16, 1924, while in the employment of Charles S. Bicknell in turning jack screws in raising a heavy building and work connected therewith, which resulted in a shock and paralysis, and finally in death three days after the hemorrhage. Compensation was awarded and an appeal taken from an affirming decree. Appeal dismissed with costs. Decree below affirmed.

The case appears in the opinion.

Edward C. Payson, for petitioner.

Hinckley & Hinckley, for respondents.

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

STURGIS, J. This is an appeal from the decree of a single Justice affirming the decision of the Chairman of the Industrial Accident Commission.

The record discloses the following facts: On the morning of July 16, 1924, Frederick J. Hull, while in the employ of Charles E. Bicknell as a carpenter, was engaged in raising a barn by means of jack-screws. The weather was warm. The position in which Mr. Hull had to work was awkward and cramped, and the building so heavy as to require unusual exertion in the work. About eleven o'clock, Mr. Hull finished his work on the jack-screws and began hewing a piece of

timber. As he commenced this new work he complained of not feeling well but continued for about a half hour, when he left the work and started towards the barn, staggering as he went. Upon entering the barn he collapsed, and when taken home was found to be suffering from a cerebral hemorrhage from the effects of which he died July 29, 1924.

The Chairman in his finding says: "It is found as a matter of fact that the work being performed by Mr. Hull during the morning preceding the hemorrhage, the excessive strain it required, the cramped position in which he was obliged to exert himself together with the heat which was particularly oppressive on the southerly side of the building where he did much of his work that morning were all material contributing factors in bringing on the hemorrhage at the particular time it occurred. Because of these facts, the conclusion is arrived at that Mr. Hull's death was due to an accident arising out of and in the course of his employment with Charles E. Bicknell."

The dependency of the petitioner, widow of the deceased employee, being established, the decree of compensation followed. The appeal is in behalf of Charles E. Bicknell, the employer, and his Insurance carrier, The Federal Mutual Liability Insurance Company.

The opinion of this court in *Patrick* v. *Ham*, 119 Maine, 510, is decisive of the present case. The facts involved in the two cases are strikingly similar. In each, cerebral hemorrhage is found to be the cause of death, and to have resulted from the work in which the deceased was engaged just before he was stricken. Upon the facts found in the Patrick case, facts not materially at variance with those in the instant case, nor of more probative value, the finding of the Commissioner that the cerebral hemorrhage was an accident arising out of and in course of the deceased's employment was held by this court to be supported by rational and natural inferences from facts proved. No less can be said in this case.

The character of the work done by the deceased as found by the Commissioner is not in dispute. The deceased was stricken at his work, carried to his house, and found by the attending physician to be practically unconscious, paralyzed in one arm and leg, and suffering from cerebral hemorrhage. His blood pressure was high. An examination disclosed hardening of the arteries. Physicians of learning and broad experience stated as their opinion that the character of the work done by Mr. Hull, and the conditions under which

he worked that forenoon, were contributing causes and probably hastened the coming on of the hemorrhage. The finding indicates that the medical testimony offered to contradict these opinions was not convincing to the Commissioner.

"It is for the trier of facts who sees and hears witnesses to weigh their testimony and without appeal to determine their trustworthiness." And, "the Court will review the commissioner's reasoning but will not, in the absence of fraud, review his findings as to the credibility and weight of testimony." *Mailman's Case,* 118 Maine, 177.

The theory of the defense is that the hemorrhage was the natural result of a diseased condition of the circulatory system and it occurred independently of the employment of the deceased. The existence of hardening of the arteries and high blood pressure is immaterial, even though it would have finally produced cerebral hemorrhage. Acceleration or aggravation of pre-existing diseases is an injury caused by accident. *Patrick's Case,* supra; *Orff's Case,* 122 Maine, 114.

The Commissioner adopted the theory that the hemorrhage resulted from Hull's exertions in the course of his work raising the barn. We think this inference is reasonable and warranted.

The entry must therefore be,

Appeal dismissed with costs.
Decree below affirmed.

CUMBERLAND COUNTY POWER AND LIGHT COMPANY

vs.

INHABITANTS OF THE TOWN OF HIRAM.

Oxford. Opinion January 23, 1926.

A petitioner for an abatement of taxes, in order to be entitled to relief, must show that his property is overrated; that the valuation is manifestly higher than its just value, or that an unjust discrimination exists against him, thus denying him the equal protection of the laws.

In the instant case the town assessors intended and attempted to apportion and assess all taxes upon real estate in Hiram in the year 1922, equally and according to the just value thereof as required by Section 8 of Article IX., of the Constitution of this State.

In determining the fair market value of these several properties and assessing upon seventy-five per cent. of that value, the assessors are presumed to have acted in good faith and in conformity with the constitutional requirement.

Their method of appraisement being general and uniform, there was no violation of the Fourteenth Amendment by an intentional and systematic undervaluation of other properties, while the petitioner paid on full just value.

The petitioner having failed to establish that other taxpayers in the town were assessed on less than the just value of their properties, the single Justice in granting the abatement properly used the "just value" of the petitioner's property as the basis of the tax allowed.

On exceptions. A proceeding by petition for an abatement of taxes assessed for the year 1922 upon the property of plaintiff situated in the town of Hiram. The assessors of said town denied the petition refusing to abate the taxes, and plaintiff company took an appeal under Secs. 79-82, of Chap. 10, R. S. By agreement of the parties the appeal was heard by a single Justice under Sec. 37, of Chap. 87, R. S. and from his rulings plaintiff excepted. Exceptions overruled.

The case fully appears in the opinion.

Verrill, Hale, Booth & Ives, for plaintiff.

Alton C. Wheeler, for defendant.

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

STURGIS, J. This is an appeal under the provisions of R. S., Chap. 10, Secs. 79-82, from the decision of the assessors of the town of Hiram, refusing to abate the tax assessed for the year 1922 upon land and a portion of the dam owned by the appellant. By agreement of the parties, the appeal was heard by a single Justice in vacation (R. S., Chap. 87, Sec. 37) and from his ruling upon matters of law exceptions are certified to this court.

The petitioner for abatement is the owner of the hydro-electric power plant located at Hiram Falls on the Saco River, with more than half the dam in the town of Hiram and the remainder, together with the power-house, etc. in the town of Baldwin which adjoins Hiram at the thread of the stream. The land taxed consists of thirty acres immediately adjacent to the river and includes the site of the dam on the Hiram side.

At the hearing upon the appeal the petitioner claimed that the appraisement of its property by the town assessors for the year 1922 was manifestly in excess of its just value, and introduced records showing the original cost of the development with allocation of cost of construction to the two sides of the river, and estimates of replacement value with proper depreciation allowance. The land value was considered in the light of the power privilege appurtenant to it, and the Justice found that the "just value" of the thirty acres of land and the portion of the dam taxed to the petitioner as of April 1, 1922, was $116,000, and abated the tax accordingly. This finding meets with the approval of the petitioner to the extent that it accepts the figure of $116,000 as the just value which the Constitution of this State fixes as the basis of taxation. Its present complaint is that by this finding it is taxed upon the full just value of its taxable property in this town, while all other properties are taxed on approximately a seventy-five per cent. basis of their respective just values. The exception taken is to the refusal of the single Justice to fix the value of the petitioner's property for taxation at seventy-five per cent. of its just value as found and abate its tax accordingly.

A careful examination and consideration of the testimony of the assessors leads us to the conclusion that, subject to the imperfections of human judgment, they intended and attempted to apportion and

assess all taxes upon real estate in the town of Hiram in the year 1922 according to the just value thereof and in accordance with Section 8 of Article IX. of the Constitution of this State, which provides:

"All taxes upon real and personal estate, assessed by authority of this State, shall be apportioned and assessed equally, according to the just value thereof."

The method of valuation adopted was this. Having determined what, in the light of their experience and knowledge, appeared to them to be the "market value" or "fair market value" of the respective properties they appraised the same for purposes of taxation at seventy-five per cent. of such values and assessed their taxes accordingly. Their testimony carries the inference that the valuations which they used for assessment were to them "just values." This inference is confirmed by the presumption of good faith and conformity to the requirements of the law which attaches to their acts. *Iron Co.* v. *Wakefield,* 247 U. S., 353; *Fibre Co.* v. *Bradley,* 99 Maine, 263.

Their method of appraisement was general and uniform in its application, and there was no discrimination. In the case of "Land and dam at Hiram Falls thirty acres," as the assessment to this petitioner was written, the fair market value of the entire property was estimated to be $200,000, and its value for purposes of taxation was fixed at $150,000. These assessors declare, and no evidence contradicts their statement, that they extended the same treatment to the petitioner that all other owners of property in the town received. There was no intentional and systematic undervaluation of other properties while the petitioner paid on full just value. *Manufacturing Co.* v. *Benton,* 123 Maine, 121; *Bridge Co.* v. *Dakota County,* 260 U. S., 441; *Iron Co.* v. *Wakefield,* supra.

The only wrong to this petitioner was in the excessive just value found by the assessors. Its property was overrated, but this wrong was righted in the court below, and it was there assessed according to the true just value of its property as required by the Constitution.

We find nothing in the evidence to indicate that other properties were valued with greater accuracy of judgment or on a less magnified basis. Failing to establish, as this petitioner does, that other taxpayers in the town were assessed on less than the just values of their properties, no ground of error in the refusal of the Justice to depart

from the constitutional requirement appears. It is the "taxpayer whose property alone is taxed at 100 per cent. of its true value (who is entitled) to have his assessment reduced to the percentage of that value at which others are taxed even though this is a departure from the requirement of statute." *Bridge Co.* v. *Dakota County,* supra. And then only when his claim of discrimination is supported by, "something which in effect amounts to an intentional violation of the essential principle of practical uniformity." *Iron Co.* v. *Wakefield,* supra.

Exception overruled.

In Re The Samoset Company.

Cumberland. Opinion January 27, 1926.

The Law Court is expressly precluded from reviewing the findings of fact by the Public Utilities Commission in the granting of licenses to the operators of motor buses, unless they are made without any evidence to support them; neither can it review the judgment of the Commission as to public policy or the discretion vested in it under the statute.

Questions of law may be raised on exceptions by a party to the procedure provided the bill of exceptions conforms, so far as possible, to the practice in the courts of law, consisting of a summary statement of the contentions of the excepting party without reference to other documents or the evidence, except in cases where it is contended that facts were found without evidence, and should also show wherein the excepting party was aggrieved.

In the instant case in so far as the grounds of complaint set forth in bill of exceptions involve any rulings of law, they cannot be sustained. The question of which of two petitioners can best serve the interest of the public is a matter intrusted by the Legislature to the sound judgment and discretion of the Commission. It is not a judicial question subject to review by the Law Court.

On exceptions. Carter and Mileson, a corporation, was granted a license by the Public Utilities Commission to operate a public car between the city of Portland and the town of Naples, under Chapter

211 of the Public Laws of 1923, the application upon which the license was granted requested that the route extend from Portland to the town of Bridgton but the Commission limited the route from Portland to Naples. Subsequently, The Samoset Company, a subsidiary of the Maine Central Railroad, filed an application with the Commission for the right to operate over the same route between Portland to and including the town of Bridgton, and soon thereafter Carter and Mileson, and also Maine Motor Coaches, Inc., filed applications for permission to operate over the same route as that sought by The Samoset Company. A public hearing was held by agreement on all the petitions at the same time, at which parties were represented and gave evidence, and after the hearing the Commission granted the petition of The Samoset Company and dismissed the others, and exceptions were taken by Carter and Mileson. Exceptions overruled.

The case fully appears in the opinion.

Edward W. Wheeler, for The Samoset Company.

Elton H. Thompson, for Carter and Mileson.

George F. Eaton, for Maine Motor Coaches, Inc.

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

WILSON, C. J. This matter comes before this court on the exceptions of Carter and Mileson to alleged rulings and findings of the Public Utilities Commission in granting a license to The Samoset Company under Chapter 211, Public Laws, 1923, the exceptions being certified to the Chief Justice under Sec. 55, Chap. 55, R. S.

Carter and Mileson is a corporation operating motor buses for the carriage of passengers and was also a petitioner for a license to operate over the same route as that covered in the petition of The Samoset Company, a part of which route Carter and Mileson were already serving under a license previously granted.

The procedure is not provided in the acts vesting in the Public Utilities Commission the granting of licenses in such cases, except that questions of law may be raised on exceptions in the same manner as provided in Sec. 55 of Chap. 55, R. S. To be entitled to exceptions, one should in some way be a party to the proceedings. Parties having an interest and appearing in opposition should upon request be permitted to be joined, in order that their rights may be protected.

In the instant matter, by consent, the petitions of these parties were heard together and to give the right of exceptions to rulings on the petition of the other, each must be regarded as joined in opposition to the petition of the other, otherwise the right of exception of Carter and Mileson must be confined to rulings in the denying of its petition.

This court desires to further add, that the form of a bill of exceptions in such cases should, so far as possible, conform to the practice in the courts of law, Sec. 59, Chap. 55, R. S., *Hamilton* v. *Water Co.*, 121 Maine, 422, and should be a summary statement of the contentions of the excepting party and, without referring to other documents or the evidence, except in cases where it is claimed that facts were found without any evidence, should show wherein the excepting party was aggrieved by the alleged rulings. This court should not be compelled to search through volumes of testimony or exhibits and schedules and the findings of the Commission, with which these cases are usually replete, to ascertain what rulings were made or wherein the party excepting was aggrieved. *Feltis* v. *Power Co.*, 120 Maine, 101; *Hamilton* v. *Water Co.*, supra.

This court has no power, as it is requested to do in brief of counsel, to review the entire proceedings before the Commission. It is expressly precluded from reviewing the findings of fact, unless they are made without any evidence to support them. It cannot review the judgment of the Commission as to public policy or the discretion vested in it under this statute. *Maine Motor Coaches, Inc.* v. *Public Utilities Commission*, 125 Maine, 63, 130 Atl., 866; *Hamilton* v. *Water Co.*, supra.

As to how Carter and Mileson were aggrieved by the finding of the Commission the only complaints made in the bill of exceptions are: that the Public Utilities Commission should have taken into consideration the fact that a prior application of Carter and Mileson had been made for a license to operate over the route in question, and preference also should have been given it because it is now operating a motor bus over a part of the route, and that before The Samoset Company should receive a license, the parent company, the Maine Central R. R., should show it was furnishing adequate service in a proper manner in the field it then occupied, viz., in operating the Bridgton & Saco River R. R., which was in a measure serving the terminals of the route described in the petition.

In so far as these complaints involve any rulings of law or imply a ruling by the Commission contrary to the interests of Carter and Mileson, they cannot be sustained; nor does it appear that the Commission did not take into consideration all the conditions assumed to exist in these complaints.

The question of which of these petitioners could best serve the public in view of all the existing circumstances is a matter left by the Legislature to the sound judgment and discretion of the Public Utilities Commission. It is not a judicial question subject to review by the courts. *Hamilton* v. *Water Co.*, supra, *In re Caribou Water Co.*, 121 Maine, 426.

As the bill of exceptions does not set forth any erroneous rulings of law, the exceptions must be overruled.

The Clerk of the Law Court will so certify to the Clerk of the Public Utilities Commission.

FRED M. LIBBY ET AL., Petitioners for Mandamus

vs.

YORK SHORE WATER COMPANY.

York. Opinion February 4, 1926.

The Public Utilities Commission has jurisdiction by implication in mandamus proceedings to compel a water company as a public utility to furnish water to an applicant therefor.

In mandamus proceedings the Law Court has no authority under the statute for deciding disputed facts, nor to send a cause back to be heard further. Not, properly, until a peremptory writ has been ordered by a single Justice and a final decision by him taken to the Law Court, has the full court jurisdiction.

This case comes to the Law Court prematurely. Where these proceedings did begin, there they must stay, till they run their compass.

On report. A petition for mandamus. The petitioners as owners of certain land in the town of York adjacent to a highway beneath the

traveled portion of which extended the main of defendant water company, a public utility, made application to respondent for use of water and were refused. On the following day a petition for mandamus was filed by such owners seeking to compel the water company to furnish them water. The respondent moved the dismissal of the petition. Without any ruling by the Justice on the motion to dismiss, under an agreed statement of facts, the cause was reported to the Law Court to determine as to whether it was within the discretion of the court to order the issuance of the alternative writ on the grounds thus shown. Report discharged.

The case fully appears in the opinion.

Stewart & Hawkes, for petitioners.

Frank D. Marshall and Charles J. Nichols, for respondent.

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

DUNN, J. The overt phase of this case is that of nonconformity to statutable procedure in mandamus proceedings. This aspect will be seen against the history and the rule.

These petitioners own certain land in the town of York. They are desirous that their property have the use of water. The public utility whose main is beneath the traveled portion of the adjacent highway, has refused to provide that use.

Attention by the Public Utilities Commission never has been sought. No statute expressly confers jurisdiction on that commission in events of this nature, but its power to deal with such situations would seem impliedly within the area of legislative meaning. R. S., Chap. 55. The decision in *Robbins* v. *Railway Company,* 100 Maine, 496, that mandamus lies immediately by an individual to make a public service corporation supply water to him, antedates the utilities law. So much by way of passing remark for that.

On the day following the denial by the respondent company, the present petition for mandamus was filed, in purpose to compel the furnishing of water.

The respondent moved the dismissal of the petition. This done, and without the Justice ruling, the counsel on the one side and the other stipulated facts agreed into the record, and suggested reserving for the Law Court whether the alternative be a writ discretionally issuable on the grounds thus shown. That suggestion found favor.

It is personally to an individual member of this court, distinguishably from him presiding as justice in term time, that a petition for mandamus should be addressed. R. S., Chap. 107, Sec. 17; *Hamlin* v. *Higgins*, 102 Maine, 510.

Once the petition is presented, the justice fixes the time and place for hearing thereof. Limitary provisions affect neither these things nor the length of the previous notice which others concerned shall have, but corrective means will reach a discretion unmistakably abused. Hearing the petition has to do with the granting or the denying of the alternative writ, a writ which determines nothing in favor of the petitioner or against the respondent, but has resemblance to an interlocutory order to show cause, which is obeyed by answering, the answer being styled the return.

The return, if it does not show a compliance with the mandate or command of the alternative writ, must either deny the facts which the writ sets out, or state other facts sufficient in law to defeat the petitioner's claim. *Dane* v. *Derby*, 54 Maine, 95. The person suing the writ, the petitioner as custom is to call him, may by his answer wholly or partially traverse the return, and on the issue so formed introduce for trial and determining the further and deeper question of whether the peremptory writ is issuable. Or, in the stead of challenging some particular matter of fact alleged by the opposite party, the petitioner may demur to the return, and in this way advance an issue which, as if it were raised by traverse, he must maintain; or failing this, see his cause fall. R. S., Sec. 18; *Hamlin* v. *Higgins*, supra.

The justice may reserve questions of law for the full court.

And, after judgment and decree by the justice that peremptory writ is issuable, exceptions saved all along from issue joined, and till now temporarily inactive or inoperative, are arguable above, on certification to the chief justice. R. S., Sec. 17; *Hamlin* v. *Higgins*, supra. There the excepter must show, not merely a granting or withholding of the writ, but an erroneous ruling in law, or patent misuse of discretionary control, else the decision below stands. *Day* v. *Booth*, 122 Maine, 91.

But there is absence of authority for deciding disputed facts by the full court, and likewise for sending a cause back to be heard further. *Hamlin* v. *Higgins*, supra. Properly, a case may not come forward before the ordering of the peremptory writ, and a coming from final

decision by the justice is for final decision here, that the controversy may know an end for good and all. *Lawrence* v. *Richards,* 111 Maine, 95.

This case is up too soon. Where these proceedings did begin, there they must stay, till they run their compass.

Report discharged.

MARY WELISKA'S CASE.

Hancock. Opinion February 5, 1926.

Under the Workmen's Compensation Act the weight and probative force of evidence in determining the facts is exclusively invested in the Industrial Accident Commission.

"Dependency" must be shown in awarding compensation as it is a condition precedent.

In the instant case the credibility of the testimony, its capacity for being believed, was one of the things to be settled before weighing it. If the testimony has not this quality there is no occasion for weighing it. The Commission rejected it as having no probative force.

On appeal. On June 3, 1924, Stanley Weliska, father of claimant, while in the employ of Lincoln Pulp Wood Company, received an injury which resulted in a few hours in death. Four years before the accident a decree of divorce had been procured by the wife of the said Stanley Weliska on her libel for utter desertion and the custody of the claimant, a child twelve years of age, was given to her mother, who subsequently remarried, and moved into another state where she continued to live, having with her, her child, the claimant, in her new home. The only question involved in this case is that of "Dependency." Compensation was denied and from an affirming decree an appeal was taken by claimant. Appeal dismissed. Decree below affirmed.

The case is fully stated in the opinion.

Peter M. MacDonald and Aretas E. Stearns, for petitioner.

Louis C. Stearns, for respondent.

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

DUNN, J. The net result of the record is, that the appeal from the decree denying compensation to the child of the fatally injured workman, on the ground of the lack of proof of dependency, must be dismissed.

The statute applicable appears to be ambiguous. After defining "dependents" as members of an employee's family or next of kin, whom he was sustaining either wholly or partly by his earnings when he was injured, there is, relationally to the conclusive presuming of the total dependency of children, in the case of an employee deceased, the clause following:

"(c) A child or children, including adopted and step-children under the age of eighteen years (or over said age, but physically or mentally incapacitated from earning) upon the parent with whom he is or they are living, or upon whom he is or they are dependent at the time of the death of said parent, there being no surviving dependent parent. In case there is more than one child thus dependent, the compensation shall be divided equally among them." 1921 Laws, Chapter 222.

Resolving it, that legislation, by the accepted use of language, has for one intended meaning, this: when no dependent parent is surviving a deceased employee, conclusive presumption is that the dependency of the dead man's less than eighteen year old legitimate child is entire, providing the state of the child when the parent died, and notwithstanding they were living apart from one another, was that of reliance upon him for subsistence.

"Dependency," said Chief Justice CORNISH, in words that still are living, "is a condition precedent to an award of compensation." *Henry's Case,* 124 Maine, 104. The mere receiving of assistance, on the authority of the same decision, does not of itself make the recipient a dependent. Granting that there were contributions, the yet further test for dependency is, had the accepting one necessity therefor in his life station, and were they counted on by him for his means of livelihood.

While Stanley Weliska was working regularly for, and because and out of his employment by, the Lincoln Pulp Wood Company, in the Hancock county woods, on June 3, 1924, the limb of a falling tree

accidentally struck his skull and fractured it. He died that very day.

Four years before his wife had divorced him, for utter desertion over the three-year period immediately preceding her libel, in Oxford county. At the same time, the one child of the marriage which met judicial dissolution, was decreed by the court in care and custody of the mother with whom she always had lived, and now is living in the mother's new marriage home in Massachusetts. This child, aged twelve years, is the petitioner in these proceedings. The divorced husband never remarried. If he died leaving living parents, for anything that is shown, they are self-supporting.

At the hearing, there was but one issue, it of the petitioner's dependency, the respondent's answer raising nothing else. *Mitchell's Case*, 121 Maine, 455; *McCollor's Case*, 122 Maine, 136.

There is evidence that the father at odd intervals, to within three or four months of the fateful day, came from Rumford or elsewhere in Maine, as the place of his employment was, to Lawrence in the other State, and meeting his child more or less slyly and clandestinely from her mother, made to the child gifts of money, the most of which has been appropriated toward, and some of which is in saving for, her maintenance.

So the child attested. And her mother, and a neighbor witnessed similarly, but with not so much detail.

The Industrial Accident Commission, Chairman Thayer sitting, characterized the testimony as "vague and unsatisfactory." This is taken to mean that it was dim and shadowy and failed to relieve the mind of the trier of facts from doubt or uncertainty. No other evidence being offered on the indispensable point of dependency, the petition was denied.

Argument is for or against the proposition that, as the testimony was uncontradicted, a consenting mind ought to have received it, and on reflection found it sufficient for the awarding of compensation.

The appellant loses.

The credibility of testimony, its capacity for being believed, is one of the things to be settled before weighing it. If the testimony has not this quality there is no occasion for weighing it. The testimony pressed upon attention was tested and found wanting. For probatory purpose it was as light as nothingness, in the faithful though perhaps erroneous judgment of the Commission, and hence negative decision was recorded.

That decision ended controversy.

As the compensation law is, the right to decide facts is invested exclusively in the Industrial Accident Commission, and the province of that tribunal may not be invaded by an arbitrary unauthorized court order that certain testimony must be accepted as involving both persuasion and decision. *Orff's* Case, 122 Maine, 114.

Appeal dismissed.
Decree below affirmed.

FRED F. LAWRENCE, Bank Commissioner

vs.

LINCOLN COUNTY TRUST COMPANY.

Lincoln. Opinion February 8, 1926.

During the receivership of a trust company the time fixed for the presentation of claims against the company may be extended by the court, and commissioners may be reappointed to whom all claims in the first instance should be presented.

Deposits in a commercial bank may be either general or special. In the case of a general deposit the title thereto passes immediately to the bank and the relation of debtor and creditor at once arises between the bank and the depositor. A special deposit passes no title from the depositor to the bank, such transaction being only a bailment and the relation between the bank and the depositor is not that of debtor and creditor, but of bailee and bailor.

In the case of a special deposit the bank merely assumes the charge or custody of the property without authority to use it and the depositor is entitled to receive back the identical money or thing deposited. Where the identical gold, silver, or bank bills which were deposited are to be returned to the depositor, the deposit will be special; while on the other hand a general deposit is one which is to be returned to the depositor in kind.

Where there is no express agreement or understanding between the parties that the deposit should be considered as special, and there is nothing in the character of the transaction from which may be found an implied agreement or understanding between the parties to that effect, it must be held that deposits are general, not special.

Ordinarily a deposit of money, at least if it be current money of the country or state where the deposit is made, will be presumed to be a general deposit unless the contrary appears at the time of the deposit or in some way distinctly implied so that the bank could not reasonably misunderstand the depositor's intent.

If the bank and the depositor intended that the proceeds of a draft left with the bank for collection as well as the draft itself, should remain the property of the depositor, such intention will control and the bank will not take title to the proceeds. On the other hand, when there is an understanding that when the collection has been made the bank shall pass the proceeds to the general credit of the depositor's checking account and such credit is authorized, it is the same as though money had been deposited by the customer to his credit.

The burden of proving that a deposit is special is on the depositor as against the bank.

In the case at bar the proceeds of the draft left with the bank for collection, under the circumstances of this case became a general deposit and no preference thereby arises in behalf of the depositor.

The failure or refusal of the bank to honor certain checks does not create a preference in behalf of the drawer of the checks since it is well established law that in the case of money deposited to the credit of the checking account does not remain the property of the depositor, subject only to a lien in favor of the bank but it becomes the absolute property of the bank and the bank becomes a debtor to the depositor in an equal amount.

On report. A bill in equity by the receivers of the Lincoln County Trust Company seeking instructions as to their duties relative to claims presented by a creditor of the trust company. Upon an agreed statement of facts by agreement of the parties the cause was reported to the Law Court. Decree in accordance with opinion.

The case is fully stated in the opinion.

Walter S. Glidden, for the receivers of the Lincoln County Trust Company.

G. Allen Howe, for Wiscasset Grain Company.

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

PHILBROOK, J. The parties whose names give title to this case are nominal. The real, actual, interested parties are the receivers of the defendant corporation and the Wiscasset Grain Company. The controversy arises on the equity side of this court, and upon the receivers' petition for instructions as to their duties relative to two claims now presented by the Grain Company. The case is reported

on an agreed statement of facts; this court to render such decision and give such instructions as may be equitable and proper.

Acting under authority given him by R. S., Chap. 52, Secs. 86 and 54, the Bank Commissioner applied to a justice of the Supreme Judicial Court for an injunction to restrain the bank from proceeding with its business. Such order was made March 13, 1923 and served on the bank March 14, 1923, at about one thirty o'clock in the afternoon. On March 29, 1923, commissioners were appointed to receive and decide upon all claims against the bank. On May 9, 1923, the court directed that the commissioners should hold meetings for the aforesaid purpose on seven designated days between May 26 and July 7, 1923, both inclusive, they to give appropriate notice of their meetings. The commissioners were further ordered by the court to report not later than August 1, 1923, and they did in fact report on July 30, 1923, their report being accepted and confirmed by a court decree dated October 24, 1923. The Grain Company did not present to the commissioners, at any time prior to the filing or to the acceptance of said report, either of its claims now under consideration, and never formally presented any claim, nor instituted any proceedings, until November, 1924, when it filed in court a petition praying that these claims might be allowed and ordered paid in full by the receivers. This petition was withdrawn by agreement in order that the questions at issue might be taken up on the receiver's petition for instructions.

CLAIM OF THE GRAIN COMPANY BARRED.

At the outset the receivers urge that the claims of the Grain Company are barred, citing R. S., Chap. 52, Sec. 55, as amended by Public Laws 1921, Chap. 35, which provides for the appointment of commissioners to receive and decide upon all claims against savings banks and trust companies which are in the hands of receivers.

It is expressly provided by R. S., Chap. 71, Sec. 20, that claims against insolvent estates not presented, and claims disallowed without appeal, are forever barred from recovery by suit. But that is not this case. With reference to claims against insolvent savings banks and trust companies, the statute, (R. S., Chap. 52, Sec. 55, supra) specifically provides that "On application of any person interested, the court may extend the time for hearing claims by the commissioners

as justice may require." The receivers contend that in the instant case the Grain Company, both by its counsel and by its manager, manifested indifference and plain negligence in failing to seasonably present the claims now in controversy to the commissioners, and that justice does not now require that this claimant be allowed opportunity to prove its claim after so great a lapse of time and when the receivership has so far progressed that dividends of eighty per cent. have been paid to the savings bank depositors from the segregated assets. "Could there be a plainer case upon which to base a finding of equitable estoppel," is the query of the receivers.

ALLOWANCE OF CLAIMS PRESENTED TO THE COURT INSTEAD OF TO COMMISSIONERS.

The receivers also contend that claims against the insolvent bank should be presented to the commissioners, in the first instance, and that this court is not vested with the right to receive and decide upon such claims, because the statute has distinctly provided the procedure otherwise. We concede that this contention is sound where the claim rests purely and simply upon the legal relation of debtor and creditor. To hold otherwise would create a confusing, if not unfair, precedent, since by such ruling any creditor could ignore the plain statutory provisions and impose a burden on the court which should be borne otherwhere.

EQUITABLE NATURE OF THESE CLAIMS.

We now approach the real ground upon which the Grain Company asks payment of its claims in full, and in order to discuss that ground we must state the nature of the claims. Statements of fact herein made are gleaned from the agreed statement and from the receiver's petition for instructions. For convenience and brevity of expression these claims, two in number, will be referred to as the draft claim and the check claim.

THE DRAFT CLAIM.

The nature of the Grain Company's business involved the occasional deposit and collection of drafts upon customers to whom grain

was sold and shipped. On an average of ten or twelve times a year it would have occasion to deposit such drafts with the bank for collection. On March 10, 1923, it made a sight draft for $1,129.44 on one S. E. Winchenbach, of Waldoboro, Maine. This draft was on the same day given to the bank for collection and was forwarded by it to Waldoboro in the ordinary course of business. The net proceeds of this draft, amounting, less costs of collection, to $1,128.32 was forwarded to and received by the bank between ten o'clock and ten thirty, as nearly as can be ascertained, in the forenoon of March 14, 1923, the day of the closing of the bank. The Grain Company, at all times, kept in the bank sufficient balance for its business requirements and whenever it deposited drafts for collection never needed, or asked, for tentative credit against them. According to the brief statement, the course of dealing between the Grain Company and the bank with regard to these drafts was as follows. The manager of the Grain Company, Mr. Willband, gave instructions to the bank to make collection and report to him. No further specific instructions were given, and he never instructed the bank to await further or additional orders and instructions from him before crediting the proceeds of drafts to the Grain Company's account. When a draft was collected the bank officials, at some time during the day on which the collection was received, always credited the proceeds to the Grain Company's account. The Grain Company made almost daily deposits and sometimes deposited more than once a day. These deposits were usually made by its bookkeeper, although sometimes by Mr. Willband himself. As collections were sometimes uncertain, Mr. Willband kept very close tabs on these drafts, and from time to time would enquire of the bank if collections had been made. Whenever the bank collected a draft they would notify the bookkeeper the next time she came to deposit, and credit would be entered on the Grain Company's pass book which she would have with her, as the bank used the system of individual depositor's pass books. Sometimes she would add the amount of the draft to the deposit slip which she had already made out, and sometimes the bank official in attendance would make out a deposit slip at the time, and on other occasions, when any official of the bank had previously made out a deposit slip and credited the amount, he would simply inform her of the amount of credit and enter it on her pass book.

In regard to the Winchenbach draft, which is now in question, the particular facts are as follows. A cashier's check for its net proceeds was received by mail from the Medomak National Bank of Waldoboro on the morning of March 14, 1923, as we have just said. Mr. Day, treasurer of the bank, laid the check on the counter and at some subsequent time, but before the closing of the bank, Mr. Lewis, the assistant treasurer, took up the check and entered it on the books of the bank to the credit of the Grain Company. When this credit was entered neither Mr. Day nor Mr. Lewis were aware that the bank had been ordered closed nor that any proceedings had been instituted against it. The credit was not reported or entered on the Grain Company's pass book for the reason that neither the bookkeeper nor Mr. Willband called at the bank that morning before it closed.

THE CHECK CLAIM.

On March 9, 1923, the Grain Company drew a check on the bank to the order of the Maine Central Railroad Company for $140.68; and on March 10, 1923 drew its check on the bank to the order of the same railroad company for $446.21. Both of these checks were deposited by the railroad company for collection in the ordinary course of business and both were received by the bank at some time between ten o'clock and ten thirty in the forenoon of March 14, 1923, and before the closing of the bank. At the time of their receipt the Grain Company had on deposit to its credit, on its checking account, sufficient funds to pay both of said checks, exclusive of the proceeds of the Winchenbach draft. The bank did not pay any of the checks received by it on March 14, 1923, from the clearing house in Boston, and of course among those checks not paid were included the two checks just described as drawn by the Grain Company, both of which were duly protested for non-payment and returned with other checks to the clearing house in Boston. The Grain Company subsequently paid the railroad company the amount of said checks from other funds.

The Grain Company admits that the ordinary relationship between a commercial or checking depositor and a trust company or commercial bank, is that of debtor-creditor, and that unless it can show that it stands in some different relation to the bank as to the funds in question, it is relegated to the unpreferred class of creditors.

But it contends that with reference to both of these claims the creditor-debtor relationship did not exist between it and the bank, that by reason of the non-existence of such relationship it was not obliged to present its claim to the commissioners, because, as it contends, equitable considerations entitle it to payment in full of both claims and in its petition of November, 1924, hereinbefore referred to, that it was seeking an equitable order of court for the payment of these claims in full; that it was not asking the court to extend the time for hearing claims before commissioners; and that any suggestion of its claims being barred by non-presentation to the commissioners has no application to the instant facts or law governing the same.

Let us first discuss the so-called draft claim. The Grain Company contends that the proceeds of the draft should not have been mingled with the general funds of the bank or credited to the checking account of the Grain Company. It contends that it never took tentative credit for any draft left with the bank for collection and did not in the instant case; that its instructions to the bank in draft matters were simply to make collection and report to the company; that the orders given by Mr. Willband were to collect and report to him. It contends that a bank receiving paper for collection is the agent of the party from whom it receives it and holds in trust the money so collected. In support of this proposition the following is quoted from *Anheuser Busch Brewing Association* v. *Morris*, 36 Neb., 31; "Where a bank collects money for another it holds the same as trustee of the owner and on the making of an assignment by the bank for the benefit of its creditors the trust character still adheres to the fund in the hands of the assignee and the owner is entitled to have his claim allowed as a preferred claim." A substantial number of cases from various states is cited in support of this claim and under certain circumstances the contention and the law are well settled, but other elements enter into this case which are entitled to full consideration.

In considering the contentions of the interested parties we must bear in mind the different legal results which arise from the nature of deposits in a commercial bank, that is to say, whether they be general or special. There is no principle of the law of banking more firmly established than that relating to the title of money deposited generally in a bank. Such a deposit passes title immediately to the bank, and the relation of debtor and creditor arises at once between the bank and the depositor. In the case of a special deposit no title

passes from the depositor to the bank. Such a transaction is but a bailment, and the relation between the bank and the depositor is not that of debtor and creditor, but that of bailee and bailor. And when checks or drafts are deposited, and are regarded by the bank and the depositor as amounting to so much cash, the title to such paper passes immediately, and the relation of debtor and creditor arises. The transaction is equivalent to a purchase of the check or draft by the bank and it becomes responsible to the depositor for the amount thereof. But to produce this result it must appear that the check or draft was received as a deposit to be treated as cash, and that such was the intention of both parties. If the check or draft was deposited merely for collection, then the bank does not take title, but acts merely as an agent for such collection. The title to the check or draft remains in the depositor and the relation arising from the transaction is not that of debtor and creditor, but of principal and agent.

"It is well recognized and familiar law that deposits made with bankers are either general or special. In the case of a special deposit the bank merely assumes the charge or custody of property without authority to use it, and the depositor is entitled to receive back the identical money or thing deposited. In such case the right of property remains in the depositor and if the deposit is of money the bank may not mingle it with its own funds. The relation created is that of bailor and bailee and not that of creditor and debtor." *Fogg* v. *Tyler*, 109 Maine, 109.

"There is a wide difference between a special and a general deposit, as these terms are understood, not only by bankers, but by the public who are transacting business daily with banks. Where money of any description is deposited in a bank, and the identical gold or silver or bank bills which were deposited are to be returned to the depositor, and not the equivalent, the deposit will be special; while on the other hand a general deposit is a deposit which is to be returned to the depositor in kind. Where gold or silver coin or a package of bills currency are received in a bank as a special deposit, the identical money to be returned, the bank has no authority to use the money in its business. Its duty is to safely keep and return the identical money. But where there is a general deposit, the understanding being that a like sum of lawful money shall be returned, the bank is permitted to use the money in its general business, and the relation

of debtor and creditor is created by the transaction." *Mutual Acc. Ass'n of the Northwest* v. *Jacobs et al.* 141 Illinois, 261; 31, Northeastern Rep., 414.

Where there is no express agreement or understanding between the parties that the deposit made should be considered as special, and there is nothing in the character of the transaction from which there may be found an implied agreement or understanding between the parties to that effect, it must be held that deposits are general and not special. *Minard* v. *Watts*, 186 Fed. Rep., 245.

Ordinarily, a deposit of money, at least if it be current money of the country or state where the deposit is made, will be assumed to be a general deposit unless the contrary is at the time directly notified, or in some shape distinctly implied, so that the bank could not reasonably misunderstand the depositor's intent. Morse on Banks and Banking, 2d Ed., Page 69.

In a recent, and well reasoned opinion of this court, *Weed* v. *B. & M. R. R.*, 124 Maine, 336, it was clearly shown that if the bank and the depositor intended that the proceeds of a draft, as well as the draft itself, should remain the property of the customer, such intention will control, and the bank will not take title to the proceeds. On the other hand, when there is an understanding that when the collection has been made the bank shall pass the proceeds to the general credit of the depositor's checking account, and such credit is thus authorized, it is the same as though money had been deposited by the depositor to his credit; the title to the proceeds, after being thus credited, passes to the bank; the relation becomes one of debtor and creditor.

The burden of proving that a deposit is special is on the depositor as against the bank. *Sharon First National Bank* v. *City National Bank*, 76 S. W., 489.

The contention, as made by the Grain Company, having been herein stated, it remains for us to determine whether that contention is supported by the agreed statement to the extent that the transaction surrounding the Winchenbach draft made it, or the proceeds thereof, a special deposit. When that agreed statement is studied carefully, in the light of other similar transactions, it appears to be quite clear that the custom was firmly fixed whereby collections of drafts by the bank were credited to the checking account of the Grain

Company without specific orders or instructions from the Grain Company or objection by it because such credit had been given. We therefore hold that the proceeds of the Winchenbach draft became a general deposit and that no preference thereby arises in behalf of the Grain Company.

The check claim calls only for brief discussion since our court, in harmony with the decisions of thirty or more states in this Union, as well as in harmony with decisions of Federal and English courts, has held that money deposited in a bank, subject to check, does not remain the property of the depositor, subject only to a lien in favor of the bank. It becomes the absolute property of the bank and the bank becomes a debtor to the depositor in an equal amount. *Manufacturers' National Bank* v. *Chabot & Richard Co.*, 114 Maine, 514.

It is our opinion that upon proper presentation to and allowance by the commissioners of these claims, a sitting justice having full power to reappoint the commissioners, *Nutter and Deering* v. *Saco Savings Bank*, 109 Maine, 124, those commissioners may consider and report thereon.

Decree in accordance with this opinion to be drawn by the attorneys for the receivers.

JOHN W. DOUGHERTY,

(by Administratrix)

vs.

MAINE CENTRAL RAILROAD COMPANY.

Penobscot. Opinion February 17, 1926.

An administrator prosecuting is relieved by statute of the burden of showing that there was no contributable negligence on the part of his decedent.

Negligence of a plaintiff will not preclude the recovery of damages unless such negligence combined in some degree with that of the defendant constitutes an immediate and operative or moving cause for what happened.

Negligence and contributory negligence as a general rule are questions for the jury, and become matters of law only when the conclusion of the jury is so manifestly contrary to the law and the evidence that all reasonable minds must agree that it ought not stand.

In the instant case, the predominating efficient cause of injury and damage was negligence of the defendant, exclusively. But for its wrongful act alone, the catastrophe would not have been, hence the defendant's omission or disregard of duty precipitated disaster directly in temporal sequence through the chain of factual causation.

The undisputed testimony of the disinterested witness Decker, who was in no way discredited, being accepted and believed, gave evidence in plenty for the jury that there was an interval before the collision in which it would have been consistently possible for the engineer, had he exercised ordinary care, to have interrupted the making of that continuous succession of linked events which ended in injury and loss to this plaintiff's decedent. And reasonable minds will not, because they cannot, consonantly reject that testimony as wholly improbable of belief.

Excessiveness of damages, an assigned ground for the motion, was not pressed in argument, and is regarded as having been waived.

On exceptions and motion for a new trial by defendant. An action on the case brought by John W. Dougherty against defendant corporation to recover damages for personal injuries by him suffered and damages to personal property by reason of a collision between a

locomotive drawing a freight train of defendant and the automobile of plaintiff, stalled on the crossing of defendant's railroad near the Bangor Pumping Station. Negligence of defendant was alleged, and contributory negligence pleaded. Before the cause was tried the plaintiff died, and the administratrix of his estate prosecuted. At the conclusion of the charge the defendant excepted to a refusal to give a requested instruction, and excepted also to a requested instruction qualified by the court before being given. A verdict of $3,600 was rendered for plaintiff and defendant filed a general motion for new trial. Exceptions and motion overruled.

The case is fully stated in the opinion.

George E. Thompson and Abraham M. Rudman, for plaintiff.

George E. Fogg, for defendant.

SITTING: WILSON, C. J., PHILBROOK, DUNN, MORRILL, STURGIS, BASSETT, JJ.

MORRILL, J., concurring in the result.

DUNN, J. On exceptions and usual-form motion.

Action begun by the person injured to recover for his own harm and for the damage done his automobile by train collision at railroad crossing, and prosecuted by his administratrix.

Exception was filed for failure to instruct the jury, in substance, that, where death followed but was not caused by the injury, the administrator prosecuting had the burden of the proposition that there was no contributable negligence on the part of his decedent. The refusal was right; there is no doubt about that, for the statutory altering of the common-law rule is comprehensive of the situation at the time of the trial. R. S., Chap. 87, Sec. 48; *Coolidge* v. *Worumbo Manufacturing Company*, 116 Maine, 445. Indeed the plaintiff so recognized in its pleadings. *Curran* v. *Railway Company*, 112 Maine, 96.

And there is exception that the request for the instructing, that negligence of the decedent, if it continued to the time of the accident, would be contributive in proximation and efficiency, was qualified by the judge in submitting it, "provided the negligence contributed to the accident." This exception fails too. Negligence on the part of a person whom hurt of any sort befalls, mere negligence, will

not preclude the recovering of damages; the negligence must have combined in some degree, albeit slight, with the negligence of the defendant, as an immediate and operative or moving cause for what happened. *Smith* v. *Elliott*, 122 Maine, 126; *Mahan* v. *Hines*, 120 Maine, 371; *Nicholas* v. *Folsom*, 119 Maine, 176; *Sylvester* v. *Gray*, 118 Maine, 74; *Blanchard* v. *Railroad Company*, 116 Maine, 179; *Denis* v. *Railway Company*, 104 Maine, 39; *Ward* v. *Railroad Company*, 96 Maine, 136; *Conley* v. *Railroad Company*, 95 Maine, 149; *Atwood* v. *Railroad Company*, 91 Maine, 399; *Pollard* v. *Railroad Company*, 87 Maine, 51; *O'Brien* v. *McGlinchy*, 68 Maine, 552. In applying to a litigated case the principle deducible from the decided ones, it must not be assumed that the angular and stubborn things called the governing facts, are in precise correspondence. The side light thrown by cognate testimony upon an evidential picture may essentially differentiate in saliency that ruling must depend upon the facts developed in each case. All the reported decisions cited by the defending counsel look in the same direction that he argues, but they do not look so far.

Amid its contradictions, this record clearly shows: That soon after noontime, on the fifth day of June in 1922, John W. Dougherty backed his automobile out of the garage, headed it toward the highway, and, his wife riding with him, started on from his yard to the public street; the steam railroad track straight ahead and openly intervening. He knew the place, knew the possible peril in front, having lived ten years or more there in the house on the river bank in Bangor, which that city afforded for occupancy by himself and his family, nearby his employment as chief engineman at the water works.

The distance to the track was short, with but little lateral view to the eastward or right, until within six feet of the crossing, because the pumping station first, and the filter house beyond it, were obstructing.

About one yard from the crossing, within the zone of danger, as the testimony is he regarded it, Mr. Dougherty stopped and looked and listened. He looked up the track, the easterly track, and saw no train. He saw one arm extended from an automatic signal post, in admonitory notification that a train was approaching, five to eight or ten minutes away, from behind the curve above. He looked down the track; there was neither train nor warning.

Again he started. Near or on the first rail of the track, there is slight testimonial difference touching this, but in any event immedi-

ately at the crossing, his car stalled. Upon that, Dougherty's wife, on looking along the track toward the curve, exclaimed: "My God, Pa, here comes the train!" The woman jumped from the vehicle and made away to safety. Mr. Dougherty outsprang, but he tarried in vain efforts to push the automobile back.

The train, a freight of eighteen cars besides the caboose, was coasting at the customary speed of twenty to twenty-five miles an hour, perhaps not as rapidly. The engineer, as he bore down upon Dougherty in his predicament, applied the emergency brake and poured sand on the track; still the engine or its overhang struck the automobile, and, the automobile striking the now decedent, he was thrown into the air, and thence fell onto the ground. Less than one hundred and eighty feet farther the locomotive came to rest; it made a good stop, was the attestation.

This, however, is not the only aspect of the suit.

The engineer left his cab and hurried to the scene. There he talked with a man named Decker. Mr. Decker testified that the engineer told him: "I thought that fellow was going to roll back from the track or I would have stopped," or, "I could have stopped" (the witness was doubtful whether the verb should be "would" or "could"), in time to have avoided accident.

Not even the shadow of denial is against this testimony. It was weighable for nothing, or little, or much, from all the circumstances with the evidence fully in. And the engineer had already given witness, that he for the first time saw the automobile when it was stopping at the crossing, and that being stopped it did not start.

Negligence and contributory negligence, it is the general rule, are jury questions, because determining them involves the testing and considering of evidence. It may not be defined, as matter of law, that the conduct of a defendant was free from negligence, or that concurring negligence on a plaintiff's part is bar, unless the conclusion of the jury is so manifestly contrary to the law and the evidence that all reasonable minds must agree that it ought not stand.

What was the predominating efficient cause of this injury and damage? The verdict answers, negligence of the defendant exclusively; that is, but for its wrongful act alone, the catastrophe would not have been, hence the defendant's omission or disregard of duty precipitated disaster directly in temporal sequence through the chain of factual causation.

The undisputed testimony of the disinterested witness Decker, who was in no way discredited, being accepted and believed, gave evidence in plenty for the jury that there was an interval before the collision in which it would have been consistently possible for the engineer, in cognizance that colliding could not be otherwise escaped, had he exercised ordinary care, to have interrupted the making of that continuous succession of linked events which ended in injury and loss to this plaintiff's decedent. *Purington* v. *Railroad Company*, 78 Maine, 569; *Ham* v. *Railroad Company*, 121 Maine, 171. And reasonable minds will not, because they cannot, consonantly reject that testimony as wholly improbable of belief.

Excessiveness of damages, an assigned ground of the motion, has not been pressed in argument, and is regarded as having been waived.

The mandate must be:

Exceptions and motion overruled.

PERLEY A. ADAMS *vs.* CHARLES S. BARRELL.

York. Opinion February 19, 1926.

An owner of premises who engages a person to perform some labor on or about such premises is under the duty of exercising reasonable care to keep the premises reasonably safe for such employee while performing his work.

In the instant case the evidence convincingly estalishes negligence on the part of the chauffeur. He was guilty of that thoughtless inattention which is accepted as the very essence of negligence.

The negligence of the chauffeur was chargeable to the defendant.

The use of a ladder extending over a driveway where more or less passing by vehicles must be anticipated, carries elements of risk, but proof of this fact is not conclusive evidence of contributory negligence, and the verdict should not be disturbed on this ground.

Though the verdict is large it is not so excessive as to warrant interference by the court.

On general motion for a new trial. An action on the case to recover damages for personal injuries sustained by plaintiff while in the

employ of defendant painting the roof of his house, standing on a ladder, when the chauffeur of the defendant backed an automobile owned by defendant, in whose employ he was, against the ladder throwing plaintiff to the ground seriously injuring him. Plaintiff recovered a verdict of $9,667.33 and defendant filed a general motion. Motion overruled.

The case sufficiently appears in the opinion.

Sewall & Waldron, for plaintiff.

Emery & Waterhouse, for defendant.

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

STURGIS, J. The firm of Tower & Adams, of which the plaintiff was a member, contracted to repair and paint the defendant's summer residence at York Harbor. The plaintiff worked on the job as a painter.

For access to the roof and support while staining the shingles, the plaintiff placed a ground ladder up across a private driveway leading from the street to the defendant's garage. The foot of the ladder was set out from the house about eleven and one half feet across the driveway close to a hedge, and the top rested upon and projected above the eaves of the house.

On the morning of July 27, 1923, as the plaintiff was standing on this ladder near its top, painting the lower shingles of the roof which he could not reach from his roof ladder, the defendant directed his chauffeur to bring his automobile, which was standing in front of the garage, to the street in front of the house. In response to this summons the chauffeur started the car, and, without warning by word or signal, backed the car out of the driveway, hit the ladder upon which the plaintiff stood, driving it back with sufficient force to throw the plaintiff to the ground thirty feet away. The case is before this court on a general motion by the defendant for a new trial.

The negligence of the chauffeur is clearly established. From his own testimony it appears that he knew the plaintiff's ladder stood across the driveway. He had driven under it several times that morning and the day before, but says each time he gave warning of his approach and received consent to his passage. He says he saw

the plaintiff standing upon the ladder as he started to back the car out, but gave no signal or warning of his intention to drive under the ladder. His explanation is that he thought the plaintiff saw him.

The chauffeur's excuse for hitting the ladder is that he was forced to drive out from the building because of an area opposite the ladder. Measurements, however, refute the claim of necessity, and the jury may well have given credence to the testimony of two witnesses who stated that immediately after the collision the chauffeur said, "I never thought about the ladder being there," and, "I didn't see the ladder until I hit it." We are convinced that the chauffeur was guilty of that thoughtless inattention which is accepted as the very essence of negligence. *Stanwood* v. *Clancey*, 106 Maine, 75; *Towle* v. *Morse*, 103 Maine, 251.

The defendant having invited the plaintiff to come upon his premises to do work upon his buildings was under the duty of exercising reasonable care to keep the premises reasonably safe for the plaintiff while performing his work. The negligence of his chauffeur in this case was the defendant's negligence, and the jury were justified in so finding.

The defendant urges, however, that the plaintiff was himself guilty of contributory negligence. While the use of a ladder extending over a driveway where more or less passing by vehicles must be anticipated carries elements of risk, it is not conclusive evidence of want of due care. Whether the adoption of a dangerous position contributes to an injury, is a question of fact for the consideration of the jury. *Keith* v. *Pinkham*, 43 Maine, 501; *Dirpen* v. *Great Northern Paper Company*, 110 Maine, 374.

The defendant contends that the plaintiff was in a position to see the approach of the backing automobile, and should have retreated to a place of safety. The plaintiff testifies, on the other hand, that the collision of the car and ladder was unexpected and without warning, and he neither saw nor heard the starting or backward movement of the car. Under instructions, which we must assume to be full and correct, this controverted issue of fact was presented to the jury and decided in the plaintiff's favor. We find no sufficient reason for disturbing the verdict on this ground.

The damages awarded are large in amount. The injuries received, however, were serious, involving pain and suffering continued and excruciating. The method of treatment made necessary by the

character of the fracture of the thigh bone involved great physical discomfort. Hospital and medical expenses were large, as was the actual loss of wages. The extent of the permanent disability is somewhat uncertain, but that there is some, cannot be denied. The plaintiff is a painter and naturally left handed. His work requires, not only reaching to the side and above, but bending on the knees and in a squat position. The climbing of ladders is necessary. His left arm is restricted in the flexibility of the elbow. There is a shortening of the left leg, and some lateral curvature of the spine. At forty-three years of age his ability to meet the demands of his trade is thus impaired for the future years of his expectancy.

It is indeed difficult to measure damages for such injuries and losses in dollars and cents, but, "when it appears that the jury have discharged their duty with fidelity, and have reached a reasonable approximation of the damages, the court will not interfere, even though the verdict should seem to them somewhat large." *Felker* v. *Railway & Electric Company,* 112 Maine, 257.

We are not satisfied that the verdict is beyond the bounds of reason, and the mandate must be,

Motion overruled.

DAVID C. FOGG'S CASE.

Cumberland. Opinion February 19, 1926.

A permanent member of a municipal fire department who sleeps at the station house, is on duty the entire twenty-four hours in each day, has a limited period in each day in which to go to his home for meals, and is subject to duty upon an alarm of fire while at his meals, if accidentally injured while alighting from a street car on his way home to a meal, may properly be found to have suffered an injury arising out of, and in the course of his employment.

In the instant case the causal relation between the employment and the injury is not too remote to preclude the legitimate inference that the risk which resulted in the injury was incidental to the conditions of the employment which exposed the employee to the injury.

On appeal. Claimant was a fireman in the employ of the city of Portland, and on October 29, 1924, he left the engine house where he was stationed to go to his home for lunch on electric cars and in alighting from a car in making a transfer to another car he was struck by a passing automobile and seriously injured. The issue involved was as to whether the accident arose out of and in the course of his employment. Compensation was awarded and an appeal taken from an affirming decree. Appeal dismissed. Decree below affirmed.

The case is fully stated in the opinion.

Hinckley & Hinckley, for petitioner.

H. C. Wilbur, for respondent.

SITTING: PHILBROOK, DUNN, MORRILL, STURGIS, BASSETT, JJ.

MORRILL, J. Appeal by employer from award of Chairman of Industrial Accident Commission. Injury by accident is admitted; the issue is whether the injury was one arising out of and in course of claimant's employment; upon the evidence submitted the Chairman so found.

The evidence of the claimant tended to show, and the Chairman was justified in finding that claimant was, on the date of the injury, a

permanent man, with the rank of Lieutenant, in the fire department of the city of Portland, stationed at Hose Station 11; that he lived and slept at the station house, and that his hours of duty were twenty-four hours a day; that the permanent men at the station house were allowed three hours a day for their meals, which were fixed by agreement among the men as most convenient; when so fixed the men were not at liberty to change them without notifying the office or the Chief of the Department. Claimant had been a permanent man since 1908, and when he was transferred to Hose 11, owned and lived in a house two miles distant from the station, and had continued to live there, and was living there at the time of the accident. Because he could not get to his house, eat his meals, and return to the station in the one hour allowed, he arranged to take his breakfast to the station house and eat it there, and to have one hour and a half each for his midday and evening meals; in going to his home he was obliged to transfer on the street cars. On the day of the injury his hour for leaving the station was 11:05 A. M., and he was injured while alighting from an electric car on his way home. He was subject to duty at all times; if an alarm for fire came while he was at his meals, it was his duty to answer the call as soon as possible, if within his district; if the alarm was a second or general alarm, it was his duty to go whether it was within his district or another.

So far as the testimony of the Chief of the Department tended to show that there were no general orders on some points, or that the conduct of the men was not uniform, the Chairman was warranted in accepting the positive statements of the claimant, if he believed them. Upon appeal from an award in his favor we cannot pass upon the weight of the evidence; it must be taken most favorably for the claimant.

The words "in course of" refer to time, place and circumstances, under which the accident takes place. *Westman's Case*, 118 Maine, 133, 142. At the time of the injury the claimant was on duty; he was doing something which a man employed in such a calling may reasonably do within the time during which he is employed, and at a place where he might reasonably be during that time. *Bryant* v. *Fissell*, 84 N. J. L., 72, 86 Atl., 458. The fact that he was on his way home for his midday meal, in accordance with a routine permitted and approved by his superiors, did not in any manner, break or

suspend the relationship of employee. *Madura* v. *City of New York,* 144 N. E., 505. Clearly the injury was received in the course of his employment.

The words "arising out of" mean that there must be some causal connection between the conditions under which the employee worked, and the injury which he received. The causative danger must be incidental to the character of the employment, and not independent of the relation of master and servant. The accident must be one resulting from a risk reasonably incident to the employment. *Westman's Case,* 118 Maine, 133, 143. *Mailman's Case,* 118 Maine, 172, 180.

We think that this is not the case of a common hazard to which persons having occasion to use the streets are exposed, but rather falls within the cases of hazard by reason of his employment. *John Moran's Case,* 234 Mass., 566, 125 N. E., 591, in which the court says: "In the case at bar, the workman, to do the work of his employment, must continually stand in danger of receiving an injury from accidents resulting from exposure to whatever risks and hazards are commonly attendant on the use of public streets and conveyances, which risks to him are greater because more constant than those incidental to the occasional and casual use of such streets by persons who use them in the ordinary way."

In the instant case the claimant was on duty at the time of the accident; the relationship of employer and employee still existed during the meal hours, and he was in a place where at that hour he might reasonably be in connection with his duties, and was there in the usual routine of his duties.

We are of the opinion that the causal relation between the employment and the injury was not too remote to preclude the legitimate inference that the risk which resulted in the injury was incidental to the conditions of the employment which exposed the employee to the injury. *Keaney's Case,* 232 Mass., 532, and cases cited. The finding of the Chairman is in harmony with the second general rule stated in *Robert's Case,* 124 Maine, 129, 131.

Appeal dismissed.
Decree below affirmed.

SEWALL C. STROUT, ADMR. ET ALS., In Equity.

vs.

FRANKLIN R. CHESLEY, ADMR., ET ALS.

Cumberland. Opinion February 21, 1926.

When a legacy lapses which is a part of the residue it presumptively passes as intestate property and does not fall into the residue.

In case of a devise to several persons constituting a class one of whom predeceases the testator, no lapse takes place. The individual dies, but the class designated as the taker under the will remains in esse.

When legatees are designated by name and the character of the estate bequeathed is indicated by the words "in equal parts share and share alike" there is a strong presumption of testamentary intent that the legatees shall take as individuals, and not as a class.

In the instant case by the residuary clause the testatrix left all the residue of her estate to four legatees G., M., A. and C. "in equal parts share and share alike."

G. (Sarah E. Goodrich) predeceased the testatrix. Not being a relative her heirs are not made substituted legatees by statute.

The bequest is not to a class. In effect one fourth of the residue was bequeathed to each of the four residuary legatees. The contingency of G's death before that of the testatrix was not provided for in the general residuary clause. No substituted legatee was designated either by the will or by statute. It follows that the general residuary bequest to G. of one fourth the estate lapsed and passed to the legal heirs of the testatrix as intestate property.

But the daughter having deceased the disposal of the $20,000 held in trust during her lifetime presents a different problem. The will provides that this shall go to the same four persons named as residuary legatees "or their heirs." Many authorities hold that such use of the disjunctive conjunction "or" discloses an intent to make the heirs living when the will takes effect substituted legatees.

But such heirs of G. (Sarah E. Goodrich) are not shown to be parties. A person who by a possible construction of a will may become a legatee thereunder should be made a party to a bill for the construction of the will.

The case must be remanded to afford an opportunity for further allegations and further parties, if necessary.

On report. A bill in equity seeking the construction of the will of Lucy A. Morgan who died at Saco, Maine, April 13, 1911. A hearing

was had on the bill, answers and replication, and by agreement of the parties, on an agreed statement of facts, the cause was reported to the Law Court. Case remanded for opportunity for further allegations and further parties, if necessary.

The case is fully stated in the opinion.

Strout & Strout, for complainants.

F. R. & M. Chesley, for respondents.

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

DEASY, J. Lucy A. Morgan died in 1911 leaving as her only heir at law a daughter, Clara A. Morgan, who was feeble minded and under guardianship. Clara died intestate in 1924. The plaintiff, Sewall C. Strout, is Clara's administrator. The other plaintiffs and the defendant Helen M. Cook are all of her heirs.

Lucy A. Morgan, the mother, left a will which has been duly probated. She bequeathed to her daughter Clara a life estate in $20,000, and by the same paragraph of the will (numbered 21) she disposed of the remainder dependent upon Clara's life estate. Then after sundry other bequests the will of Lucy disposes of the residue of her property (the greater part of the whole estate) by the following general residuary clause numbered (22). "All the rest and residue of my estate, real, personal or mixed, I give, devise and bequeath to the aforesaid Sarah E. Goodrich, Charles C. Morgan, Marion B. Aten and Helen M. Cook in equal parts share and share alike, to be held and enjoyed by them, their executors, administrators and assigns forever."

Three of the residuary legatees (all except Sarah E. Goodrich) survived the testatrix. Of these only the defendant, Helen M. Cook, is living. Through testamentary transfers she has succeeded to all the estate and rights which Charles C. Morgan and Marion B. Aten acquired under Lucy Morgan's will.

The other residuary legatee, Sarah E. Goodrich, predeceased the testatrix. She was not a relative of Mrs. Morgan. Therefore, her heirs do not take, under the statute, by substitution. R. S., Chap. 79, Sec. 10.

The whole controversy relates to the part of the estate of Lucy A. Morgan which Sarah E. Goodrich as one of the persons entitled to

share in the remainder under Paragraph 21 of the will and as one of the residuary legatees under Paragraph 22, would have taken if she had survived the testatrix. The plaintiffs contend that it descended to Clara as intestate property. The defendants, on the other hand, claim that it passed by virtue of the will to the other three residuary legatees whose interests are now vested in Helen M. Cook.

As to the bulk of the estate disposed of by the general residuary clause (22) the contention of the plaintiffs must be sustained. Further on in the opinion we consider paragraph 21.

The testatrix might have provided, in her will, for the contingency of Sarah Goodrich's death. After the decease of the latter she might have bequeathed the lapsed legacy by codicil. She did neither. The residuary bequest is to the four legatees "in equal parts share and share alike." The effect is the same as if she had made a separate bequest to each of one undivided quarter part of her residuary estate. If this had been done it would hardly be claimed that upon the death of one, the others would take, under the will, more than one fourth part each.

The will spoke as of the date of Mrs. Morgan's death. 28 R. C. L., Page 234. It devised three fourths of her residuary estate to three living persons. The other fourth was bequeathed to Sarah E. Goodrich, a deceased person. No substitute legatee was provided for in the will or codicil nor by statute. This fourth part was undevised. It became intestate property.

In a Maine case the will provided that "All the rest and residue of my estate I give to B. M. B. and H. M. B." H. M. B. predeceased the testatrix. It was held that the legacy lapsed and descended as intestate property. Peters, C. J., said "There can be no doubt that by the same rule the deceased legatee's portion of the general residue of the estate also lapses and that this portion falls to the heirs of the testatrix under the laws of descent and distribution." *Stetson* v. *Eastman*, 84 Maine, 369. The will of Lucy Morgan presents a stronger case for intestacy and a weaker case for the surviving legatees by reason of the words "in equal parts share and share alike."

"When a legacy lapses which is a part of the residue it cannot fall again into the residue. It must pass as intestate property." Rugg, C. J., in *Crocker* v. *Crocker*, 230 Mass., 482. See also to same effect *Morse* v. *Hayden*, 82 Maine, 230; *Lyman* v. *Coolidge*, 176 Mass., 9; *Dresel* v. *King*, 198 Mass., 548; *Kerr* v. *Dougherty*, 79 N. Y., 346;

Hard v. *Ashley,* 117 N. Y., 606; *Burnet* v. *Burnet,* 30 N. J., Eq., 595; 40 Cyc., 1519, and cases cited—44 L. R. A., N. S., 811 (Note).

The defendant, however, says that this rule does not apply when the residuary bequest is to a class of persons, but that upon the death of one or more it passes to those of the class living at the decease of the testatrix. This is true. In such case there is no lapse in any proper sense. The individual dies but the class designated as the taker of the residue remains in esse.

But the legacy in the instant case is plainly not to a class. It is to four named persons "in equal parts share and share alike." The individuals were not connected with the testatrix or with one another by common kinship. Apparently they had nothing in common except the good fortune of being legatees in the same will.

When legatees are designated by name and the character of the estate bequeathed is indicated by the words used in Mrs. Morgan's will, "in equal parts share and share alike," there is a strong presumption of testamentary intent that the legatees shall take as individuals and not as a class. *Blaine* v. *Dow,* 111 Maine, 483, and cases cited; *Hay* v. *Dole,* 119 Maine, 424; 28 R. C. L., Page 261; *Dresel* v. *King,* supra, 44 L. R. A., N. S. 811 (Note). This presumption may indeed be controlled by plain language in the will manifesting a contrary intent. But no such controlling language is found in Mrs. Morgan's will. *Fairbank's Appeal,* 104 Maine, 333, and *Estate of Brown,* 86 Maine, 572, are upon this ground plainly distinguishable from the instant case.

We have thus far considered only the general residuary clause numbered 22, and hold that the residuary bequest to Sarah Goodrich lapsed and descended to Clara Morgan as intestate property, and that Helen M. Cook took no part of it except her share as one of Clara's heirs.

Paragraph 21 gives the remainder dependent upon Clara's life estate to the same persons who under paragraph 22 took the general residue. But paragraph 21 presents other problems. It reads as follows:

"I give and bequeath to my daughter, Clara A. Morgan of Saco aforesaid the interest and income of Twenty Thousand Dollars or of its equivalent on the appraisal of my estate from the time of my decease to the end of her natural life; and upon the termination of her life estate therein, it is my will that the principal from which such interest

and income has been derived shall become the sole and absolute property of my residuary legatees hereinafter named, and shall be promptly transferred to them or their heirs in the several proportions to which they may be entitled."

The defendants contend that this paragraph creates a contingent remainder; that the estate passed to such of the residuary legatees named as should be living at the termination of Clara's life estate, the contingency arising from the uncertainty as to which, if any, would so survive. The answer to this question has already been suggested. The will spoke as of the date of Lucy Morgan's death. Before that time it was a mere "scrap of paper." At that time three of the four named legatees were living. Each took a vested remainder in one fourth of the estate, to take effect in possession upon the death of Clara. The fourth legatee, Mrs. Goodrich, having deceased, took no estate at all either vested or contingent. Not being a relative of the testatrix her heirs are not made substituted legatees by statute. Nothing in the will indicates that the other residuary legatees were to take by substitution.

The defendants set up the further claim that paragraph 21 of the will makes the heirs of Mrs. Goodrich substituted legatees, taking in her stead. We have already seen that her heirs take nothing by substitution under the statute. But the defendants say that they so take under the will.

That such was the intent of the testatrix is shown, so it is urged, by the use of the word "or" in the phrase "to them or their heirs," and by the omission of the usual word "assigns."

Except under conditions not existing in this case the intention of the testator when manifest must be given effect. It was competent for Mrs. Morgan to substitute any person by name or by description as heirs or otherwise for any primary legatee dying during her life-time. The defendants say that by the language of paragraph 21 she manifested her intention to do this. We do not need to say that presumptively the words "and . . . . heirs" are words of limitation and not of purchase. Heirs, when these words are used, prima facie at least, take under and not instead of the persons named as legatees or grantees. *Kenniston* v. *Adams*, 80 Maine, 295; *Hand* v. *Marcy*, 28 N. J., Eq., 59; *Jones* v. *Warren*, 124 Maine, 282.

But many cases hold that if the disjunctive conjunction "or" is used, and more especially if the word "assigns" is conspicuous by its

absence, (*Kenniston* v. *Adams,* 80 Maine, 295) an intent is presumed that in case, during the life of the testator, the primary legatee dies, his heirs take by substitution the same estate which the primary legatee would have taken but for his death. Among the cases so holding are the following: *Brokaw* v. *Hudson,* 27 N. J., Eq., 135; *Gittings* v. *McDermott,* 2 M. & K., 65; *Trust Co.* v. *Hollister,* (Conn.), 50 Atl., 750; *Defrees* v. *Brydon,* 275 Ill., 530; 114 N. E., 342; In re Evans' Will, 234 N. Y., 42; 136 N. E., 233; In re *Kidder's Estate,* 200 N. Y. S., 783.

There are authorities opposed to this doctrine. See *Sloan* v. *Hanse,* 2 Rawl., 28. And in *Kenniston* v. *Adams,* supra., Peters, C. J., speaks of it by way of dictum as a "refined interpretation . . . . resorted to in instances where justice can be best administered only by its application."

But before this question can be decided other parties to the suit may be requisite. All persons who may have the rights of substituted legatees must be joined. "A party who by a possible construction of a will may become a legatee thereunder should be made a party to a bill for the construction of a will." *Waker* v. *Booraem,* (N. J.), 59 Atl., 451. To same effect see *Ungaro's Will,* (N. J.), 102 Atl., 244; *Loomis* v. *Healy,* (Conn.), 119 Atl., 31; *Gaddess* v. *Norris,* (Va.), 46 S. E., 905.

That Helen M. Cook is the sole surviving legatee of Sarah E. Goodrich is entirely immaterial. Sarah Goodrich took nothing under Lucy Morgan's will and therefore could bequeath nothing. Nor is it decisive that Helen Cook is now the sole surviving heir at law of Sarah Goodrich. What we need to know is, who were the heirs at law of Sarah Goodrich living at the date of Mrs. Morgan's death. In paragraph 21 the word "heirs" is descriptio personae. It is a word of purchase. Whoever took as substituted legatee or legatees took individually.

If at the date of Mrs. Morgan's death Helen Cook was the sole heir at law of Sarah Goodrich, then (assuming but not deciding that the language of the will provides for substituted legatees) Helen, as substituted legatee, took a vested remainder in one fourth of the estate bequeathed for life to Clara Morgan, subject to Clara's life estate. *Kimball* v. *Crocker,* 53 Maine, 268; *Dove* v. *Torr,* 128 Mass., 38.

But there may have been other heirs of Mrs. Goodrich who took as substituted legatees. As to this the court is not informed. If there were other heirs, to whose interests Helen Cook has not succeeded, other parties are necessary.

Does paragraph 21 make the heirs of Sarah Goodrich substituted legatees? If so, it is heirs living at the time of Mrs. Morgan's death who thus acquired title. They took by purchase and not by descent. All such persons, or others claiming under them, are interested and should be parties. This court is averse to deciding cases until it is made certain that all persons who may be affected by its decree have had an opportunity to be heard. For further facts or parties this case must be remanded.

This bill prays for the construction of Mrs. Morgan's will. It also contains other prayers. The further alleged ground of equity jurisdiction is mistake. No fraud is claimed. It appears that one, Walter T. Goodale, was the executor of Mrs. Morgan's will; that in 1913 he had $112,281.15 for distribution, and that obedient to an order of the Probate Court he distributed this fund equally among the three surviving residuary legatees, paying to each $37,427.05. This was a mistake. The fund should have been divided into four parts and one part paid to Clara Morgan's guardian. But counsel for the plaintiffs in their brief distinctly disclaim any intention to ask to have this decreed and completed distribution disturbed.

No other mistake appears. Franklin R. Chesley, joined herein as defendant, is administrator d. b. n., c. t. a., of Mrs. Morgan's estate. As such he has in his possession more than $30,000 ready for distribution. This should be paid and distributed in such manner as to (so far as may be) make the distribution of the entire estate conform to the legal rights of the parties interested. But it is for the Judge of Probate and not for this court to order such distribution, subject of course to appeal to the Supreme Court of Probate.

Certain other points are made in the pleadings and have been fully and exhaustively argued by counsel. Passing upon them cannot affect injuriously persons, not made parties, who may be interested in the estate. To possibly expedite this litigation we consider these points.

The former order of distribution does not tie the hands of the Judge of Probate so far as concerns the undistributed fund.

The Judge of Probate may, subject to appeal, determine "who are entitled to take and their respective shares." R. S., Chap. 70, Sec. 21. He may "after public notice and such other notice as he may order" decide, subject to appeal, whether or not the heirs of Sarah E. Goodrich took her share by substitution. This does not affect the right of this Court of Equity to construe the will. The remedies are to a certain degree concurrent.

The settlement of the contemplated will contest does not bar a claim for intestate property.

No reason is perceived why this proceeding should be held barred by laches or by the Statute of Limitations.

The greater part of the fund now in the hands of Mr. Chesley could not have been distributed until after the death of Clara, which occurred January 1, 1924.

The case will be remanded for amendment if desired.

Bill sustained.
Case remanded.

MORRIS MENCHER *vs.* ELLIS E. WATERMAN ET AL.

Cumberland. Opinion February 21, 1926.

An excepting party, in the Law Court, is confined to the grounds expressly stated at the trial or contained in his exceptions.

A single statement in the charge, standing alone, might be open to objection, but taken in connection with all other parts of the charge, and as it must have been understood by the jury, may not be exceptionable.

Even if instructions are erroneous a new trial will not be granted for that reason unless it also appears that the error was prejudicial to the excepting party.

While an instruction may not be perfectly correct, standing alone, yet if the finding of the jury was correct, upon a view of the whole case as presented to them, the excepting party cannot be considered as a party aggrieved, in the language of the statute which authorizes filing exceptions by an aggrieved party.

When a party to the cause takes exceptions to a ruling of the presiding Justice it is incumbent on such party to show affirmatively, not only that there was error in such ruling, but also that he is aggrieved thereby.

On exceptions by defendant. An action to recover damages to a stock of clothing and furnishing goods in a retail store of plaintiff on Congress Street in Portland. Plaintiff alleged negligence of the defendants in allowing a certain water pipe filled with water in rooms occupied by defendants over the plaintiff's store, to freeze and burst, thus causing the water to run down into plaintiff's store and damage his stock of goods. A verdict for plaintiff for $415 was rendered. At the close of the charge by the presiding Justice defendants' counsel took three exceptions to certain parts thereof, the first of which he waived, and argued the other two. Exceptions overruled.

The case is fully stated in the opinion.

Samuel L. Bates, for plaintiff.

Joseph E. F. Connolly, for defendants.

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

PHILBROOK, J. This case is before us upon defendants' exceptions to certain instructions contained in the charge of the presiding Justice. As originally prepared the bill contained three exceptions, but defendants, in argument, state that they now waive the first exception and rely only on the second and third. Moreover, they say that these two exceptions are part of the same thought and are treated jointly.

The record shows that the plaintiff was a clothing dealer, occupying a store on the street floor, and a portion of the basement thereunder, in a certain building; that on the second floor, directly over the store, was a room under the control of and occupied by the defendants; that this second floor room was used by the defendants as a storeroom; that there was a water pipe which led from the basement, through plaintiff's store and into the defendants' storeroom; that the storeroom was not heated; that on a cold January night the water was frozen in that part of the pipe which was under a sink in defendants' room; and that because of such freezing the pipe was bursted, thus allowing water to run down into plaintiff's store, injuring merchandise and rendering the store unfit for use for a time.

The defendants were not the owners of the building but because of certain leasehold rights were landlords of the plaintiff.

The record further shows that in the charge the language made the subject of the second exception immediately followed the language made the subject of the third exception, so that by first quoting the instruction challenged by the third exception we shall better understand the consecutive language made the subject of the second objection.

THIRD EXCEPTION:

"Now the plaintiff in this case says that there were certain water pipes in the building under the control of the defendant, and that it was the duty of the defendant to maintain those water pipes in such a manner that they would not burst, and thereby injure the plaintiff; and I say to you that it was their duty to maintain those pipes in such a manner that they would not burst, and that they should maintain them, so to speak, against weather conditions such as exist in this climate. That means not simply against ordinary temperatures, but against extremes. That is all in accordance with the rule that you have applied in these cases, of reasonable and due care, and I say to you that it is reasonable and due care that the defendants should, and the occupant of that store below had a right to assume that in the exercise of reasonable and due care the defendants would, maintain their water pipes in a manner such that they would not be affected by weather conditions so as to burst and thereby injure the plaintiff or his property. Now there is one exception to that which is due to the fact that there sometimes intervenes in the affairs of men what is called an Act of God, or vis major, or superior force, which means a force or a happening that is beyond the power of man to prevent and not to be expected by him. One authority has said that the term 'Act of God,' in its legal sense, applies only to events in nature so extraordinary that the history of climatic variations and other conditions in the particular locality affords no reasonable warning of them. And if you should find as a fact that the weather conditions were such as to be not simply unusual, but so utterly unexpected that the defendants could not have and should not have been expected to foresee such condition, then the instruction which I have given you as to their duty to keep their pipes in such a condition that weather conditions would not affect them, would be open to that exception."

SECOND EXCEPTION:

"So, I say, it is their duty to do this. They may do it by the construction of the pipes, if such is possible, by enclosing them, or in one way or another putting them into such a part of the building that the cold would not get to them to affect them; or, if they see fit, they may shut them off and withdraw the water from them."

When defendants asked for allowance of the second exception counsel, in open court, assigned as cause therefor "There being no evidence of any change in the situation of appliances after the plaintiff went into possession," and that "from the evidence, so far as it shows here, the pipes were in the same position they were in when the landlord (defendants) took possession." It is familiar law that the excepting party is confined to the grounds expressly stated at the trial or contained in his exceptions. *Lenfest* v. *Robbins*, 101 Maine, 176; *McKown* v. *Powers*, 86 Maine, 291. Hence, so far as the rights of the defendants are concerned, in the consideration of this second exception, we may and should properly confine our examination to the grounds thus stated in open court and before the jury retired. The gravamen of the alleged cause of action is the negligence of the defendants. The exact application of this exception to that gravamen is not made clear. By the terms of his lease the plaintiff was required "to do all and every of their own repairing at their own expense,—heating and lights—keep all water pipes, furnace, water closet, window and walls, partitions and all other things in good order, condition and repairs during the time of their occupancy of said premises." But the obligation thus resting on the plaintiff related only to the part of the building leased by him. He did not lease the room over the store. It was there, in that part of the building occupied and controlled by the defendants, that the cause of damage arose. It cannot be successfully claimed that the plaintiff was at fault for negligent conditions in that part of the building which he did not lease. Under the testimony in the case the plaintiff cannot be charged with knowledge of conditions in the upper room, nor with a duty to see that the defendants maintained those conditions in a proper manner. Upon the grounds stated we cannot hold that the second exception avails the defendants in their desire to set aside the verdict.

Under the general discussion of both exceptions, upon which defendants rely, they say that the gist of the instructions excepted to is that a landlord is a guarantor, or an insurer, and responsible for all things which occur upon his property, except it be due to an Act of God which alone excuses him.

More then three quarters of a century ago, in *Hunnewell* v. *Hobart,* 40 Maine, 28, this court wisely held that a single proposition in the charge, standing alone, might be open to objection, but taken in connection with other parts of the charge, and as it must have been understood by the jury, was not exceptionable. In a still earlier case, *French* v. *Stanley,* 21 Maine, 512, decided in 1842, it was held that while a certain instruction then under consideration might not have been perfectly correct, yet, if the finding of the jury, upon a view of the whole case as then presented to them, was correct, the excepting party cannot be considered as a party aggrieved, in the language of the statute, authorizing the filing of exceptions, and exceptions in such case would not be sustainable. In *Russell* v. *Turner,* 59 Maine, 256, citing several cases in support, it was declared that there are many cases in which it has been held that even if instructions are erroneous, unless it appears also that they might have been prejudicial to the excepting party, a new trial will not be granted. In *Look* v. *Norton,* 94 Maine, 547, this court held that even if a certain instruction was erroneous it did not follow that the exceptions should be sustained, because it must also appear that the excepting party was prejudiced by the instruction against which complaint is made. Again, in *Gordon* v. *Conley,* 107 Maine, 286, discussing motion for new trial and exceptions, our court declared "whatever the errors in the rulings of the court, the result of the trial was evidently right. It would seem like trifling with the ends of judicial procedure to say that an erroneous ruling, which did not affect the truth of the result, should be regarded as a sufficient reason for the overturning of a fair and honest judgment. If the court erred, the jury did not." Finally, when a party takes exceptions to the rulings of a presiding Justice, it is incumbent on such party to show affirmatively, not only that there was error in such rulings, but also that he is aggrieved thereby. *Hix* v. *Giles,* 103 Maine, 439; *Moore, Appellant,* 113 Maine, 195.

Bearing in mind these salutory rulings, which not only tend toward an end of lawsuits and legal delays, but also toward the working of

such substantial justice as the infirmities of human institutions may render, we have carefully examined the entire charge, to isolated portions of which exceptions have been taken, and the testimony upon which the jury based a verdict. From this examination we unhesitatingly say that when the whole charge is studied, and the effect thereof is carefully weighed, there is not exceptionable error to be found therein. The instructions which preceded and those which followed the paragraphs relied upon in the bill of exceptions are substantially correct and must have made the legal situation clear to the minds of the jurors. Moreover, we are equally satisfied that the verdict of the jury was conservative and well founded upon the evidence; that "the result of the trial was evidently right." No motion for new trial upon grounds that the verdict was against the weight of evidence, or that the damages were excessive, was presented.

Exceptions overruled.

ALICE L. REDMAN, In Equity

vs.

ASENATH H. ACHORN AND EDWARD BRYANT COMPANY.

Knox. Opinion February 26, 1926.

A deed conveying an interest in real estate, which was procured by concealment and misrepresentation constituting fraud upon the grantor, may be declared null and void in a bill in equity and a reconveyance decreed.

Rents and profits accrued subsequent to such conveyance may also be recovered.

On appeal. A bill in equity seeking the reconveyance of an interest in real estate alleging that the conveyance of such interest was procured from complainant by inducements and fraudulent concealment amounting to fraud, and also to recover a share of the rents and profits. Upon a hearing the bill was sustained and respondent appealed. Appeal sustained and bill remanded.

The case is fully stated in the opinion.

Ensign Otis, for complainant.

Alan L. Bird and Charles T. Smalley, for respondents.

SITTING: WILSON, C. J., PHILBROOK, DUNN, DEASY, STURIS, BARNES, JJ.

BARNES, J. Plaintiff, George E. Achorn and Frank B. Achorn, who at his death made his wife, Asenath H. Achorn, his sole devisee, upon the death of their father, Girard Achorn, were the owners in fee of a six acre lot of land in Rockland, which for many years had been used only as a hay field, but which prior to the earliest recollection of any witness in this case had been operated for lime rock and showed in its surface an ancient depression, perhaps twenty feet deep and fifty feet square, long since abandoned as a quarry and grown over with grass.

Girard Achorn died in 1918. For several years prior to his death he had lived part of the time in a house owned by him and situated on one of three small parcels of his land, but separate and apart from the six acre hay field.

In 1891, defendant, Mrs. Achorn, was married to Frank B. Achorn, and from April to October of that year her husband and she lived with his father, in his house, where she took care of him. At intervals thereafter, when the father felt the need of care, he lived with his daughter, the plaintiff, in Thomaston, with the defendant or with a sister, Mary Allen, until in 1914, when, according to the testimony of defendant, Mrs. Achorn, the plaintiff brought him to the Frank B. Achorn home, where he lived with his son until his death in 1918. From the time of his father's death, Frank B. Achorn harvested the hay on the lot with which we are concerned and paid the taxes assessed thereon, until the death of the latter, in December, 1922. He also paid the expenses of the last sickness and burial of Girard Achorn.

At some time prior to October 12, 1921, defendant's husband learned that the six acre field contained commercial lime rock in quality and quantity of great value, and on that date, through his attorney, he obtained from the plaintiff a deed of her undivided share of the field, the consideration for the same being services rendered to the deceased in his lifetime and monies paid since his death. And thereafterward, claiming that then for the first time she knew the six acre field to be of value as a source of lime, plaintiff brought her bill in equity against Asenath H. Achorn, who had acquired the field by will of her husband, and the Edward Bryant

Company, a corporation manufacturing lime, which has been operating a quarry on the six acre lot, by virtue of a lease from Frank B. Achorn, and has paid for about 200,000 casks of lime obtained therefrom in the first year of its operation.

Allegations of the bill that are in dispute are that Frank B. Achorn, before he acquired plaintiff's title to the land, had informed himself and knew that it was of value, as a source of lime, greatly in excess of its value as a hay field; that he failed to impart this knowledge to plaintiff, but, on the other hand, treating with her as if its value was only that of six acres of hay land, secured from her the deed to the lot when it was his duty to appraise her of its greater value, and hence that by fraudulent concealment and misrepresentation he worked a fraud upon her. If her bill is sustained, she prays for a reconveyance of the premises upon payment, on her part, of one third of the amount paid by Frank B. Achorn on account of Girard Achorn, and that her deed to said Frank B. Achorn be declared void.

The cause was heard by the sitting Justice, who sustained the bill and decreed, "That the deed of Alice L. Redman to Frank B. Achorn, dated October 12, 1921, as set forth in complainant's bill is colorable and fraudulent, null and void.

"The said Asenath H. Achorn is hereby perpetually enjoined from making any conveyance of said premises described in said deed to any party other than the complainant.

"That the said Asenath H. Achorn is hereby ordered and required to make, execute and deliver a good and sufficient deed of release of said premises to the complainant forthwith.

"That the said Edward Bryant Company as Trustee shall immediately prepare and present to this court a full statement of all the monies paid to the said Frank B. Achorn and to Asenath H. Achorn and to any other parties under the terms of a lease of said premises dated October 15, 1921.

"That the said Asenath H. Achorn as executrix of the estate of said Frank B. Achorn and in her own behalf account for and pay to said Alice L. Redman immediately a sum equal in amount to one-third of each and every payment heretofore made by the said Edward Bryant Company on the aforesaid lease, together with interest at six per cent. on each instalment so paid from the day of payment of such instalment to the day of payment in fulfillment of this decree."

From the decree of the sitting Justice appeal was taken in due course.

This court must therefore determine the validity of the conclusions set forth in the decree upon the facts proven and the law applicable to the case.

Careful reading of the evidence satisfies the court that before he moved to secure a deed of plaintiff's share of the field defendant's husband knew that the land had a value greatly in excess of that which he represented to be its value and that he concealed this knowledge from her.

He had begun to deal with the lime manufacturers, the Bryant Co., in September or the very first days of October, 1921, and three days subsequent to the date of the deed from plaintiff he executed the lease in evidence, to his great profit, if he and his devisee may hold two thirds of the return from the lime rock.

Some testimony was introduced to the effect that there was an agreement that Frank B. Achorn should care for and properly bury the father and in return therefor should have upon request deeds of the real estate left by him, but this was by no means satisfactorily proven.

Nevertheless, he sought to obtain plaintiff's title to the six acre field in return for such advances, a grossly inadequate consideration, and convincing proof of fraudulent purpose on his part.

Of the value of the land, except as a hay field, plaintiff had no knowledge. He approached her as proceeding without the guidance of the Probate Court to settle a part of the affairs of the deceased. He had investigated and knew that the property sought was of far greater value than a six acre hay field. It was his duty under all the circumstances, before driving a trade, to impart that knowledge to her. Even if no confidential relations exist, the intelligence, experience, age and mental condition of the parties may vary the rule that it is incumbent on every man to investigate and know the value of land which he is selling. In this case defendant's husband assumed to deal with his sister in a confidential relation and he should have made a full and truthful disclosure of all facts material to the transaction.

"Catching bargains with heirs, reversioners and expectants" is a type of frauds cognizable in equity, and classified as such since the day of Lord Hardwicke.

It is objected that had the plaintiff attempted to pursue a remedy at law she might have failed to recover. This objection comes late

and cannot avail, for we conceive that the statutes confer equity jurisdiction for relief in just such a case as this.

The defense of laches is advanced; but from the evidence, considering the ignorance of law and legal procedure manifest in the plaintiff, and the further fact that much time might prudently be consumed in communicating with her brother, in far away Panama, who was a part owner, was interested and might well be consulted, this defense fails.

The deed from plaintiff must be held void, and defendant, Asenath H. Achorn, should reconvey an undivided third interest in the property to the plaintiff, upon payment to Asenath H. Achorn, as executrix of her husband's will, of one third of the sum of all payments proven to have been made by her late husband for the account of Girard Achorn.

It does not yet appear whether the defendant company paid stumpage under the lease to defendant, Achorn, in her capacity as executrix, or to her as devisee and owner of the field.

To aid the court in determining this point decree should issue requiring said company to account to the court as decreed by the sitting Justice; and further that defendant, Asenath H. Achorn, account for and pay to plaintiff a sum equal in amount to one third of each and every payment heretofore made by the said Edward Bryant Company on the aforesaid lease to Asenath H. Achorn in her individual capacity, together with interest at six per cent. on each instalment so paid, from the day of payment of such instalment to the day of payment under the decree of court.

Such sums, if any, as have been paid by said company to Asenath H. Achorn, in her capacity as executrix, cannot be reached under this bill, and in that particular the decree of the sitting Justice cannot be sustained.

The cause must therefore be remanded to the court below, for decree, upon further information, in accordance with this opinion. The entry here will be

Appeal sustained.

ROY O. MILLETT *vs.* ALBERT G. SOULE.

Oxford. Opinion March 3, 1926.

In a replevin action, upon a nonsuit, the disposition of the property is to be regulated according to the rights of the parties at the time of making the order.

Where chattels are taken from the possession of a defendant, on nonsuit, judgment for return of the property should follow, but if he was not in possession of the property and the situation remains unchanged, an order to return the property to him from whom it was not taken is exceptionable error.

In the instant case the defendant's position is that he never took or detained the goods, that he did not have them in his possession when the replevin action was commenced, and moreover that the complete union of all the elements which constituted their ownership was then and ever afterward in the plaintiff's wife.

In this case the possession of the chattels was as foreign to this defendant, when the taking on the writ occurred, and also when a return was ordered as though Mrs. Millett had had the property, not in a room in the dwelling-house of the defendant, but in a residence distinct from his which she had leased from him, whereof the leasing had made her the owner temporarily.

On exception. An action of replevin to recover possession of certain household property which the wife of the plaintiff, on leaving to live apart from him, took with her and placed in an upper room in the house of defendant, the exclusive occupancy of which room was hers. One day Mrs. Millett, wife of the plaintiff, locked the door of her room where the chattels were and went away taking with her the only key. Before her return a deputy sheriff, having a replevin writ sued out by the husband to possess himself of the goods against the owner of the house where the wife had her room, came there. The defendant neither detained the property nor asserted claim to it, nor objected to the taking, beyond protesting the breaking of the locked door. A hearing was had before a single Justice who ordered a nonsuit and a return of the goods, and plaintiff excepted. Exception sustained.

The case fully appears in the opinion.

Albert J. Stearns, for plaintiff.

Harry Manser, for defendant.

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

DUNN, J. After nonsuit in replevin, the ordering of the chattels to the defendant constituted exceptionable error, on the state of the record.

The Milletts were husband and wife at Greenwood. The wife left her husband. She took the piano, the sewing machine, an art square and rugs and other household property to the defendant's house in Oxford. Save the piano, which was left downstairs in that house, because of the difficulty which would have attended putting it upstairs, all that she had brought was placed in an upper room, the exclusive occupancy of which was hers.

One day Mrs. Millett locked the room door and went away, taking with her the only key to it. While she was gone, a deputy of the sheriff came to the house. He had a replevin writ sued out by the husband to possess himself of the goods against the owner of the house where the wife had her room.

The defendant neither detained the property nor asserted ground of claim to any thereof, nor did he object the taking, beyond protesting the breaking of the locked door.

The deputy took the chattels.

When the jury-waived trial was, defendant pleaded the general issue, in effect admitting the legal right to the property in the plaintiff, and supplemented this by brief statement: (1) That the property was not in or taken from the defendant's possession, but from that of the plaintiff's wife; (2) "That the title to the goods and chattels and the right of possession thereof was not in the plaintiff, but was in Dora Millett, wife of the plaintiff."

In one and the same breath the defendant denies the taking or retaining, and then insists that, if this is negatived, the plaintiff had neither title to nor right of possession of the personalty; both of these being in a stranger to the suit. The seeming inconsistencies represented by the plea and the brief statement are, however, reconcilable with each other under the rules of pleading. *Pejepscot Proprietors* v. *Nichols*, 10 Maine, 256, 261. Stated in more practical terms, the position of the defendant was that he never took or detained the goods, that he did not have them in his possession when the action

was commenced, and moreover that the complete union of all the elements which constituted their ownership was then and ever afterward in the plaintiff's wife.

Judgment of nonsuit was entered, and for return also.

The insistent question presented on exception concerns the resumptive judgment which would pass into the possession of the defendant the property that he had not had before and is not claiming now.

It is quite true this court has said that, in cases of nonsuit in replevin except where the general issue alone is pleaded, the order for return goes as a matter of course (*Bettinson* v. *Lowery*, 86 Maine, 218, 224), but the opinion there is discussing a conceivable state of things wherein the defendant, in his plea, inferentially at least, advances what this defendant has not, and that is that he is privileged to be restored to the possession, either because the property is his or because he is accountable for it to the true owner, and not contemplating that on nonsuit a defendant should be given the possession of somebody else's property, though previously he had not had or asserted it, nor at the judgment time set up right to it, and ought not acquire simply in consequence of a suit against him.

The propriety of ordering goods to the possession of a defendant will depend upon the pleadings. Whenever upon the pleadings, the general rule is, it appears that a defendant is so entitled, he will have judgment for restoration; otherwise he will not. *Mason's Practice*, 562; *Gould* v. *Barnard*, 3 Mass., 199, *Simpson* v. *McFarland*, 18 Pick., 427. Or, more apropos, the disposition of the property is to be regulated according to the rights of the parties at the time of making the order. If chattels were taken from the possession of a defendant on nonsuit, there should follow judgment for return to him, but, if he was not possessed and the situation remains unchanged, certainly the governing direction is that a return cannot be commanded to him from whom the property was not taken. *Standard Varnish Works* v. *Cushing*, 202 Mass., 576; *Whitwell* v. *Wells*, 24 Pick., 25. "If it appears that the defendant is entitled to a return of the goods, he shall have judgment and a writ of return accordingly," is the language of our own statute. R. S., Chap. 101, Sec. 11.

Possession of the chattels in the instant action was as foreign to this defendant, when the taking on the writ was or the court ordered, as though Mrs. Millett had had the property, not in a room in the

dwelling-house of the defendant, but in a residence distinct from his which she had leased from him, whereof the leasing had made her the owner temporarily.

This defendant was not possessed of the things in the beginning, there is no changed condition, and possession must not be imposed upon him.

Exception sustained.

CENTRAL MAINE GENERAL HOSPITAL

vs.

CHARLES B. CARTER ET ALS., EXR'S.

Androscoggin. Opinion March 3, 1926.

An oral offer to give a certain sum of money for a specific purpose named imposes an obligation to devote the fund when received to that particular purpose and an implied promise so to do, which constitutes a valid consideration for the promise to give, which becomes a binding promise upon acceptance, though such offer may not be consummated as a gift inter vivos, nor a demand made during the lifetime of the promisor.

It does not follow that an acceptance of an unconditional offer for the general purposes of a charitable institution will satisfy the requirement of a valid consideration.

In the instant case only two of the exceptions require special consideration, as the record does not show that the defendants were aggrieved by the rulings on which the other exceptions are founded.

The proof of the claim before the Probate Court was properly admitted in support of the declaration. There was no variance. The declaration merely sets out in more detail than the claim filed the consideration for the promise to give. It sets forth no new claim.

The testimony of incorporators and officers of the plaintiff was properly admitted. The officers and stockholders of a corporation, while interested, are not parties in actions by or against the corporation in which they are not joined, within the exception contained in Sec. 117, Sub. Sec. 2, Chap. 87 of the R. S.

The jury must have found that the offer of Mr. Osgood made January 12, 1922, to the plaintiff was accepted at a meeting at which Mr. Osgood was present February 3, 1922, which finding has sufficient evidence to support it.

There is also evidence in the case from which the jury may have been warranted in finding, in confirmation of the acceptance of Mr. Osgood's offer, that officers of the plaintiff corporation with the knowledge of Mr. Osgood during his lifetime and with the knowledge of the directors of the plaintiff corporation and their sanction as a Board, took steps toward carrying out the purposes for which the proposed gift was to be made, though the authority of said officers to incur any expense in behalf of the corporation during Mr. Osgood's lifetime may be lacking.

On exceptions and motion. An action to recover on an alleged oral offer to give twenty thousand dollars made in his lifetime by defendants' decedent for a specific purpose to the plaintiff which was not consummated as a gift inter vivos nor a demand made on decedent during his lifetime, but accepted by the plaintiff during the lifetime of decedent, and that certain acts were done by plaintiff before the death of the promisor toward the fulfillment of the specific purpose for which the offer was made, which it was alleged constituted a valuable consideration for the promise to give. A verdict was rendered for the plaintiff in the sum of $21,150. During the trial exceptions were taken by the defendants to the admission and exclusion of certain testimony, and also to a refusal to direct a verdict for the defendant, and defendant also filed a general motion for a new trial. Exceptions and motion overruled.

The case is fully stated in the opinion.

William H. Gulliver, Dana S. Williams and Edmund P. Mahoney, for plaintiff.

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

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

WILSON, C. J. An action to recover of the estate of Charles H. Osgood, formerly a prominent business man of Lewiston, the sum of twenty thousand dollars, which, it is alleged, Mr. Osgood during his lifetime, to wit, on January 12th, 1922, agreed to give to the plaintiff, a duly organized charitable corporation under the laws of this State, for the purpose of constructing an addition to its hospital buildings to be known as the west wing. The action was tried before a jury, which awarded the plaintiff a verdict for the full amount claimed, with interest from the date of demand upon the executors. The case is before this court on a motion for a new trial on the usual grounds

and numerous exceptions to the introduction or exclusion of evidence and to a refusal to direct a verdict for the defendants.

Owing to the ruling of this court upon the motion, but two of questions raised by the defendants' exceptions require special consideration; as it does not appear from the bill of exceptions that the defendants were aggrieved by the rulings of the court to which exceptions upon other grounds were taken.

The exception to the admission of the proof of claim filed in the Probate Court by the plaintiff against the estate of Mr. Osgood is untenable. That the declaration sets forth more specifically than was set forth in the proof of claim the consideration for the alleged promise to give could not have prejudiced the defendants, especially since even further specifications were filed at the defendants' request.

The claim filed sets forth that Mr. Osgood on January 12th, 1922 contracted to give the sum named and that there was a valid consideration for the contract. The declaration alleges in addition to the contract to give that the offer to give was accepted by the plaintiff on February 3d, 1922, and that in consequence of and relying on the promise to give, the plaintiff incurred certain financial obligations and failed to do certain things in the promotion of the interests of the Hospital that it otherwise would have done. These additional allegations were obviously intended to set forth what the plaintiff contends was the consideration which rendered the promise to give binding and which was only set forth in the proof of claim in general terms. It is no new claim.

The testimony of several incorporators and officers of the plaintiff corporation was offered by the plaintiff and admitted against the objection of the defendants' counsel upon the ground that such officers and incorporators were in effect parties to the suit and so were disqualified as witnesses under Chap. 87, Sec. 117, Sub. Sec. 2.

The defendants' counsel evidently places little reliance upon this contention. They cite no cases in point. All decisions of the courts where this question has been raised appear to be against their contention. *Grange Warehouse Ass'n* v. *Owen,* 86 Tenn., 355; *Merriman* v. *Wickersham,* 141 Cal., 567; *Rust* v. *Bennett,* 39 Mich., 521. Also see 40 Cyc., 2290 and note in 9 Am. and Engl. Anno. Cases, Page 181 for further citations. The statute of this State includes only parties to the action and even though a corporation can only speak through its officers, such officers are not parties to the

action within the meaning of this statute. All the testimony of the officers or incorporators of the plaintiff corporation, if otherwise admissible, was properly received for the consideration of the jury.

The real issue in the case, however, is raised on the refusal to direct a verdict and on the motion for a new trial, viz., whether the oral promise or agreement of Mr. Osgood to give to the plaintiff the sum of twenty thousand dollars is now enforceable against his estate after his death by reason of a lack of consideration to support it during his lifetime.

The defendants say that admitting a definite offer to give the sum named within one year, it never went beyond the stage of a mere offer; that the evidence did not warrant the jury in finding that the offer was ever accepted by the plaintiff, or if it does, that there is still lacking evidence of any consideration to make it a binding promise on the part of Mr. Osgood and so bind his estate after his death.

We think there was sufficient evidence from which the jury was warranted in finding that the offer of Mr. Osgood was considered by the plaintiff at a meeting of its directors, and its intent to accept the proposed gift for the express purpose for which it was offered was clearly shown.

But even though the jury were warranted in finding an agreement on Mr. Osgood's part to give and an acceptance, or an intent on the part of the plaintiff to accept and conveyed to Mr. Osgood during his lifetime, the troublesome question is still left: was there a valid consideration for Mr. Osgood's promise to give?

The courts in the earlier decisions appear inclined to hold such agreements to give for charitable purposes are not enforceable for various reasons; *Boutell* v. *Cowdin*, 9 Mass., 254; *Phillips Limerick Acad.* v. *Davis*, 11 Mass., 113; *Trustees of Bridgewater Academy* v. *Gilbert*, 2 Pick., 579; *Foxcroft Academy* v. *Favor*, 4 Maine, 382; but beginning with *Amherst Academy* v. *Cowls*, 6 Pick., 427; *Trustees of Parsonage Fund in Fryeburg* v. *Ripley*, 6 Maine, 442 there is clearly discernable a more liberal attitude toward sustaining such agreements. *Williams College* v. *Danforth*, 12 Pick., 541; *Ladies Collegiate Institute* v. *French*, 16 Gray, 196; *Ives* v. *Sterling*, 6 Met., 310; *Athol Music Hall Co.* v. *Carey*, 116 Mass., 471; *College Street Church* v. *Kendall*, 121 Mass., 528; *Troy Academy* v. *Nelson*, 24 Vt., 189; *Barnett Adm.* v. *The Franklin College*, 10 Ind., App. 103; *Collier* v. *Baptist Education*, 47 Ky., 68; *Albert Lea College* v. *Brown Admr.*, 60 L. R. A., (Minn.), 870.

It is true many of the cases may be differentiated from the case at bar, especially if it be held that there was no evidence properly admitted in the instant case of any acts done by the plaintiff during Mr. Osgood's lifetime and of which he was cognizant, in furtherance of the purpose for which the funds were to be given. It may also be true that in strict theory the sustaining of such promises to give cannot be upheld as a contract based on a valid consideration. Williston on Cont., Vol. I, Page 249. However, the courts have sustained them as contracts in numerous instances, not only where the performance in part at least of the purpose for which the funds were subscribed or promised were shown, or where liabilities were incurred on the strength of such promise, but in many of the cases the courts have indicated that they regarded the promise on the part of the donee, or promisee, to accept the proposed gift with the express or implied undertaking to apply it to a specific purpose for which it was to be given as a valid and sufficient consideration to bind the promisor. In other words, it has been held that an express promise, or the implied promise contained in the acceptance of a proposed gift upon the conditions upon which it is offered, as for instance, to apply the gift to the purposes specified in the offer, is a valid consideration for the promise to give. One promise supports the other, without incurring any expense or other obligation to the detriment of the promisee, except the obligation to carry out the trust it has agreed to assume in accepting the gift, and which it can in equity be compelled to fulfill.

If it were an entirely new question in this State we might hesitate to adopt the reasoning that has led the courts to enforce such promises without any other consideration than the implied promise to fulfill the conditions of the proposal involved in the mere acceptance of the offer to give, but this court appears to have committed itself to this doctrine and it finds support in other jurisdcitons.

In *Collier* v. *Baptist Education Soc.*, 47 Ky., 68, the court said: "In the execution of this note then, there was on one side the obligation to appropriate this fund to the provision of the charter and the promise to pay on the other."

In *Helfenstein's Est.*, 77 Pa. St., 329: "If the note had been accepted by the trustees before the death of the promisor, it would have stood on the footing of the principle applied in *Chambers* v. *Calhoun*, 6 Harris, 13; for in such case, if the trustees assumed the

duty imposed upon them by the terms of the condition of the note, it would be a sufficient consideration to sustain the promise."

In *Troy Academy* v. *Nelson*, 24 Vt., 194 the court said: "But a sufficient consideration, we think, is readily found in the case. A legal consideration may consist in loss, damage, or inconvenience, sustained by the party to whom the promise is made or of benefit or advantage to the party promising. The amount of the consideration is unimportant, nor is it necessary in this state that it should appear on the face of the contract or agreement, as it may be proved *aliunde*. The consideration for this agreement is found in the obligations imposed upon and assumed by the Trustees of this Academy to see to and make the application of this money as directed by the subscribers to this fund so as to enable this Institution to prosecute its duties of public instruction for which it was incorporated, thus rendering this assumed liability and promise the consideration of the promise by the other. To create this obligation upon this corporation or its trustees, it was not necessary that the instrument should have been signed by them for that obligation arises from the acceptance of those subscriptions for that purpose, and which can be enforced at law and in equity."

In *Barnett Admr.* v. *The Franklin College*, 10 Ind., App., 103, 109: "The principle upon which promises of the character of those embraced in the present case are held to be valid is the reciprocal undertaking on the part of the promisor to pay and the promisee to perform something of value to the promisor . . . The acceptance of the obligation imposed creates a trust incapable of being subsequently renounced, and which may be enforced by proper legal proceedings.

Amherst Academy v. *Cowls*, 6 Pick., 427: "But it is quite sufficient to create a consideration that the other party, the payee, should have assumed an obligation in consequence of receiving the note, which he was compellable either at law or equity to perform."

Ladies Collegiate Institute v. *French*, 16 Gray, 196: "The second objection is that the promises of the defendants being mere subscriptions to the funds of the Institute are without consideration and therefore void. Subscriptions of this character have been made the subject of litigation in many instances and the earlier cases in our reports contain *dicta* some of which have not been sanctioned by later decisions. But in the cases of *Amherst Academy* v. *Cowles*,

6 Pick., 427; *William's College* v. *Danforth*, 12 Pick., 541; and *Thompson* v. *Page*, 1 Met., 565, their validity is established and the ground of it definitely stated. It is held that by accepting such subscription the promisee agrees on his part with the subscriber that he will hold and appropriate the funds in conformity with the terms and objects of the subscription and thus mutual and independent promises are made, which constitute a legal and sufficient consideration for each other. They are thus held to rest upon well-settled principle in respect to concurrent promises."

The same rule is recognized in *Cottage St. Church* v. *Kendall*, 121 Mass., 528, 530: "In every case in which this Court has sustained an action upon a promise of this description, the promisee's acceptance of the defendant's promise was shown either by express vote or contract assuming a liability or obligation legal or equitable, or else by some unequivocal act such as advancing or expending money or erecting a building in accordance with the terms of the contract and upon the faith of the defendant's promise."

Chief Justice Holmes in discussing this question in *Martin* v. *Meles*, 179 Mass., 114, reviewed the cases in which the Massachusetts Court has considered it and the grounds upon which such promises have been enforced, and in discussing the view that it is necessary to show some acts or expense incurred in carrying out the purposes for which the promises to contribute was made, said:

"A more serious difficulty if the acts are the consideration, is that it seems to lead to the dilemma that either all acts to be done by the Committee must be accomplished before the consideration is finished, or else the defendant's promise is to be taken distributively and divided up into distinct promises to pay successive sums as successive steps of the Committee may make further payments necessary and may furnish consideration for requiring them. The last view is artificial and may be laid on one side. In the most noticeable cases where a man has been held entitled to stop before he has finished his payments, the ground has not been the divisibility of his undertaking but the absence of consideration which required the Court to leave things where it found them. (citations). As against the former view, if necessary, we should assume that the first substantial act done by the Committee was all that was required in the way of acts to found the defendants' obligation. (citation). But if that were true, it would follow that as to the future conduct of the Committee their

promise and not their performance was the consideration, and when we have got as far as that, it may be doubted whether it is not simpler and more reasonable to set the defendants' promise against the plaintiffs' promise alone. We are inclined to this view, but do not deem a more definitive decision necessary, as we are clearly of opinion that, one way or the other, the defendants must pay."

Of more importance in sustaining our conclusions in the case at bar is the position taken by our own court, from which we see no sufficient reason to depart at this time. In *Trustees Fryeburg* v. *Ripley*, 6 Maine, 442 the court said: "The subscribers have expressed in plain terms the conditions on which their donations are made and by these require of the trustees the performance of several duties attended with labor and some expense. The acceptance of the donations on these conditions amounts to an undertaking on the part of the trustees, to perform this labor and incur the necessary expense of recording the list of donations and the directions of the donors and furnishing copies as required by them; this acceptance and undertaking of the trustees at the request of the donors form a good consideration for the note in question."

Maine Central Institute v. *Haskell*, 73 Maine, 140, 143 in which this court reviewed the authorities and concluded: "The promise was made to a definite payee by name, one legally competent to take, incorporated for the express purpose of carrying out the object contemplated in the promise and therefore amenable to law for negligence or abuse of the trust. It is not, of course, binding upon the promisor until accepted by the promisee and may up to that time be considered as a revocable promise. But when so accepted, and much more when the execution of the trust has been entered upon, when money has been expended in carrying out the purposes contemplated, it becomes a completed contract binding on both parties; the promise to pay and at least the implied promise to execute each being a consideration for the other."

The quotations in this case from other authorities in support of its conclusion are all to the effect that the promise to execute is a consideration for the promise to give.

In *Haskell* v. *Oak*, 75 Maine, 519, 423, this court again said: "To say nothing of the advantage secured to himself as owner of an overloaded stock through payments made by his fellow subscribers, there was in the implied undertaking of the payee to devote the sub-

scription which he accepted to the purpose declared, a sufficient consideration to support the promise," citing the same line of authorities as in *Me. Central Institute* v. *Haskell.*

This court, therefore, appears to have committed itself to the doctrine, that a promise, whether express or implied, on the part of the promisee, in case of a proposed gift for a special purpose, to devote the gift when received to the purpose named, or receive it upon the conditions stated, is a sufficient consideration to support the promise to give; and that such a promise to execute may be implied from an unequivocal acceptance of the gift itself, and especially from any acts or expense incurred in furtherance of the purpose or in compliance with the conditions.

If such acts were necessary to show the acceptance of Mr. Osgood's offer and the purpose to devote the funds when received to the building of the west wing of the hospital, evidence was received showing acts of the President of the plaintiff corporation and of one other member of the Board of Directors in relation to carrying out this purpose. Acts of which we think the jury from all the evidence were warranted in inferring that the other members of the Board of Directors, including Mr. Osgood in his lifetime, by reason of the interest manifested by him in this particular project, must have had knowledge.

Question was raised as to the authority of these men to act or bind the corporation. The authority to bind as to financial obligations may not have been shown prior to Mr. Osgood's death, though their acts in obtaining plans may have been later ratified; but by reason of their official position and as members of a committee appointed to oversee the construction of a Nurses' Home for the hospital, which was constructed by outside parties and presented to the hospital on January 12, 1922, which Committee, although the Home had been constructed, presented, and dedicated, was continued by vote of the directors at the meeting of February 3, 1922, we think that their acts in conferring with architects and obtaining preliminary sketches for a west wing may have been properly found by the jury, from the admissible evidence, to have been done with the knowledge of all the directors and with their sanction as a Board.

Nor do we regard it as a sufficient reply to say that any acts done or steps taken during Mr. Osgood's lifetime toward the construction of a west wing were taken solely in view of a generous bequest for

that purpose by another former Lewiston resident in his will published just before Mr. Osgood's offer on January 12th, and not in any respect in consequence of Mr. Osgood's accepted offer to give toward the same object. As the court said in *Martin* v. *Meles*, supra, that is a speculation upon which the court will not enter. Both gifts when consummated, were for the same object and any acts of the plaintiff indicating an intent to carry out the purpose for which the gifts were promised or made must be presumed to be, unless otherwise shown, in furtherance of each.

We do not hold that the mere acceptance of an unconditional promise to give for the general purposes of a charitable corporation will always satisfy the requirements of a valid consideration. A corporation is bound to carry out the general purposes for which it was organized and it assumes no new burden by accepting a proposed gift without limitations. Where, however, the proposed gift is stipulated by the donor to be devoted to some particular purpose and is accepted with that condition attached, a special obligation in respect to that particular fund ensues in addition to the duty to carry out its general purposes, though the acceptance of the conditional gift must of course be in furtherance of them, a distinction clearly pointed out by the Vermont Court in *Montpelier Seminary* v. *Smith*, 69 Vt., 382, 386-387.

Exceptions and motion overruled.

EDNA FLORENCE BLACKARD *vs.* NATIONAL BISCUIT COMPANY.

(Two Cases)

Cumberland. Opinion March 6, 1926.

The construction and interpretation of a written contract.

In this case the only real issue involved was as to whether the contract entered into contemplated that the driver furnished might be called upon to make and bring in collections.

On exceptions by defendant. Two actions to recover damages for breaches of one and the same written contract wherein it was stipulated that the plaintiff for an agreed consideration promised to furnish defendant for a period of fourteen months an equipped motor truck, including a driver, to do delivering as the defendant might direct. At the close of the trial before the presiding Justice the defendant requested several rulings of law which were refused and defendant excepted to the denial of each requested ruling. Exceptions sustained.

The cases fully appear in the opinion.

Clinton C. Palmer, for plaintiff.

Verrill, Hale, Booth & Ives, for defendant.

SITTING: WILSON, C. J., PHILBROOK, DUNN, MORRILL, STURGIS, BASSETT, JJ.

MORRILL, J. concurring in part.

DUNN, J. On exceptions.

Two cases counting on different breaches of one contract. Plaintiff lives at Portland; the defendant is a wholesale biscuit dealer there. A jury was waived and trials had to the court.

These are the pertinent facts: On March 20, 1922, in consideration of the defendant's promise to pay her for performance, in stipulated instalments at designated times, this plaintiff contracted in writing that, for the period of fourteen months beginning with the first day

of the next following month, she would furnish an equipped and supplied motor truck, and provide the necessary driver, to do delivering as the defendant might direct.

Performing was duly begun, and continued for more than five months. Not in all, but in some instances, the defendant sold goods to customers at a fixed price, delivery to be made on the agreement, express or implied, that delivery and payment were to be simultaneous, and till the price was paid the title was in the seller.

In each case, the defendant instructed the truck driver to collect the price on making delivery, and the same was done: but the collector fell short in his accountings to the seller. Shortages, in the order of their occurrence, were minuted by the defendant beneath the driver's name, and on the first day of the next month were totaled and deducted from the contract payment due the plaintiff. The plaintiff, however, urges that she took each tendered check because of her need for the money it would bring, protesting positively to the defendant's actual knowledge, that the payment was but partial, and that the ill-teamed words of the writing would not draw the construction that obligation to collect is an incidental thing within the scope of contract purpose or intendment.

The first action is to recover for the sum withheld for collection deficiencies.

In the second, the effort is to recover damages for the asserted failure of the defendant to accept performance of the contract during the sued-for while; the insistent position of the defendant being that, in the exercise of reserved power to do so, it had terminated the relationship for the unsatisfactoriness of services rendered, in the failure of the driver to pay over all the money he had collected.

The plaintiff has decisions in both cases.

In the course of either trial, the defendant preferred eight requests for as many rulings, all of which were refused, and exceptions reserved.

It is quite unnecessary to state or discuss all the exceptions. The gist of the issues fundamental in the cases is embodied in the very first exception, the refusal to rule that the contract entered into contemplated that the driver furnished might be called upon to make and bring in collections. Therefore, the principal thing to be determined is, the common or normal meaning of the writing at the time it was made (*Bachelder & Co.* v. *Bachelder*, 220 Mass., 42), if possible giving effect to all related parts of that instrument, and at all events

to effectuate, as far as consistently feasible, the main object and purpose of the parties. *Smith* v. *Davenport*, 34 Maine, 520; *O'Brien* v. *Miller*, 168 U. S., 287, 42 L. Ed., 469; *Wallis Iron Works* v. *Monmouth Park Association*, 55 N. J. L., 132, 19 L. R. A., 456.

Early in the instrument, the "Contractor," as the plaintiff is there denominated, agrees with the "Company," that another corporation shall bind itself in suretyship to save the company harmless "against any pecuniary loss of money or other personal property" from the larcenous act, or the embezzlement, of any agent or employee of the contractor.

This provision has no other office now than the throwing of light upon the constituent part of the same document, that the contractor will furnish the necessary driver for the rented truck "and make deliveries as directed by the Company from time to time," the driver to assist at all times "in the loading and unloading of the said truck and also in making deliveries," on being taught by an employee of the company, which teaching comprehensive of collecting on C. O. D.'s and accounting therefor, the particular driver had had.

A salesman authorized to sell goods may collect the price at the time, or subsequent to the delivery of the chattels, in the absence of custom to the contrary, or understanding by the buyer of limited authority. *Trainer* v. *Morrison*, 78 Maine, 160. It would be ungraceful to hold the inappropriateness of his act evident, where a purchaser of ordinary prudence and familiarity with business usages, has made payment upon appearance of authority to accept it. The indicia may clothe the salesman with an apparent permission, or cause or permit him to seem to possess powers, which would make it the right of the person dealing with the salesman to presume that they went so far. *Mitchell* v. *Canadian Realty Company*, 121 Maine, 512.

And, in harmony of principle, parity of reasoning would extend the doctrine to one who, though he had not made the sale, is intrusted with the goods for delivery conditioned upon payment. But there is material distinction between this and the situation of mutual duty and liability of contracting parties under a written agreement. The purchaser who has paid finds protection on the theory, that where one of two innocent persons must suffer, he whose negligence so to speak caused the loss, ought to bear it. Of course, this is by no means the answer, when involvement solely concerns the immediate ones to the writing.

Authority to collect, like all unoriginal authorization or dominion, must be traced to a determinative source, for mere employment does not confer that warrant.

Whether it was competent for the defendant to prescribe that the plaintiff's truck driver must not deliver certain goods till they were paid for, and insist that he pursue such instructions and then himself pay over the amount collected, failing which his employer could be called upon to make any deficiency good, necessitates interpreting what evidences the contract.

Unexpressed intention is of no legal effect, and doubts growing from ambiguity of language are resolved against the party using it, observes the sitting Justice in his opinion. But these general rules are not adverse to the contention that, within the meaning of its parties, this contract looks forward to the making of collections by the driver of the truck, and accountability for them. In the event of larceny, or embezzlement,—and the latter is distinguished from the former, as being committed in respect of property which is not, at the time, in the actual or legal possession of the owner,—in the event of larceny or embezzlement, to repeat, on the part of the plaintiff's agent or employee, subjecting the other contracting party to "pecuniary loss of money," by that fact itself liability under the indemnifying bond is fixed.

Criminality is not necessarily attributed to this driver, rather the poorness of his ability to do simple things rightly. And, as argument tacitly concedes, there could not be pecuniary loss of money, in difference from the loss of other personal property, excepting money from collections on deliveries did not come to the owner from the driver.

More important still, deliveries were to be made "as directed by the Company from time to time." The driver was given orders positive to pass the merchandise in delivery not otherwise than if at the same time payment was tendered in full. He was obedient thus far. His failure completely to answer for the money collected led his employer into difficulty. The employer chose the driver of the truck, and for the quantity subsequently minus in the money that he had received, there is contractual obligation.

Let the first exception be sustained.

Exception sustained.

MORRILL, J. Concurring in part.

I concur in the opinion in the case to recover damages for breach of contract,—that the exceptions must be sustained.

The *Contractor* undertook to "make deliveries as directed by the company from time to time." I think that this language fairly put upon the *Contractor* the duty of making C. O. D. deliveries, when requested; the defendant, in the usual course of business, might well direct the Contractor not to deliver certain goods unless they were paid for; but it had no right to insist that a certain driver should make the collections against the protest of the plaintiff that he was not competent to handle them; and when she so protested, I think that the company should have insisted that it was her duty to do it, or to provide somebody who could. If she refused, as she did later, the defendant could terminate the contract. I think that after such protest it had no right to continue under the contract and to charge her for the driver's shortage. It follows that in the other case the exceptions should be overruled.

HOWARD F. SAWYER *vs.* ARTHUR O. WHITE.

Piscataquis. Opinion March 9, 1926.

An appeal in equity, like a general motion for a new trial in an action at law, carries with it necessarily all the evidence in the case. Its absence is ground for dismissal.

A final decree is one which fully decides and disposes of the whole case leaving no further questions for the future consideration and judgment of the court.

In equity, after the analogy of procedure in actions at law, where an amendment might have been made upon seasonable objection, the cause having been tried as if an amendment had been made, the court will regard that as done which could or ought to have been done, and consider the amendment as made.

In the instant case if approved equity procedure had been followed in the former case of *Wood* v. *White* after the decision reported in 123 Maine, 139, the present action would have been unnecessary.

The appeal in the former case was prematurely presented to the Law Court. Although entitled a final decree, it was not such a decree, and the appeal therefrom should have awaited the final decree.

After the mandate was filed the parties treated the decree as interlocutory, as it in fact was; and proceeded to a hearing before the Master to determine the amount which the plaintiff in that cause should pay to defendant to equalize their interests in the property referred to in the original bill as "Farrar Block," which defendant now refuses to convey.

There was no misunderstanding between the parties as to the subject matter of the controversy, or as to the property to which the court by its decree adjudged that the trust attached.

The plaintiff in the original action, before final decree, properly filed a motion to amend his bill, making more specific the description of the real estate, although apparently the motion had not been presented to a Justice for action thereon.

The court, after the parties have proceeded before the Master as if the amendment had been allowed, will regard that as done which could or ought to have been done.

A single Justice might have allowed such an amendment even after hearing before the Master; and upon motion in the original action the present plaintiff could have been made a party plaintiff therein, and proceeded to a final decree in that cause.

The rights of the defendant were fully and fairly determined in the original action; he has lost nothing by his futile attempt to appeal in the present case.

On appeal. A bill in equity asking that the respondent be compelled to convey to complainant an one half interest in certain real estate situate in Milo. The cause was heard by a single Justice, who sustained the bill and ordered a conveyance as prayed for, and respondent appealed. Appeal dismissed. Decree below, as modified, affirmed, with costs.

The case fully appears in the opinion.

Hudson & Hudson, for complainant.

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

SITTING: WILSON, C. J., PHILBROOK, MORRILL, STURGIS, BASSETT, JJ.

MORRILL, J. The plaintiff is assignee of one R. Irving Wood under a common law assignment for the benefit of creditors, dated May 23, 1923. Wood was the plaintiff in a cause in equity against this defendant in which an opinion was rendered by the Law Court, reported in 123 Maine, 139. The decree, from which that appeal was taken, adjudged that the defendant holds "one undivided half of the real estate as described in said bill in trust for the plaintiff, the said R. Irving Wood"; that a Master be appointed to determine the sum which Wood shall pay to White to equalize their interests in the cost of said real estate; and that upon tender of the amount so found "the defendant shall make, execute and deliver to the plaintiff a deed of an undivided one half part of said real estate."

The plaintiff in this bill seeks to compel a conveyance to himself, upon payment of the amount found due to White, of the real estate declared by the decree in the former suit to be held in trust by White for Wood. The bill contains fourteen charging paragraphs, the first two of which alleging the common law assignment and plaintiff's acceptance of the trust, must be considered as admitted, being neither admitted nor denied by the answer; the allegations of the other paragraphs are denied. The cause was heard by a single Justice, who sustained the bill and ordered a conveyance in accordance with the plaintiff's contention. The defendant appealed and presents in this court as a record a statement which counsel over their signatures stipulate "as a record, in the hope that it may be found intelligible for the deciding of the indicated issues, and are requesting the Clerk to forward it." In this statement of two printed pages the counsel have undertaken to state in

very abbreviated form the proceedings in the former suit, the non-performance of the decree in that suit by White and the contentions of the parties in this suit. It is obvious upon reading the statement, that if the defendant contends that the plaintiff's claim under the decree in *Wood* v. *White* cannot be supported by the allegations of the bill in that cause, and that those allegations are conclusive, a bill of exceptions is the appropriate mode of protecting his rights. But we learn from the statement that parol evidence was introduced at the hearing before the sitting Justice for a stated purpose; whether or not parol evidence was introduced for other purposes does not appear; a transcript of the evidence is not made a part of the "counsel-stipulated record" before us, and for that reason the appeal must be dismissed.

The instant case is clearly within the rule stated in *Caverly* v. *Small*, 119 Maine, 291, 294. "No exceptions were filed. Instead an appeal was taken, and an appeal in equity, like a general motion for a new trial in an action at law, carries with it necessarily all the evidence in the case. Its absence is ground for dismissal." In a very recent case, where no evidence was transmitted to this court, a dismissal was ordered "in accordance with the well established rules of equity practice." *De Pietro* v. *Modes*, 124 Maine, 132. R. S., Chap. 82, Sec. 32. Counsel have evidently endeavored to make an agreed statement not certified by the sitting Justice take the place of a full record. If this was necessary through inability to procure a transcript of the testimony, the case falls within the *Stenographer Cases*, 100 Maine, 271. *Atwood* v. *New England Tel. & Tel. Co.*, 106 Maine, 539. Any abstract of the evidence before the court below must be approved by the Justice hearing the case. Section 32, supra.

Upon an examination, however, of the proceedings taken in the former case of *Wood* v. *White* after the decision of this court reported in 123 Maine, 139, which by stipulation of the parties are before us, it is clear that the present contention of the defendant is without merit; had approved equity procedure been followed in that case, the present action would have been unnecessary.

The appeal in the former case was prematurely presented to the Law Court. The decree from which that appeal was taken, although entitled a final decree, was not such a decree, and the appeal therefrom should have awaited the final decree. R. S., Chap. 82, Sec. 24.

A final decree is one which fully decides and disposes of the whole case leaving no further questions for the future consideration and

judgment of the court. *Gilpatrick* v. *Glidden*, 82 Maine, 201, 203; 1 Whitehouse Eq. Pr. Sec. 399. A decree is final which provides for all the contingencies which may arise and leaves no necessity for any further order of the court to give all the parties the entire benefit of the decision. *Gerrish* v. *Black*, 109 Mass., 474, 477. No decree is a final one, which leaves anything open to be decided by the court, and does not determine the whole case. *Forbes* v. *Tuckerman*, 115 Mass., 115, 119. A decree to be final for the purposes of appeal must leave the case in such a condition that if there be an affirmance, the court below will have nothing to do but execute the decree already entered. *Bank of Rondout* v. *Smith*, 156 U. S., 330; 39 Law. Ed., 441. *Dainese* v. *Kendall*, 119 U. S., 53; 30 Law. Ed., 305.

The decree in question declared the trust for which the plaintiff contended, and referred the cause to a Master to determine the sum which the plaintiff should pay the defendant to equalize their interests in the cost of the real estate, and provided "that the *respondent* shall have sixty days *from the filing of this decree* in which to tender to said defendant payment of the amount so reported by the said Master."

When the mandate was filed, the parties could only treat the decree as interlocutory, as it in fact was. *Dainese* v. *Kendall*, supra.

The plaintiff filed a motion to amend the bill making more specific the description of the real estate on which he sought to impress a trust. The allowance of such an amendment at that stage of the case was within the power of the court. *Gilpatrick* v. *Glidden*, 82 Maine, 201; but the motion has apparently never been presented to a justice for action thereon.

The Master, to whom the cause had been referred by the original decree, filed a motion setting forth the delay caused by the proceedings upon appeal, and asking that the time be fixed anew in which the hearing might be had before him, and that the plaintiff in that cause have additional time in which to tender the amount which might be found due from him. This motion having been granted, the case proceeded to a hearing before the Master who filed a report on July 31, 1924, and found $1,100.79, and interest on $884.47 from August 1, 1924 to date of tender, to be the amount to be paid by plaintiff. This sum was seasonably tendered by the present plaintiff to the defendant. The report of the Master bears this endorsement by the sitting Justice who entered the original decree in *Wood* v. *White:* "Fees and report approved." No further proceedings were taken in that case.

By this report of the Master we learn that the parties agreed that the defendant neither received nor paid out any money on account of the triangular piece of land to which alone the defendant now claims that the trust declared in the original bill attached, and which alone he is willing to convey. Yet the parties proceeded before the Master to determine the amount before stated, which the original plaintiff should pay to defendant to equalize their interests in the larger property referred to in the original bill as the "Farrar Block," consisting of three stores and two apartments above them, which the defendant now refuses to convey upon tender of the amount found due by the Master, contending that it was not included in the original bill and decree.

Such contention is absolutely without merit. There was no misunderstanding between the parties as to the subject matter of the controversy, nor as to the property to which the court by its decree adjudged that the trust attached. If the language of the original bill was not sufficiently explicit, the plaintiff, at any time before final decree, might have filed an amendment (*Gilpatrick* v. *Glidden*, supra. R. S., Chap. 82, Sec. 12), which as we have seen, he did do, and this court after the parties have proceeded before the Master as if the amendment had been allowed, will regard that as done which could or ought to have been done; *Morin's Case*, 122 Maine, 338, 343; *Maxim* v. *Thibault*, 124 Maine, 201, 207; or a single Justice might have formally allowed such an amendment even after hearing before the Master. So, too, upon motion in the original action the present plaintiff could have been made a party plaintiff therein, (not to the supplemental bill which was later dismissed, as was done), and proceeded to a final decree in that cause; in that event the present bill would have been unnecessary. The entire difficulty has arisen from the action of the defendant in prematurely bringing to this court his appeal in the original action. His rights were fully and fairly determined in that cause. He has lost nothing by his futile attempt to appeal in the present case.

The time limited in the decree below for delivery of a deed by the defendant, and for deposit by the plaintiff of the amount found due by the Master must be extended, by reason of the delay caused by the appeal. In other respects the decree below is affirmed, with costs.

Appeal dismissed.
Decree below, as modified, affirmed, with costs.

DUNHAM BROS. COMPANY *vs.* ISRAEL COLP.

Androscoggin. Opinion March 10, 1926.

The liability assumed by sureties upon a bond given by the principal for the purpose of vacating an attachment of property in an action against the principal is not affected by bankruptcy of the principal.

In the instant case the effect of the bankruptcy was to discharge the defendant from further liability for the debt, but in no way affected the liability which was assumed by the sureties upon the bond.

The extent of that liability depends upon the amount which should be determined by a judgment which would declare the extent of that liability.

The plaintiff is entitled to judgment for the full amount of the debt, with interest from the date of the writ, but with perpetual stay of execution upon the judgment.

On exceptions. An action of assumpsit on an admitted claim of $331.77 for merchandise sold and delivered, defendant's stock of goods being attached on the writ, which attachment was vacated on the same day by defendant giving a bond with sureties under R. S., Chap. 86, Sec. 79, and in fourteen days defendant was adjudicated a bankrupt upon a voluntary petition and an offer of composition was made and confirmed. Plaintiff did not prove his claim in the bankruptcy court. Defendant pleaded the composition as a discharge of the debt on which the action was founded. The cause was heard by the presiding Justice without a jury on an agreed statement of facts, rights of exceptions being reserved, who ruled that the bankruptcy proceedings discharged the defendant from personal liability, but did not affect the liability assumed by the sureties on the bond, and ordered a special judgment for the full amount and interest from date of the writ, and further ordered perpetual stay of proceedings and execution upon the judgment, and defendant excepted. Exceptions overruled.

The case appears in the opinion.

Ralph W. Crockett, for plaintiff.

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

SITTING: WILSON, C. J., PHILBROOK, DUNN, MORRILL, STURGIS, BASSETT, JJ.

PHILBROOK, J. This is an action upon an account annexed to recover a judgment for amount due because of sale and delivery of merchandise. The case was heard by a Justice, upon an agreed statement of facts, without jury, right of exceptions being reserved by both parties. The writ is dated September 1, 1923, and returnable to the October term, 1923, of the Superior Court for the County of Androscoggin. The defendant's stock of goods was attached on the date of the writ and, on the same day, the attachment was released by the giving of a bond, with sureties, as provided in R. S., Chap. 86, Sec. 79. The condition of this statutory bond is that within thirty days after rendition of judgment the defendant will pay to the plaintiff, or his attorney of record, the amount of judgment, including costs. Thus we see that rendition of judgment is a prerequisite to fixing liability of the sureties upon the bond.

It appears that fourteen days after the attachment was made, and released by the giving of the bond, namely on September 15, 1923, the defendant filed a voluntary petition in bankruptcy, and on the same day was duly adjudicated a bankrupt. He subsequently made an offer of composition which was confirmed by the judge of the District Court of the United States on November 23, 1923. The plaintiff was scheduled as a creditor of the defendant, and had notice of the bankruptcy, but did not prove its claim in bankruptcy, and did not become a party to, or participate in, the composition proceedings. It must be conceded that by the provisions of the Bankruptcy Act of 1898, Chap. 3, Sec. 14, Sub-division C, the confirmation of a composition discharges the bankrupt from his debts, other than those agreed to be paid by the composition, and those not affected by a discharge. It is now the contention of the defendant that the plaintiff's claim is one barred by a composition in bankruptcy and that judgment should have been rendered for the defendant. On the other hand, the plaintiff contends that it is entitled to a general or a special judgment against the defendant regardless of the bankruptcy. The Justice who heard the case ruled that the effect of the bankruptcy was to discharge the defendant from further personal liability for the debt, but that it in no way affected the liability which the sureties upon the bond assumed; that the extent of their liability

depended upon the amount which should be determined by a judgment which would declare the extent of that liability. He found for the plaintiff, gave judgment for the amount of the debt, with interest from the date of the writ, and further ordered perpetual stay of proceedings and execution upon the judgment. Exceptions were taken to these findings and order, and the case is before us upon these exceptions.

The rulings and finding are in harmony with those declared by a per curiam decision of this court in *Damon* v. *United Photo Materials Co.*, 109 Maine, 563; with the full opinion of the Massachusetts court in *Rosenthal* v. *Nove et al.*, 175 Mass., 559; with that of *United States Wind Engine & Pump Co.* v. *North Penn. Iron Co.*, 75 Atl., 1094, decided February 21, 1910, where a full discussion was given concerning the questions here involved; also with *Hill* v. *Harding*, 130 U. S., 699, 32 L. Ed., 1083. See also *Marks* v. *Outlet Clothing Co.*, 122 Maine, 406, an action of debt on a bond given to release an attachment, where the principal named in the bond became a bankrupt within four months after the bond was given.

Exceptions overrruled.

INHABITANTS OF ELLSWORTH *vs.* INHABITANTS OF WALTHAM.

Hancock. Opinion March 12, 1926.

Evidence of a deceased witness given at a former trial can only be admitted in another trial when the second action is between the same parties, or their privies, and the issues are the same.

In an action against the town of derivative settlement, which sets up in defense an acquired settlement in another town, the burden of proving the acquired settlement is on the defendant.

In the instant case, the jury found that the defendant had not sustained the burden of proving an acquired settlement set up as a defense. The evidence in the case does not warrant the court in substituting its opinion for the finding of the jury.

On exceptions and motion for new trial by defendant. An action by the inhabitants of Ellsworth against the inhabitants of Waltham brought under Sec. 71, Chap. 19, of the R. S., to recover for supplies and medical attendance furnished an indigent family quarantined by the Board of Health of Ellsworth on August 23, 1921. Counsel for defendant offered the testimony given at a former trial by a witness since deceased which was excluded and exceptions taken. The jury rendered a verdict for plaintiff for $265.52 and defendant filed a general motion for a new trial. Motion and exceptions overruled.

The case sufficiently appears in the opinion.

D. E. Hurley, for plaintiff.

L. F. Giles and Wood & Shaw, for defendant.

SITTING: WILSON, C. J., DUNN, MORRILL, STURGIS, BASSETT, JJ.

WILSON, C. J. An action brought under Sec. 71, Chap. 19, R. S., to recover for supplies and medical attendance furnished an indigent family during quarantine. The verdict was for the plaintiff. The case is before this court on defendant's exceptions and a motion for a new trial on the usual grounds.

It is admitted that the supplies were furnished and the quarantine was in the interest of public health, and the only question involved is the pauper settlement of Charles A. Emerson, who, it is admitted, had a derivative settlement in the defendant town.

In a previous action, 122 Maine, 356, the city of Ellsworth sought to establish an acquired settlement for Charles A. Emerson in the town of Bar Harbor and failed. It now in this action seeks to have recourse against the town in which his parents had a settlement when he became of age. The town of Waltham in turn defends by claiming that at the time the supplies were furnished he had acquired and retained a settlement in the city of Ellsworth. Upon this issue the burden is on the defendant. *Inhabitants of Monroe* v. *Inhabitants of Hampden*, 95 Maine, 111.

In the former action between the plaintiff and the town of Bar Harbor, the town of Bar Harbor introduced the evidence of one John H. Bresnahan, a former tax collector of the city of Ellsworth to show the payment of taxes in the city of Ellsworth by Charles A. Emerson during the years of 1908, 1909, 1910, 1911 and 1912. Since testifying in the former action Mr. Bresnahan has died. The defendant now seeks to introduce the stenographer's notes of Mr. Bresnahan's testimony given at the former trial upon the ground that the same issue is involved here as in the former trial and the action is between the same parties or their privies.

The evidence was properly excluded. It is urged by defendant's counsel in argument that, while the parties are not the same, the town of Waltham was interested with the city of Ellsworth in prosecuting the former action against Bar Harbor and may now be regarded as a privy.

While the main consideration in the admission of testimony of deceased witnesses at a former trial is the opportunity of the party against whom it is offered for cross-examination at the previous trial, we do not find the authorities have ever gone so far as to permit the admission of such evidence where the second suit is brought against an entirely different party. *Metro. St. R. Co.* v. *Gumby*, 99 Fed. R., 192; *Patty* v. *Salem Flouring Co.*, 53 Ore., 350. We do not go so far as to hold that the parties must be the same in name. If either of the parties to the second action is a privy to the corresponding party in the previous action, such evidence may be admitted, but privy in this respect means a person claiming under one of the former parties.

Goodrich v. *Hanson*, 33 Ill., 499; *Chicago & E. I. R. R. Co.* v. *O'Connor*, 119 Ill., 586; *Fredericks* v. *Judah*, 73 Cal., 604; *Cumb. Coal Co.* v. *Jeffries*, 27 Md., 526; *Jacob Tome Inst.* v. *Davis*, 87 Md., 591; 21 Am. & Eng. Anno. Cases, 182.

The town of Waltham is in no sense a privy of the town of Bar Harbor. Its interest in the former suit was hostile to that of Bar Harbor. Nor can it be said the issue is the same. The issue in the former action was whether Charles A. Emerson had acquired and retained a settlement in Bar Harbor. Here it is whether he had acquired and retained one in the city of Ellsworth. Cross-examination upon the one issue might differ from cross-examination upon the other.

As to the motion the evidence was conflicting. There is evidence from which at some time between 1904 and 1914 the jury might have found that Charles A. Emerson claimed a residence in Ellsworth; but this court cannot say that the evidence of continued residence for five successive years is so compelling that the jury clearly erred in finding to the contrary.

His name, it is true, appears upon the voting lists of that city from 1904 to 1913, and in the later years in obtaining a marriage license he gave his residence as Ellsworth, but it does not appear that he voted in Ellsworth but three of the years included in the period above named and even though he paid a poll tax in Ellsworth during one or more years in the same period, it is not conclusive as to his continuous residence for five successive years against other testimony that he was during this time a rover, working here and there, with no personal effects except the clothes he wore, nor any fixed place or home in Ellsworth to which he could return. *North Yarmouth* v. *West Gardiner*, 58 Maine, 207; *Ripley* v. *Hebron*, 60 Maine, 379; *Thomaston* v. *Friendship*, 95 Maine, 202, 208.

Probably little credence was given to the testimony of Charles Emerson himself. Offered by the defendant, it was of little value in establishing a continuous residence for five successive years in the city of Ellsworth. Registration as a voter or the assessment of poll taxes, even if the voter votes at the annual elections, which, with three exceptions, he did not do in this case, or pays the taxes, which the evidence in this case does not show were paid by him for more than one or two years, is not conclusive evidence. *Rumford* v. *Upton*,

113 Maine, 543. As the court said in *Monroe* v. *Hampden,* supra, it is much stronger evidence against an alleged acquired residence than in favor of establishing one.

A jury heard all the witnesses and determined that the evidence did not warrant a finding that the defendant had sustained the burden of showing that Charles A. Emerson had ever acquired a pauper settlement in the city of Ellsworth.

It would be merely substituting the judgment of this court for that of the jury to disturb the verdict.

Exceptions and motion overruled.

STATE OF MAINE *vs.* GREGORY P. CASSIDY.

Aroostook. Opinion March 15, 1926.

In this State an action of debt as well as scire facias lies upon a criminal recognizance.

The provisions of R. S., Chap. 86, Sec. 88 apply to writs of scire facias.

This action is not barred by any statute of limitation.

On report on agreed statement of facts. An action of debt upon a recognizance where neither the principal nor the surety appeared at the return term and the principal was defaulted. The only ground set up by the defense was that the action was not seasonably begun. By agreement the case was reported to the Law Court upon an agreed statement of facts with the stipulation that a nonsuit or default was to be ordered as the law and the facts require. Defendant defaulted. Judgment for the State.

The case fully appears in the opinion.

Cyrus F. Small, County Attorney, for plaintiff.

George E. Thompson, James C. Madigan and Ross St. Germain, for defendant.

SITTING: WILSON, C. J., PHILBROOK, DUNN, MORRILL, STURGIS, BASSETT, JJ.

MORRILL, J. This is an action of debt upon a recognizance for the appearance of one Louise Harvey at the April Term 1923 of this court for Aroostook County, to prosecute her appeal from a conviction in the Houlton Municipal Court. The principal did not appear, and the defendant was defaulted at the return term. The default of the principal was entered on the docket at the April Term 1924, but neither principal nor surety appeared at the return term. The writ in this action was sued out August 14, 1924. The sole point set up in defense is, that this action of debt was not seasonably begun; in support of this contention counsel cite R. S., Chap. 86, Sec. 88. That section, however, applies to writs of scire facias. The first clause of that section was originally Sec. 8 of Chap. 67 of Laws of 1821, relating to bail in civil actions; in the revision of 1841 it was transferred to the chapter on the limitation of personal actions. The section was amended by Public Laws, 1859, Chapter 99 by adding the second clause, which is here relied upon, and again amended by Public Laws 1861, Chapter 15, by adding the third and last clause.

In *Hewins* v. *Currier*, 62 Maine, 238, the court said in relation to the first clause: "This limitation is imposed upon that form of remedy upon the supposition that there is no other," and accordingly held that an action of debt will not lie upon a statute bail bond given to a sheriff to obtain release from arrest upon a writ in a civil action, scire facias being the only remedy. It is settled, however, that in this State debt as well as scire facias lies upon a criminal recognizance. *State* v. *Folsom*, 26 Maine, 209. So in Massachusetts, *Com.* v. *Green*, 12 Mass., 1; *Com.* v. *McNeill*, 19 Pick., 138; *Com.* v. *Stebbins*, 4 Gray 25, 26. "A recognizance is a debt upon condition, and on default it is forfeited and becomes a debt due." *Com.* v. *McNeill*, supra.

We know of no statute of limitation barring the present action.

Defendant defaulted.
Judgment for the State..

J. FREDERICK NORWOOD *vs.* MAUDE E. PACKARD.

Knox. Opinion March 15, 1926.

A proceeding for partition under R. S., Chap. 93, is appropriate for determining the status of an alleged "omitted child" in a will.

In the instant case the agreed fact; that Mary A. Norwood had but one daughter, named at her birth "Maude Emily Norwood," and so known until after her marriage, when she used "Norwood" as her middle name, is material and admissible upon the issue of respondent's alleged status as an "omitted child."

The legacy in the fourth paragraph of Mrs. Norwood's will, "to my daughter, Mary E. Packard," was intended for the respondent.

Evidence is admissible to identify the person intended by the testatrix.

On report upon an agreed statement of facts. A petition for partition of certain real estate, wherein the respondent claims in addition to an one third interest as heir of her father, an one sixth interest as a child omitted from the will of her mother, making an undivided half interest, while the petitioner claims an undivided two thirds interest. The cause was reported upon an agreed statement of facts to the Law Court "to render such judgment as a jury might render under proper instructions by a presiding justice," the respondent reserving the right to have her objections to the admissibility of conceded facts considered by the court. Judgment for partition as prayed for, with costs.

The case sufficiently appears in the opinion.

Ensign Otis and Edward C. Payson, for petitioner.

J. H. Montgomery and R. I. Thompson, for respondent.

SITTING: WILSON, C. J., PHILBROOK, DUNN, MORRILL, STURGIS, BASSETT, JJ.

MORRILL, J. This is a petition for partition in which the petitioner claims to own two undivided third parts of certain real estate, in common and undivided with the respondent, his sister. The petitioner claims title to one third as heir of their father, who formerly

owned the premises, and to another third as residuary devisee under the will of Mary A. Norwood, the mother of the parties. The respondent claims title to one undivided half of the premises, derived as follows: to one third as heir of her father, and to one sixth as a child omitted from the will of her mother. R. S., Chap. 79, Sec. 9.

The case is submitted upon an agreed statement of facts, for this court "to render such judgment as a jury might render under proper instructions by a presiding justice." The respondent reserves the right to have her objections to the admissibility of conceded facts considered by this court.

Carefully considering the facts agreed upon, and the objections noted, we are of the opinion:

1. That the respondent is properly named in the petition.

2. That the will of Mary A. Norwood is clearly admissible in evidence in support of the petition.

3. That this proceeding is appropriate for determining the respondent's alleged status as an "omitted child." *Doane, Aplt.* v. *Lake,* 32 Maine, 268. *Church* v. *Crocker,* 3 Mass., 17. *Wilder* v. *Goss,* 14 Mass., 357.

4. That the agreed fact: that Mary A. Norwood never had but one daughter, named at her birth "Maude Emily Norwood," and so known until after her marriage to Mr. Packard, when she used "Norwood" as her middle name,—is material and admissible upon the issue stated in the preceding paragraph.

5. That the contention of the respondent that she was omitted from her mother's will and is entitled to one half of her mother's interest in the property, must fail. The court is satisfied that the legacy in the fourth paragraph of Mrs. Norwood's will, "to my daughter, Mary E. Packard," was intended for the respondent. Evidence is admissible to identify the person intended by the testatrix. *Wood* v. *White,* 32 Maine, 342. *Preachers' Aid Society* v. *Rich,* 45 Maine, 559. *Tucker* v. *Seaman's Aid Society,* 7 Met., 188, in which on page 208 the principle governing this case is fully stated.

Judgment for partition as prayed for, with costs.

JAMES O. MARTIN'S CASE.

Cumberland. Opinion March 16, 1926.

The finding of the Industrial Accident Commission unwarranted on the evidence.

In this case the Commission made the finding that usefulness and physical functions of the eye were totally and permanently impaired and ordered compensation appropriate to statutory provision upon undisputed testimony that the disability was less than 18%.

On appeal. The claimant while in the employ of A. H. Ward & Son as a carpenter received an injury to his right eye from some foreign substance getting into it and was awarded compensation in the sum of $16 per week for a period of one hundred weeks because of a 100% permanent impairment to the usefulness and physical functions of the right eye due to the injuries received by him as alleged, and from an affirming decree respondents appealed, alleging that the disability was not a total disability. The appeal sustained, the decree below reversed, and the case remanded.

The case is sufficiently stated in the opinion.

Harry E. Nixon, for claimant.

Hinckley & Hinckley and J. Frank Scannell, for respondents.

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

DUNN, J. The merits of the pending dispute under the system for making amends for industrial accidents are for the time being so distinctly with the appealing insurance company as to incite the saying with a new emphasis that no tenable case is against the position that in such situations it is harmful error for the Industrial Accident Commission to take for granted that essential facts are in their true proportion and perspective when they are not.

This appellee had suffered compensable injury in one of his eyes. He and the employer's insurance carrier made an open-end agreement, that is, they agreed upon the amount to be paid for partial incapacity

from a given time for an indefinite period, and the Labor Commissioner lent approval. R. S., Chap. 50, Secs. 30 and 35, as amended; *Eva M. Healey's Case*, 124 Maine, 54.

Thirteen months later the present petition, alleging in effect that whereas the accident immediately lessened the petitioner's sight more than half, the resultant is that film shuts out his seeing clearly, was filed. All which an answer denied.

One witness, and but one, an eminent specialist, testified at the hearing. He had treated the eye: the extreme comparative loss of functional ability, on the assumption of no previous visual diminution, was less than 18%; and with respect to the man's economic faculty of sight when injured, 10%.

There was this evidence without more, and even it would not have been, had not the now appellant called the witness.

The full commission made the finding that usefulness and physical functions of the eye were totally and permanently impaired and ordered compensation appropriate to statutory provision, toward which the temporary-disability payments should count. Eventually the underwriter entered an appeal.

Why the petitioner, whose clear rights were involved, was mute as a mouse at the hearing, is not indicated. The record contains the implications, that he attended without counsel, and as the brief of the appellant gracefully recognizes, that the medical man in witnessing his estimate of the percentage of permanent impairment may have overlooked a constitutive factor.

Certain it is that the finding complained of has no evidential support; there is the adduction of proof that impairment will continue in the same state, but in degree so less and so distant from the finding that obviously that is not grounded upon testimonial foundation.

It may be consistent to supply deficiency, on recourse to the Commission, that final decision may follow more thorough hearing. The authority to recommit is necessarily implied in some circumstances. *McKenna's Case*, 117 Maine, 179; *Maxwell's Case*, 119 Maine, 504; *Gauthier's Case*, 120 Maine, 73.

The appeal is sustained, the decree below reversed, and the case remanded.

So ordered.

LEWIS C. GOWER *vs.* ANGELETTA P. WATERS ET ALS.

Lincoln. Opinion March 18, 1926.

At common law where a tenancy at sufferance existed, the tenant had no right of possession as against the landlord, and the landlord might enter, at any time, using such force as was reasonably necessary and expel such tenant.

The authorizing of the civil process of forcible entry and detainer following the termination of a tenancy at will by written notice did not take away the landlord's common law right of entry in case of a tenancy at sufferance resulting from a termination of a tenancy at will by written notice in accordance with the statute for the termination of tenancies at will, or from a termination in any manner.

While in case of the use of excessive force the landlord may be liable to indictment for the common law offense of forcible entry, he is not liable to a tenant at sufferance on the civil remedy of trespass quare clausum.

In so far as *Brock* v. *Berry*, 31 Maine, 293 holds that a landlord is liable in an action of trespass *quare clausum* to a tenant at sufferance in case of a forcible entry, it is overruled.

On report. An action of trespass quare clausum alleging a breaking and entering of plaintiff's dwelling-house. The defendant, Angeletta P. Waters, owned in fee the dwelling-house described in the writ, and the plaintiff, on March 3, 1925, occupied, as tenant of Mrs. Waters, a part of the dwelling-house, the rest being reserved for her own use by Mrs. Waters. The plaintiff being in arrears in rent the defendant gave him the statutory written notice to quit, and on the expiration of the thirty days, the plaintiff continued to occupy the premises against the wishes of defendant, who with the other defendants entered and demanded possession of that part of the dwelling-house occupied by plaintiff. Defendants contended that there was no breaking and entering because the defendant, Waters, had a right to enter the premises, the plaintiff being a tenant at sufferance, and that an action of trespass quare clausum could not be maintained under such circumstances. At the close of the testimony by consent of the

parties the case was reported to the Law Court for final determination, including damages to plaintiff, if he should prevail. Judgment for defendants.

The case fully appears in the opinion.

George A. Cowan, for plaintiff.

Weston M. Hilton, for defendants.

SITTING: WILSON, C. J., PHILBROOK, DUNN, MORRILL, STURGIS, BASSETT, JJ.

DUNN, J., concurring in the result.

WILSON, C. J. An action of trespass *quare clausum* in which it is alleged that the defendants broke and entered the plaintiff's dwelling-house located on the close described in the writ.

The case is reported to this court on the evidence. From the reported evidence we find that the plaintiff prior to April 2, 1925 occupied a portion of a certain dwelling-house belonging to the defendant, Angeletta P. Waters, as a tenant at will; that on the third day of March, 1925 the owner, Mrs. Waters, caused to be served on the plaintiff a notice that his tenancy in the premises described in the writ in this action would terminate on April 2, 1925; that the plaintiff did not vacate said premises on April 2, but remained and was still occupying said premises on April 6th following; that on April 6th, the defendant with the defendant, Alfred W. Huston, a deputy sheriff, and the other two defendants who were nephews of Mrs. Waters went to the premises for the purpose of taking possession of the part occupied by the plaintiff; that the defendants first went to the back or side door leading to the part occupied by the plaintiff as a kitchen and asked to be permitted to enter and were refused admission by the plaintiff's wife, the plaintiff being away at the time; that the defendants then entered the front door of the dwelling-house and the front hall which was then and had been in the sole possession of Mrs. Waters, who also retained in her own possession several other rooms in the house; that while in the hall the plaintiff's wife notified the defendants that she forbade their entering the part occupied by the plaintiff, that while the defendant Huston was again talking with the plaintiff's wife at the side or back door, Mrs. Waters opened a door leading from the front hall into a room occupied by the plaintiff as a bedroom; which door

was not locked, but was fastened on the hall side by a hook or hasp; that Mrs. Waters then entered the bedroom and thence the sitting room occupied by the plaintiff without using any more force than was necessary to open the door leading from the hall into the bedroom, and was followed by the other defendants.

After Mrs. Waters entered in the above manner, she demanded possession of the premises, and later the plaintiff returned and an agreement was entered into for the payment of rent to date, and the plaintiff was permitted to remain until he obtained another tenement.

The present action is the result of the entry above described. There appears to be no question, from the above facts, that at the time of the entry the plaintiff's tenancy at will had been terminated on April 2, and he was, on April 6th, only a tenant at sufferance, and that the defendant, Mrs. Waters, had a right to possession.

The only issues here are, whether the entry of Mrs. Waters was a peaceful entry, and if not, whether a tenant at sufferance can maintain trespass *quare clausum* against his landlord who, using no more force than may be necessary to effect an entrance, enters to dispossess him.

If a peaceful entry is had, it is already settled that a tenant at sufferance cannot maintain trespass *quare clausum* against his landlord. *Stearns* v. *Sampson*, 59 Maine, 568. While there is a conflict, the great weight of authority appears to be that, unless affected by some local statute, a landlord as against a tenant at sufferance may enter to take possession, using no more force than is necessary to effect an entrance and in expelling the tenant no more than would enable him to maintain a plea of *molliter manus*; and by reasoning that appears unassailable, it is further held by courts of the highest standing, that regardless of the force used in entering, trespass *quare clausum* is not maintainable. *Harvey* v. *Brydges*, 14 M. & W., 437, 442; *Hyatt* v. *Wood*, 4 Johns, 150; *Ives* v. *Ives*, 13 Johns., 235; *Jackson* v. *Farmer*, 9 Wend., 201; *Curl* v. *Lowell*, 19 Pick., 25, *Meader* v. *Stone*, 7 Met., 147; *Miner* v. *Stevens*, 1 Cush., 482, 485; *Mason* v. *Holt*, 1 Allen, 45; *Curtis* v. *Galvin*, 1 Allen, 215; *Low* v. *Elwell*, 121 Mass., 309; *Lash* v. *Ames*, 171 Mass., 487; *Mentzer* v. *Hudson Savings Bank*, 197 Mass., 325; *Benton* v. *Williams*, 202 Mass., 189, 192; *Sterling* v. *Warden*, 51 N. H., 217; *Vinson* v. *Flynn*, 64 Ark., 453; *Krevet* v. *Meyer*, 24 Mo., 107; *Levy* v. *McClintock*, 141 Mo., App., 593; *Todd* v. *Jackson*, 26 N. J. L., 525, 532; *Kellam* v. *Janson*, 17 Pa., St., 467; *Overdeer* v. *Lewis*, 1 W. & S., (Penn.), 90;

Johnson v. *Hannahan*, 1 Strob, (S. C.), 313; *Walton* v. *File*, 1 Dev. & B. (N. C.), 567; 16 R. C. L., 1178; Taylor's Landlord & Tenant, Vol. II., Secs. 531, 532; 1 Washburn Real Property, Vol. I., Pages *393, *397.

In *Reed* v. *Reed*, 48 Maine, 388, *Allen* v. *Bicknell*, 36 Maine, 436, 438; and *Stearns* v. *Sampson*, supra, this court appears to have recognized the same principles upon which the above authorities are based, though the facts did not require them to be carried to the same extent.

As the court said in *Dunning* v. *Finson*, 46 Maine, 546, 556: "A tenant at sufferance can hardly be called a tenant at all as his holding is without right of any kind," unless, under some circumstances, he is entitled to a reasonable time for the removal of his goods. It is because of the nature of the tenancy at sufferance that the Massachusetts and other courts have held that such a "tenant could not maintain an action in the nature of trespass *quare clausum*, because the title and the lawful right to possession are in the landlord, and the tenant as against him has no right of occupation whatever"; hence it has been held that even if entry by the landlord was obtained by force, trespass *quare clausum* will not lie. *Low* v. *Elwell*, supra; *Mentzer* v. *Hudson Savings Bk.*, supra; *Benton* v. *Williams*, supra.

The courts which hold the contrary view, *Dustin* v. *Cowdry*, 23 Vt., 631; *Mason* v. *Hawes*, 52 Conn., 12; *Reader* v. *Purdy*, 41 Ill., 280, either rest their decisions in the main upon the English cases of *Hillary* v. *Gay*, 6 C. & P., 284, a case decided at *nisi prius*, and *Newton* v. *Harland*, 1 M. & G., 644, which was later overruled; See *Harvey* v. *Brydges*, 14 M. & W., 437; *Davis* v. *Burrell*, 10 C. B., 821; or upon a construction of a statute substantially of the tenor of the early English statute, 5 Rich. II., C. 8; "That none from henceforth shall make any entry into lands or tenements, but in case where entry is given by law, and in such case, not with strong hand nor with multitude of people, but only in a peaceable and easy manner" and making a forcible entry an indictable offense. The Vermont Court rests its decision mainly upon the authority of the English cases, while the Illinois Court holds that a statute similar to that of Rich. II. makes a forcible entry unlawful, and, if unlawful, it is a trespass.

These cases have been extensively reviewed and their reasoning criticized in 4 Am., Law Rev., 429. The decisions in the various

courts as to the right of tenant at sufferance to maintain trespass *quare clausum* against his landlord may be found in 16 L. R. A., 798, Note; 42 L. R. A., (N. S.), 392, Note.

It may be noted at this point, that we have no statute similar to that of Rich. II., although forcible entry is recognized as an offense at common law, *Hardings Case*, 1 Maine, 22, indicating that the statute has been adopted as a part of our common law. However, this statute did not change the nature of a tenancy at sufferance or restrict the rights of the landlord to enter except to make him liable to indictment for the use of unnecessary force. Neither the English Courts nor those in this country above cited, holding that trespass *quare clausum* will not lie even though the entry be forcible, regard this, or similar statutes, as having any effect upon the civil liability of the landlord. *Sterling* v. *Warden*, supra, Page 232. Without such a statute and with the common law in this respect unmodified, under which the landlord had the right to enter by force, if necessary, in case of a tenancy at sufferance, Taylor's Landlord & Tenant, Vol. II., Sec. 531, we see no reason why this court should not adopt the rule laid down by the English Courts and the courts of Massachusetts, Rhode Island, New Hampshire, and New York.

It is true that in *Brock* v. *Berry*, 31 Maine, 293, this Court in a brief opinion without reasoning or citation of authorities, held that a landlord had no right to enter by force. It is not clear that the court in this case was stating its conclusions as applicable to a tenancy at sufferance. Although the parties had agreed the tenancy was at sufferance, the facts showed the tenancy was at will and had not been terminated, hence the mandate was correct. It is significant, however, that this case has never been cited by this court in support of the rights of a tenant at sufferance, but always in support of the rule that a landlord cannot enter and oust a tenant at will by force. *Cunningham* v. *Holton*, 55 Maine, 33, 38; *Kimball* v. *Sumner*, 62 Maine, 305, 309; *Bryant* v. *Sparrow*, 62 Maine, 546; *Marden* v. *Jordan*, 65 Maine, 9.

Moore v. *Boyd*, 24 Maine, 242, cited by the Vermont Court in *Dustin* v. *Cowdry* as sustaining the doctrine that a landlord is liable in an action of trespass *quare clausum* for a forcible entry in case of a tenancy at sufferance, goes no further than to hold that a landlord may not enter by force to terminate a tenancy at will and remove the tenant's goods without first giving the tenant a reasonable opportu-

nity to remove his own effects, and was decided before the present statute was enacted for terminating tenancies at will by notice in writing. It has no bearing on the question here at issue.

A statement of the law upon the subject may be found so full and logical, in *Sterling* v. *Warden*, 51 N. H., 217; *Low* v. *Elwell*, 121 Mass., 309 and 4 Am. L. Rev., 429, that a further discussion here would be a work of supererogation.

At common law the process known as forcible entry and detainer was criminal or quasi criminal in its nature, *Eveleth* v. *Gill*, 97 Maine, 315, and was only permitted where the entry or the detainer or both were with actual force. By Chapter 268, Public Laws, 1824 this state created a civil remedy more or less summary in its nature and known by the same name, but also available only in case of a forcible entry or detainer, except in case of a terminated tenancy, when after thirty days' notice in writing following the termination thereof such process would lie, if the tenant then "unlawfully refused to quit" the premises.

However, the existence of this civil process, enlarged as it appears in Chap. 94 R. S., 1857, did not deprive a landlord of his common law right to terminate a tenancy at will without notice and enter upon such termination, *Gordon* v. *Gilman*, 48 Maine, 473. It furnishes him with a convenient and speedy process to regain possession of his premises of which he may avail himself instead of resorting to an entry without legal process and with force, if necessary, and a consequent liability to indictment in case of the use of excessive force, for which no exact standard can be prescribed for his guidance; but except so far as the statute regulating the use of this process is expressly or by necessary implication in conflict with the common law, it should not be held to deprive a landlord of his common law rights.

We are, therefore, of the opinion and hold that the case of *Brock* v. *Berry* should not be regarded as authority against the right of a landlord to enter by the use of reasonable force, if necessary, to expel a tenant at sufferance; and that even in case of the use of excessive force in entering while he is subject to indictment, he is not liable in an action of trespass *quare clausum*. *Seavey* v. *Cloudman*, 90 Maine, 536.

Entry will be:

Judgment for the defendants.

NICHOLAS S. HASTY

vs.

CUMBERLAND COUNTY POWER & LIGHT COMPANY.

ROYAL W. HASTY *vs.* SAME.

Cumberland. Opinion March 23, 1926.

The question as to whether a minor is chargeable with negligence is one of fact for the jury, except in case of a child of very tender years when it may be for the court.

The parents or legal custodians of a child incapable of exercising care for its own safety, must exercise reasonable care for its protection, and the negligence of the parent or custodian is imputable to the child who suffers thereby.

If the parent or legal custodian were negligent, the child cannot recover for an injury unless at the time of the injury he was in the exercise of that degree of care which would be required of an adult under the circumstances.

But parents or custodians are holden to the exercises of reasonable care only, and what is reasonable care depends upon the facts and circumstances in any given case.

In the instant cases the question of contributory negligence on the part of the mother of the minor having been passed upon by the jury, is one of the elements of fact, in reaching their verdict for the plaintiff, and it not appearing that the jury manifestly erred in this or other respects, the motion in each case must be overruled.

On general motions for new trial by defendant. Actions to recover damages resulting from injury to a child between four and five years of age while sliding in the street in South Portland and in crossing the track of defendant came in contact with one of its moving electric cars and was seriously injured. A verdict of $2,500 was rendered for the child, and one for $697.50 for the father for expenses and loss of services of his son. A general motion was filed in each case. Motion in each case overruled.

The cases fully appear in the opinion.

Hinckley & Hinckley, for plaintiffs.

Verrill, Hale, Booth & Ives, for defendant.

SITTING: WILSON, C. J., PHILBROOK, DUNN, MORRILL, STURGIS, BASSETT, JJ.

PHILBROOK, J. These two actions, the first by a minor and the second by his father, were tried together. They involve the same evidence and legal principles, each action resulted in a verdict for the plaintiff, and each is before us on defendant's motion for a new trial, no exceptions being reserved. It will be sufficient, therefore, if we consider one case only, namely, the action brought by Nicholas, the minor.

THE PLAINTIFF'S CASE.

It was stipulated and agreed between the parties that Nicholas S. Hasty was four years and eleven months of age at the time of the accident which caused the damages for the recovery of which this action was instituted.

On the fifth day of December, nineteen hundred and twenty-four, the plaintiff was sliding on a cement walk leading from the Summer Street school, so-called, in the city of South Portland, to Summer Street, a public highway in that city. The defendant company was operating an electric car line on that street, its tracks being located between the terminus of the cement walk, where the plaintiff was sliding, and the paved part of Summer Street. The accident happened in the late hours of a short December afternoon. The exact time was not fixed by the witnesses for the plaintiff. As bearing upon the ability to see, in the gathering darkness, one witness for the plaintiff said, "It was just getting dark—it was kind of dusk"; another, that it was "light enough so you could see"; another, "why, it was dark, dusk, lights in the car and the lights were lit on the street, the street lights"; another, "it was what I call twilight, between dark and light." One witness for the plaintiff, a school teacher, who boarded the car at twenty minutes before five, and thought she had been on the car about five or ten minutes before the accident happened, said, "It was not at all dark when I got on." The plaintiff, thus approaching the point where his sled would cross the car track, claims that because of his tender years he was not fully aware of, and did not appreciate the dangers to which he was subjected; that the defendant, through its motorman, by the exercise of due, reasonable and proper

care, could and should have known of the presence of the plaintiff, and by the exercise of such care could have avoided striking the plaintiff. The plaintiff furthermore claims that the motorman actually saw him, as he was approaching the danger point, and by the use of due care could have seasonably stopped the car. And so the plaintiff claims that he has proved negligence on the part of the defendant's motorman and demands adequate compensation in damages.

THE DEFENSE.

The defendant contends (1) that its negligence was not established by the evidence in the case; (2) that plaintiff's cause of action is barred by the contributory negligence of his mother.

As bearing upon the question whether the motorman actually did see the plaintiff, or by the exercise of due care could have seen him, the defendant calls attention to testimony given by both plaintiff's and defendant's witnesses, from which it claims as substantially shown that the accident occurred between the hours of four forty-five and four fifty in the afternoon, and that the sky was cloudy. It was agreed that the sun set at three minutes past four on the day of the accident, and, as bearing on the question of light, the defendant urges this court to take judicial notice of the fact, which can be verified by examination of an almanac, that on December 5th darkness comes on as early as on any day of the year. This element of the case, as well as all other factual elements which had proper bearing upon the question of due care of the motorman, are presented forcefully and fully by counsel for the defendant. But these questions were decided by the jury in favor of the plaintiff. That constitutional tribunal declared the defendant's motorman to be guilty of negligence, and we are not convinced that the jurors so manifestly erred, or were so improperly influenced by bias, prejudice or passion that their finding on this branch of the case should be disturbed.

In considering the defense of contributory negligence we observe that a special question was submitted to the jury, namely, "Under the evidence in this case, was Nicholas S. Hasty of sufficient age and mental capacity to be capable of negligence in sliding down the walk in the school yard, as he did, on December 5, 1924?" To this question the jury returned a negative answer.

In a very extensive and valuable note, *Westbrook* v. *Mobile & Ohio R. R. Co.*, 14 Am. St. Rep., 587, supported by many authorities, the annotator says that from the nature of the proposition it is impossible to fix an exact period when an infant may be of such natural capacity, physical condition, training and habits of life, as to be chargeable with negligence, and therefore it becomes a question of fact for the jury, when the inquiry is material, unless the child is of such very tender years that the court can safely decide the fact. In the case at bar, as we have just seen, the chargeability of the plaintiff has been determined by the jury in the negative.

Was there such contributory negligence on the part of the mother as to defeat the minor plaintiff's right to recover? It is the claim of the defendant that when a child is incapable of exercising care for its own safety a duty devolves upon the parents or legal custodians of the child to exercise reasonable care in protecting it and keeping it off the streets and other places of danger, and in case of failure to exercise such care the negligence of the parents or custodians is imputable to the child who suffers thereby. Stating their proposition in different words, the defendant says the rule of law is that if a parent negligently permits such a child to go into the streets, or other places of danger, and the child is injured, the child cannot recover unless he was at the time in the exercise of that degree of care which would be required of an adult under the circumstances. These legal principles are sound and well supported by the authorities, but the issue of fact, namely, whether or not the mother was guilty of such contributory negligence as would bar the action of the plaintiff, in the instant case, is the contested issue.

In this class of cases parents are holden only to the exercise of reasonable care, and what is reasonable care depends upon the facts and circumstances, and sometimes in part upon the financial condition of the family. No exact rule can be laid down. *Morgan* v. *Aroostook Valley R. R. Co.*, 115 Maine, 171. No hard and fast rule as to the care of children can be laid down and the financial condition of the family, and the other cares devolving upon the parents are not to be ignored. Small children have a right to light, air and exercise, and the children of the poor cannot be constantly watched by their parents. *Grant* v. *Bangor Railway and Electric Co.*, 109 Maine, 133.

In the case at bar it appears that a cousin of the plaintiff, a boy between nine and ten years of age, went with the plaintiff to obtain his mother's permission to go sliding. At first she objected but finally consented, on being told that they were going to a place known as Chandler's field. Apparently this field was a comparatively safe place for their childish sport. After leaving her the boys changed their plans without the knowledge of the mother and went to the school yard for sliding. The mother was at home where in all probability she was attending to domestic duties. The plaintiff had a brother younger than himself who necessarily called for the mother's care and attention. Since the record presents no failure of the learned presiding Justice to instruct the jury upon this branch of the case we may properly assume that necessary and correct instructions were given. The situation must have been pictured before the mind of each juror, the home, the customs of people situated as this family was situated, the degree of care which the average, ordinarily careful mother would exercise under the circumstances, having regard for healthful out-door sport so essential to the welfare of children. With this picture before them, to return a verdict for the plaintiff, they must have found, as a matter of fact, that the mother was exercising reasonable care under the facts and circumstances of the case. From that finding, we do not differ.

The damages were not excessive in either case.

In each case,
Motion overruled.

GEORGE I. JEWETT

vs.

QUINCY MUTUAL FIRE INSURANCE COMPANY.

Penobscot. Opinion March 24, 1926.

In an action upon fire insurance policy to recover for loss of property, the requirement of proof of loss is for the sole benefit of the insurer and, whether imposed by contract or statute, it may be waived in part or in whole by the company for whose benefit it is imposed.

When there is no express waiver, it is for the jury to determine whether, from the acts relied upon and proved, the inference could be properly drawn, either that there was an intention upon the part of the insurer to waive its right to have a proof of loss furnished by the insured, or that the denial of liability, for another cause, was of such a character or made under such circumstances as to reasonably induce a belief upon the part of the insured that the furnishing of a proof of loss would be a useless formality.

In this case the denial of liability was not for failure to furnish proof of loss, but for another cause, namely, that the loss was occasioned by wind, which was not within the terms of the policy. It has been very generally held that if an insurance company denies its liability upon other grounds, and thereby causes the insured to believe that a compliance with the condition to furnish proofs of loss would be unavailing, and but a useless formality, and he for that reason neglects to comply with such condition, it will be considered as equivalent to a waiver.

It is settled by a controlling weight of authority that an unqualified denial by the insurance company of all liability under the policy renders inoperative a provision therein for an arbitration as to the amount of the loss as a condition precedent to a right of action to recover such loss.

On motion for new trial by defendant. An action to recover damages under an insurance policy issued by defendant upon a barn owned by plaintiff. The general issue was pleaded, with brief statement alleging failure of plaintiff to comply with the statute relative to furnishing a proof of loss, and also for not requesting arbitration. The contention of the defendant was that the damage was caused

by wind and not by lightning. A verdict for plaintiff for $584.79 was rendered by the jury and defendant filed a general motion for a new trial. Motion overruled.

The case is fully stated in the opinion.

J. S. Williams and W. B. Peirce, for plaintiff.

George E. Thompson and Ross St. Germain, for defendant.

SITTING: WILSON, C. J., PHILBROOK, DUNN, MORRILL, STURGIS, BASSETT, JJ.

PHILBROOK, J. This case is before us upon defendant's motion to set aside the verdict. The motion is based upon the usual grounds. The plaintiff owned a barn in the town of Dexter which was insured by the defendant under a contract known as the Standard Farm Policy Form. On the twenty-sixth day of June, 1923, during a thunderstorm, accompanied by a heavy wind, the building was partially destroyed. The insurance policy contains the following clause:

"This policy also covers direct loss or damage to the property insured, by lightning (meaning thereby the commonly accepted use of the term 'lightning', and in no case to include loss or damage by cyclone, tornado or windstorm) whether fire ensues or not."

In brief statement, as matter of defense, the defendant declares that the damage claimed by the plaintiff was not caused by fire originating from any cause covered by the policy, nor was it caused by lightning, or the results of lightning, nor did it arise from any cause rendering the defendant company liable under the policy. The plaintiff claimed that the damage was done by lightning which partly demolished the building. The defendant claimed that the damage resulted alone from the force of the violent wind. This was an issue of fact to be determined by the jury from all the evidence in the case, and from such inferences as might be properly and reasonably drawn therefrom. The determination was favorable to the plaintiff, and after a careful examination of the record testimony, and exhibits, we cannot say that the verdict was so clearly wrong that we should disturb it.

In further brief statement, the defendant relies upon two provisions in the policy, both being based upon statutory provisions, and are as follows:

"1. Said policy provides that in case of loss or damage under this policy, a statement in writing, signed and sworn to by the insured, shall be within a reasonable time rendered to the company setting forth the value of the property insured, the interest of the insured therein, all other insurance thereon, in detail, the purposes for which and the persons by whom the buildings insured, or containing the property insured, was used, and the time at which, and the manner in which the fire originated, so far as known to the insured.

"2. In case of loss under this policy, and a failure of the parties to agree as to the amount of loss, it is mutually agreed that the amount of such loss shall be referred to three disinterested men, the company and the insured each choosing out of three persons to be named by the other, and the third party selected by the two so chosen; the award in writing . . . . shall be a condition precedent to any right of action in law or equity to recover for such loss."

It is conceded that the written notice or proof of loss was not given, nor was there any arbitration, as to the amount of loss, by reason of the fact that the parties failed to agree upon such amount.

After several interviews between the plaintiff and W. A. Small, the agent who issued the insurance policy, the latter wrote the defendant company and received the following reply dated August 8, 1923:

"We are very sorry that we did not reply to your letter regarding the 'Jewett' loss sooner, but we had assumed from your letter that no reply was necessary—as our adjuster claims that the damage to the barn was done entirely by wind and not by lightning. You can see in that case that we should not be called upon to make up any loss that Mr. Jewett may have suffered."

The plaintiff claims that by virtue of this letter the requirement of notice, or proof of loss, was waived by the defendant. In *Biddeford Savings Bank* v. *Dwelling-house Insurance Co.*, 81 Maine, 566, decided in 1889, this court held that this requirement is for the sole benefit of the insurer; that it was then well settled that, whether imposed by contract or statute, it may be waived in part or in whole by the company for whose benefit it is imposed. This rule has been consistently upheld by this court for nearly forty years and is still in full effect.

When there is no express waiver, it is for the jury to determine whether, from the acts relied upon and proved, the inference could

be properly drawn, either that there was an intention upon the part of the insurer to waive its right to have a proof of loss furnished by the insured, or that the denial of liability, for another cause, was of such a character or made under such circumstances as to reasonably induce a belief upon the part of the insured that the furnishing of a proof of loss would be a useless formality. That the question whether or not there has been a waiver, when it is a matter of inference, is one of fact for the determination of the jury, is generally, if not universally, held by the courts of this country. *Robinson* v. *Insurance Company*, 90 Maine, 385. In this case the denial of liability in the letter of August 8, 1923, was not for failure to furnish proof of loss, but for another cause, namely, that the loss was occasioned by wind, which was not within the terms of the policy. It has also been very generally held that if an insurance company denies its liability upon other grounds, and thereby causes the insured to believe that a compliance with the condition to furnish proofs of loss would be unavailing, and but a useless formality, and he for that reason neglects to comply with such condition, it will be considered as equivalent to a waiver. *Robinson* v. *Insurance Co.*, supra. In the absence of any exceptions we must assume that the jury was fully and correctly instructed as to the law covering proof of loss and, upon the evidence, in the light of those instructions, the jury found, as matter of fact, that waiver was established. That finding we do not reverse.

Upon the question of arbitration we need cite only *Oakes* v. *Insurance Company*, 112 Maine, 52, where it is declared to be settled by a controlling weight of authority that an unqualified denial by the insurance company of all liability under the policy renders inoperative a provision therein for an arbitration as to the amount of the loss as a condition precedent to a right of action to recover such loss.

Motion overruled.

NORMAN A. SMITH ET AL. *vs.* WESTERN MAINE POWER COMPANY.

York. Opinion March 29, 1926.

Whether public exigencies require the condemnation of land for public purposes, is a legislative and not a judicial question. The power of such determination may be delegated to a private corporation. When such power so delegated by the Legislature is exercised in good faith and for public purposes, the court has no authority to intervene.

Whether the purpose of condemnation is public or private is a judicial question. The Legislature cannot constitutionally authorize the condemnation of land for private purposes. But if a corporate charter purports to authorize the taking of land for both public and private purposes, such charter is not for that reason unconstitutional, if the purposes are separable.

When a corporation exercising the right of eminent domain, i. e., condemning land refers to its charter for the purposes of condemnation, and it appears that the charter includes and purports to authorize taking land for both public and separable private uses the condemnation will be sustained, the presumption being that the taking is for constitutional and legal purposes only. Even if the record of condemnation literally construed, comprehends and includes private as well as public uses, the bad may be rejected and the good may stand.

In proper cases an injunction will issue to prevent the sale or use of electric current for unauthorized purposes.

Whether a power transmission line authorized by legislative act and carrying a current, the use of which all are legally entitled to share on equal terms, is a public or private use need not at this time and in this case be determined.

On appeal. A bill in equity seeking to restrain defendant corporation in constructing a transmission line across land of plaintiffs taken under condemnation proceedings under the right of eminent domain authorized by its charter, Special Act of 1907, Chapter 159. A hearing was had and the sitting Justice entered a decree sustaining the bill and enjoining the defendant from cutting, destroying or removing any of the trees on said land, and commanding defendant to remove from said land of plaintiffs all obstructions erected thereon by defendant, from which decree defendant appealed. Appeal sustained.

The case fully appears in the opinion.

Clifford E. McGlauflin, for plaintiffs.

Elias Smith and Emery & Waterhouse, for defendant.

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

DEASY, J. The defendant corporation was chartered by Special Act of 1907, Chapter 159, for purposes, inter alia, of generating and distributing electricity "for lighting, heating, mechanical manufacturing and industrial purposes" in certain York County towns. It is authorized by its charter to exercise the right of eminent domain. Its transmission line now in use was constructed by the corporation soon after its organization, and appears from the evidence to be obsolescent, crooked and unsatisfactory. It has condemned a new and straighter route crossing the complainants' land and has begun the construction thereon of a new transmission line.

The plaintiffs upon their bill in equity have obtained a decree voiding the condemnation proceedings, so far as concerns their land, enjoining the cutting of trees, declaring the poles and wires already erected to be a nuisance and ordering their removal. From this decree the defendant corporation appeals.

The plaintiffs contend (1) that there is no necessity of a new route. They urge that the defendant has taken and is now using an electric line adequate for all public purposes. To this it is convincingly answered that (a) The evidence tends strongly to show that the existing line is inefficient and unsatisfactory; (b) If the new line is a nuisance which must upon complaint be abated, so also is the existing line; for it is not only intended to be, but is now used for the same purposes which (according to the decree appealed from) condemns the new line to demolition, and (c) Even if the line now in use be adequate and injunction proof, the necessity of a new line is a legislative and not a judicial question.

The Legislature has properly delegated to the corporation the power to determine whether "public exigencies" require the taking of a new route for its transmission line. No abuse of power appearing, the court will not and cannot for this reason interfere.

"When the power is exercised in good faith, the Court has nothing to do." *Bowden* v. *Water Co.*, 114 Maine, 156; see also *Brown* v. *Gerald*, 100 Maine, 360; *Brown* v. *Water District*, 108 Maine, 231; *Opinion of Justices*, 118 Maine, 513.

(2) That the section of the charter purporting to grant the right of eminent domain for both public (lighting and heating) and alleged

private (manufacturing and industrial) purposes should be held wholly void as violative of the constitution. This contention is effectually disposed of by the succinct ruling of the court below, as follows: "the mere fact that the legislature has in terms authorized the taking of private property for private purposes as well as public will not in itself nullify the authority to take for public uses alone at least where they are separable." *Cole* v. *County Commissioners,* 78 Maine, 532; *Brown* v. *Gerald,* 100 Maine, 351; *Lake Koen Nav. I. & R. Co.* v. *Klein,* 63 Kan., 484 (65 Pac., 684); *Walker* v. *Shasta Power Co.,* 160 Fed., 856-860.

(3) That the taking of land for power transmission is for private purposes; that in this instance the taking was for both public and private purposes and hence is unauthorized and the proceedings void.

In the finding accompanying the decree we read that the statement filed by the defendant sets forth that "the proposed taking was for public uses." This, however, is not conclusive. From all the evidence it fairly appears that one of the company's purposes in taking the complainants' land was to provide electric lights for streets and for houses and other buildings in several York County villages, a use indisputably public. Another purpose is the providing of power for farm and household purposes and also for mills. The transmission of power is not merely the incidental disposal of surplus power; it is one of the company's primary purposes.

The other primary purpose is electric lighting. It is expected that about one third of the company's current will be used for lights, and about two thirds for power.

The record of condemnation is not brought forward to this court. We assume that it refers to the charter for the purposes of the taking. Presumably the taking was for purposes authorized by the legislative act. This obviously means only those purposes constitutionally and legally authorized. The taking was for no other purpose.

Cole v. *County Commissioners,* 78 Maine, 538, holds that a condemnation under a legislative act purporting to authorize a taking of land for both public and private purposes is bad as to the latter only. *Brown* v. *Gerald,* 100 Maine, 351, the case upon which the complainants chiefly rely, assumes "that under the authority of *Cole* v. *County Commissioners,* supra, a taking may be sustained even if some of the uses are extra-constitutional; that the bad may be rejected and the good may stand." (Page 356).

The complainants cite and rely upon *Brown* v. *Gerald*, supra. But the facts in that case differ so very widely from those in the present case that it has no value as a precedent for the decree above summarized.

In *Brown* v. *Gerald* the defendants were proceeding to erect an electric line across the complainant's land for the sole purpose of furnishing power to one manufacturing plant. At the time of condemnation the defendants were bound by contract to deliver all their current to one mill for a period of ten years. The court in that case said "A purpose to use the line for electric lighting was wanting. It is not discoverable." And again the possibility of public use is "too remote for consideration."

Without questioning the authority of *Brown* v. *Gerald* in cases presenting its own peculiar facts, it is plainly not in point in the present case, as a precedent for the decree appealed from.

In the instant case the condemnation was good, at all events, for the transmission of lighting current. "The bad may be rejected and the good may stand." *Brown* v. *Gerald*, supra.

The decree rejects all. It adjudges the part of the new line already constructed to be a nuisance. The appeal must be sustained.

In cases of this kind the complainant and defendant are not the only persons interested. The public is concerned. It would be unreasonable to compel light users to abide in darkness or to submit to inferior and inefficient service because the officers of an electric company harbor an intent to commit an ultra vires act. In proper cases an injunction will issue to prevent the sale or use of electric current for unauthorized purposes.

The complainants contend that the transmission of power whether for use on farms or in dwellings, laundries, stores, shops or mills, is a public use, if by reason of statutory mandate or common law principle all members of the public have an equal and legally guaranteed right to demand the use of such power. It is argued that to transmit power in the form of an electric current over a wire is no more a private use than to transport power in the form of coal over rails.

It is not necessary at this time and in this case to pass upon the validity of this contention.

Appeal sustained.
Bill dismissed.

ELMER E. WENTWORTH ET AL. *vs.* WILLIAM S. MATHEWS, Admr.

York. Opinion March 29, 1926.

When by will the husband bestows a life tenancy in all his estate upon his wife, for her care, maintenance and support, with remainder over to his children, she also owning other property which she conserves, using the husband's estate largely for her care, maintenance and support, the remainder of her husband's estate, if any, should be restored to the personal representative of his estate by her administrator, in a proceeding in which those two personal representatives are parties.

On appeal. A bill in equity wherein the complainants are only a part of the children of Charles H. Wentworth under the provisions of whose will he gave to his wife a life tenancy in all of his estate, with remainder over to his children, to determine the rights of the complainants in such remainder. A hearing was had upon the bill, answer and agreed statement, and the sitting Justice entered a decree dismissing the bill on the ground that the controversy should be determined by and between the representatives of the estates of the testator and his widow, and not by an action brought by an heir of the testator, Charles H. Wentworth, against the estate of his widow, from which decree an appeal was taken. Appeal dismissed without costs.

The case fully appears in the opinion.

John E. Macy and Linus C. Coggan, for complainants.

Mathews & Stevens, for respondents.

SITTING: WILSON, C. J., PHILBROOK, MORRILL, STURGIS, BASSETT, JJ.

PHILBROOK, J. This is a bill in equity, heard below by a Justice of this court, and from his decree, dismissing the bill, an appeal was taken to the Law Court. The defendant is impleaded, both individually and in his representative capacity as administrator of the estate of Mrs. Wentworth. The latter was the second wife of Charles H. Wentworth who, by his first wife, had four children, namely, Elmer E., George F., Charles A., and Sarah E., who married and so became

Sarah E. Wingate. Charles A. died before the decease of Isadore, his stepmother, unmarried, intestate and without issue, leaving his two brothers and his sister as his sole heirs and next of kin. The complainants, Elmer and George, "bring this bill on behalf of themselves and their said sister, Sarah Eunice Wingate, being all the heirs and devisees of said Charles H. Wentworth, provided their said sister shall desire to come in as a party complainant herein and contribute to the cost of these proceedings." In the caption of the bill Elmer was declared to be a resident of Boston. During the pendency of these proceedings he died and his widow appointed as his administratrix by decree of the Probate Court for Suffolk County, in the Commonwealth of Massachusetts, appeared in that representative capacity and assumed the prosecution of this action as party complainant in place of said Elmer E. Wentworth, deceased. By the findings of the sitting Justice Mrs. Wingate never appeared as complainant, and since the administratrix of Elmer, appointed by the Massachusetts Court, had no extra-jurisdictional authority, the only complainant to be heard was George, who was a resident of Berwick, in our county of York.

The controversy arises out of the provisions of the will of Charles H. Wentworth. In that document, after providing for payment of debts, funeral charges and expenses of administration, he makes but one testamentary disposition of his estate, which is as follows:

"I give, bequeath and devise to my beloved wife, Isadore W. Wentworth, for and during the term of her natural life, all my estate, real and personal to have, hold and use for and during the term aforesaid, and to expend all if necessary for her care, maintenance or support, and from and after the decease of my said wife, Isadore M. Wentworth, said estate or the residue and remainder thereof to my sons, Elmer E. Wentworth, George F. Wentworth and Charles A. Wentworth, and my daughter, Sarah Eunice Wingate, wife of Edward C. Wingate, of Exeter, New Hampshire, in such shares as my said wife, Isadore M. Wentworth, shall by her last will and testament give, order, limit or direct, and I do hereby appoint my said wife, Isadore M. Wentworth, sole executrix of this my last will and testament, hereby revoking all and any wills heretofore by me made."

Mrs. Wentworth died intestate, hence she did not exercise the power given by her husband's will to dispose of the residue of his estate. Therefore, all that remained of that residue, whether in the

same form that she received it, or in any new or changed aspect, so far as the same can be traced and identified, remains a constituent part of the testator's estate, declares the sitting Justice. Among the property which passed to Mrs. Wentworth by her husband's will was certain money. From this money she made expenditures for her care, maintenance and support. But during the time between that in which her husband's will became operative and the date of her own death, she had money of her own, which money she essentially conserved by reason of the making of her expenditures largely from that which she received from her husband's estate. This the plaintiffs allege to be against their secondary right to the residue of their father's estate. Wherefore, they pray for an accounting from the individual estate of Mrs. Wentworth, and the charging of the funds in the hands of her administrator with a trust in their favor, and the payment to each complainant of his respective share. On the other hand it was urged that Mrs. Wentworth's honest judgment as to the expenditure of money derived from her husband's estate was final, without regard to whether that judgment was sound or otherwise.

The sitting Justice held that this contention was not then in order for decision. He further held that the unexpended residuum of Mr. Wentworth's estate should be restored to the representative of that estate, to the end that he might pay it to those found to be entitled thereto; that although, in a sense, some of the money in the hands of the defendant belongs to the complainant, yet he is not to be permitted to maintain this suit for its recovery; that each heir at law of Charles H. Wentworth is not entitled to have the matter determined in his own action against the administrator of the estate of Mrs. Wentworth; that the real controversy is between the two estates; and that what the administrator of the estate of Mrs. Wentworth should restore to the administrator of the estate of Mr. Wentworth should be determined once for all in proceedings between those two estates.

When the proper parties present the main issue it can be finally decided but it cannot be so decided until such parties are before us.

Appeal dismissed without costs.

BUTTS' CASE.

Franklin. Opinion March 30, 1926.

Failure to give notice to the employer of the injury required by statute, under Section 17 of the Workmen's Compensation Act, it not appearing that the employer or his agent had knowledge of the injury, bars one from being entitled to compensation, unless such failure to give such notice was due to accident, mistake or unforeseen cause.

On appeal. Petitioner alleged in his petition dated August 22, 1925, that on or about April 20, 1925, while employed by the Lawrence Plywood Corporation, at Carrabasset, he received an injury by accident by being struck in the left eye by a splinter flying from a piece of wood which he was planing. No notice of the accident was given to the employer within thirty days as required by the statute, nor did the employer or its agent have any knowledge of the accident, nor did it appear that the failure to give such notice was due to accident, mistake or unforeseen cause. Compensation was awarded and from an affirming decree an appeal was taken. Appeal sustained.

The case fully appears in the opinion.

McLean, Fogg & Southard, for petitioner.

Eben F. Littlefield, for respondents.

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

PHILBROOK, J. On August 24, 1925, Leon H. Butts filed with the Industrial Accident Commission a petition for award of compensation for a personal injury, by accident, arising out of and in the course of his employment. He stated in his petition that a "sliver of wood flew from planer and struck me in the eye," and further stated, as a result of the injury, "I believe was cause of ulcer which formed on my eye five weeks previous to the time it bothered me."

After hearing before the Chairman of the Industrial Accident Commission, on October 15, 1925, compensation was ordered in the sum of sixteen dollars per week, commencing May 30, 1925, and con-

tinuing for a period of one hundred weeks because of the loss of vision of his left eye due to the injuries received by Mr. Butts as alleged in his petition. Compensation was also ordered for medical, surgical and hospital services according to the provisions of Section 10 of the Workmen's Compensation Act.

After formal decree by a justice of this court, as provided by statute, an appeal was taken to the Law Court by the employer and the insurance carrier.

Within the time required, and before hearing, the appellants filed their answer claiming that compensation ought not to be granted because;

1. The petitioner did not receive a personal injury, by accident, arising out of and in the course of his employment as alleged in said petition;

2. The petitioner failed to notify the respondent employer of a personal injury by accident, arising out of his employment, within the statutory period.

PROOF OF COMPENSATIVE INJURY.

It is well settled law that the person petitioning for relief under a workmen's compensation act has the burden of proving the essential facts necessary to establish a case. Hence, he must adduce evidence to show that the injury was the result of accident arising out of and in the course of the employment, within the requirement of the act. *Mailman's Case,* 118 Maine, 172.

In the determination of questions of fact the Chairman of the Industrial Accident Commission is permitted to draw such inferences from the evidence, and all the circumstances, as a reasonable man would draw. *Adam's Case,* 124 Maine, 295; *Sanderson's Case,* 224 Mass., 558.

In determining the sufficiency of evidence doubts should be resolved in favor of the petitioner. *Corrall* v. *Hamlyn & Son,* (R. I.), 94 Atl., 877. There must be some competent evidence to support a decree. It may be slender, but it must be evidence, not speculation, surmise, nor conjecture. *Mailman's Case,* supra.

In the absence of fraud, the decision of the Chairman of the Industrial Accident Commission upon all questions of fact shall be final. Section 34 of Maine Workmen's Compensation Act.

Analysis of the evidence in detail would be of little interest to others except the parties to this cause, but we feel amply justified in deciding, after an examination of the evidence, in the light of the legal principles herein stated, that the finding of the Chairman of the Industrial Accident Commission upon this branch of the case should not be reversed.

NOTICE OF PERSONAL INJURY TO EMPLOYER.

Under the provisions of Sections 17, 18 and 20, of our Compensation Act, no proceedings for compensation for an injury under the Act shall be maintained unless a notice of the accident shall have been given to the employer within thirty days after the happening thereof, which notice must be in writing, but want of such notice shall not be a bar to such proceedings if it be shown that the employer, or his agent, had knowledge of the injury, or that failure to give such notice was due to accident, mistake or unforeseen cause.

In his petition for award of compensation, dated August 22, 1925, the petitioner states that the personal injury, for which he claimed compensation, occurred on or about the twentieth day of April, 1925. In that petition he gave written answers to the following questions;

1. "Did employer have notice in writing of the accident? No.
2. "Did employer have knowledge of the injury? Not to my knowledge."

From the answer to the first question, and from the evidence presented, it must be regarded as conclusively shown that the petitioner never gave the written notice required by the statute.

Did the employer have knowledge of the injury? As above seen, the petitioner declared that such knowledge did not exist so far as he was aware. The accident actually occurred on the twentieth of April but the eye, although painful and inflamed, did not bother Mr. Butts to the extent that he could not work until about the twenty-fifth of May. At or about that time he told Mr. Kimball, the superintendent of the mill, that he must see a doctor but he did not tell him what the trouble was or why his eyes were inflamed. In fact, according to his own testimony, he does not know that he ever told Mr. Kimball how or why his eyes were inflamed, and when asked why he did not tell Mr. Kimball, about the twenty-fifth of May, as to how he was injured, his reply was "I didn't think about getting

hurt there at the time. I didn't think it would amount to anything." Again, he was asked, "You didn't tell Mr. Kimball, then, you had had a blow on the eye?" to which his anwer was, "No. I never told him I had a blow on the eye." At this point the Chairman of the Commission, who was hearing the case, said:

"Under the provisions of the Workmen's Compensation Act, Mr. Butts, in order for a man to obtain compensation, it is necessary for him to give his employer notice of the accident within thirty days of the accident, or else give him some information so he will know the nature of the injury in a reasonable time. If you have never notified your employer up to date how you were injured, or told the insurance company how or when you got hurt you would not be entitled to compensation. It is necessary for the employer to have information regarding the injury in order to make him liable for compensation. That is why I am asking you when you first told anybody what your condition was due to, that you now claim, is due to a blow on the eye. If I understand your statement, the only man you ever told was on August 13th when you told the man who came to see you from the insurance company that your eye was injured."

With this suggestive statement before him the petitioner said, "I told the doctor, Doctor Cartland, at the time I was injured in the eye, and when it was, and I told Doctor Miller." But he had just testified that he told Dr. Cartland, whatever he did tell him, on the 25th of May, and Mr. Kimball testified that it was about that date when he noticed the petitioner rubbing his eyes and then Mr. Kimball called Dr. Cartland. Mr. Kimball also testified that when he noticed the petitioner rubbing his eyes there was nothing said about a sliver getting into petitioner's eyes, that he simply knew that there was a bad condition of petitioner's eyes and he sent for a doctor. He also testified he sent his report because of a request to send a report whenever a doctor was called to the mill. Doctor Cartland testified that he first saw the petitioner about the twenty-fifth of May, did not get any history of the case from the patient, and could not tell whether the condition of the eye was due to traumatic injury or some systemic condition.

This comprises all the essentials of the testimony relating to the notice required, and it does not appear that the employer had knowledge of the traumatic cause of the injury, nor that the failure to give notice was due to accident, mistake or unforeseen cause.

The answer filed by the respondents was sufficiently broad to admit of testimony relating to failure of knowledge by the employer.

Appeal sustained.
Decree below to be reversed in accordance with this opinion.

DANA E. AYER *vs.* ROBERT HARRIS.

Cumberland. Opinion April 1, 1926.

The findings by a single Justice in a trial of a cause without a jury, held to be findings on questions of fact supported by the evidence, and not rulings upon questions of law subject to exceptions.

In the instant case the claim of title by adverse possession, advanced at the trial by counsel for the plaintiff, was eliminated by the plaintiff's testimony that he did not claim beyond the true line of his property, and had no intention of claiming any land not included in his deed.

On exceptions. An action of trespass quare clausum involving the line between two adjoining lots of real estate one of which the plaintiff is the owner and the defendant the owner of the other.

The general issue was pleaded and the cause tried by the presiding Justice without a jury the right of exceptions being reserved. To certain findings by the court defendant entered exceptions contending that such findings were erroneous rulings on questions of law. Exceptions overruled.

The case is sufficiently stated in the opinion.

Cram & Lawrence and A. E. Neal, for plaintiff.

Frank H. Haskell, for defendant.

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

STURGIS, J. This is an action of trespass quare clausum, involving the southeasterly bounds of the northwesterly half of lot No. 35 in

the sixth division of lots in the town of New Gloucester. The case was heard by the Judge, without a jury, but with right of exceptions reserved. The judgment was for the plaintiff, and the defendant presents five exceptions to what he terms the rulings and findings of the court.

In cases heard by the court without a jury, the right of exception is limited to rulings upon questions of law, *Prescott* v. *Winthrop,* 101 Maine, 236, which include only opinions, directions and judgments upon questions of law; and do not include such opinions, directions or judgments as are the result of evidence, or the exercise of judicial discretion. *Pettengill* v. *Shoenbar,* 84 Maine, 104. *Dunn* v. *Kelley,* 69 Maine, 145.

The findings of fact by the Justice hearing the case, if there is any evidence to support them, are conclusive, and exceptions do not lie. *Viele* v. *Curtis,* 116 Maine, 328. *Investment Co.* v. *Palmer,* 113 Maine, 397. *Lunt* v. *Stimpson,* 70 Maine, 250. *Mosher* v. *Jewett,* 63 Maine, 84. *Randall* v. *Kehlor,* 60 Maine, 37.

In the light of these well-settled rules, an examination of this case shows sufficient evidence to warrant the findings of the presiding Judge, and discloses no errors in his rulings upon questions of law.

The first exception reserved is to a statement made by the Justice in his finding, that, "reduced to its lowest terms, the right of the plaintiff to recover damages for acts alleged to have been done by the defendant, depends upon the location upon the face of the earth of the line crossing lot No. 35 from west to east, and delimiting in a southerly direction the northerly half of said lot."

There is no error in this statement. The plaintiff claims title to the northwest half of lot 35 through mesne conveyances running back to a deed from Gideon Dawes to Charles Dawes, dated January 6, 1838, which described the property as "one half of Lot No. 35 in the Sixth Division of Lots in said New Gloucester, being the northwesterly half of the lot." His predecessor in title, Zavier Lemay, conveyed, however, to him, on June 2, 1913, by the following more specific description: "Commencing at the westerly corner of land formerly owned by John M. Ayer, thence running in an easterly course by land formerly owned by said Ayer, thence by same course by land now or formerly owned by the Staples heirs, to the town Line, thence on the town Line in a northerly direction to land formerly owned by John M. Ayer, thence in a westerly direction by the land

of John M. Ayer to the land formerly owned by the Staples heirs to the Range Way line, thence in an easterly course to the first mentioned bounds, containing thirty acres more or less."

The "land now or formerly owned by the Staples heirs," named as the second bound in this Lemay deed, it appears, is now the property of the defendant, he having acquired title to it by mesne conveyances running back to a deed from Nathaniel Larrabee to Charles Staples, dated January 2, 1928, containing a description of the following tenor:

"Beginning at Danville line at the Southeast corner of Gideon Dawes' land, thence on said Dawes' land forty eight rods & one half to John Bragdon's land, thence on said Bragdon's line twenty four rods to a ledge of rocks, thence along at the foot of said ledge forty eight rods and one half a rod to Danville line, thence on said Danville line seven and one half rods to the first mentioned bound, containing four Acres and one eighth of an Acre more or less." The true location of the northwest line of this land of the Staples heirs, therefore, marks the southeasterly extent of the plaintiff's land. *Murray* v. *Munsey*, 120 Maine, 148.

In support of his claim to title and actual possession of the land upon which it is alleged the trespass was committed, the plaintiff offered a chalk of a survey and plotting of part of lot 35, with the easterly bounds of the lot marked by the town lines between New Gloucester and Danville and Durham, which adjoin New Gloucester on the east. Robert F. Chandler, the surveyor, delineated upon his chalk what he found to be the location of the divisional line between the "land of the Staples heirs" and the northwest half of lot 35. His location was made by starting at what was admitted by both parties to be the southwest corner of Gideon Dawes' land, and thence running northeasterly on the course of pieces of ancient stone wall, along the line marking the joining of tilled land with wood-lot, and thence through the woods to the easterly line of lot 35, which was also the town line. Reversing his course to the point of beginning, he plotted the other lines of the land of the Staples heirs according to the Larrabee deed to Charles Staples. It is to this line that the plaintiff claims title, and to which, by the testimony of several witnesses, he offered evidence of his actual possession and that of his predecessors in title. His counsel advanced at the trial a claim of title by adverse possession, but the plaintiff himself eliminated this

element from the case by his testimony that he did not claim beyond the true line of his property, and had no intention of claiming any land not included in his deed. *Borneman* v. *Milliken*, 116 Maine, 76. *Preble* v. *Railroad Co.*, 85 Maine, 260. The plaintiff's only claim is under his legal title to the northwest half of lot 35, which he says extends southeasterly to the line located by his surveyor.

The defendant accepted this issue, and presented his defense in the form of an attack upon the Chandler line, and a presentation of a survey made by one John Bartlett, who located the "land of the Staples heirs" to the northwest of the location found by Mr. Chandler, with the result that the division line between the plaintiff's land and the defendant's "Staples lot" would, according to his survey, be beyond and to the northwest of any acts of trespass claimed. This line, the defendant claimed, marked the southeasterly limits of the plaintiff's land, and was the northwesterly bounds of his own property. To it he claimed title and right of possession, and admitting the cutting of hay and wood on, and some crossing by teams over, the land between the Chandler line and Bartlett line, justified these acts under this claim of title to his surveyor's line.

In the light of the foregoing contentions of the parties, and the evidence each offered in support of the same, the statement of the presiding Justice, to the effect that the right of the plaintiff to recover, depends upon the location of the line crossing lot No. 35 from west to east, and delimiting in a southerly direction the northerly side of said lot, was strictly in accord with the issue presented by the evidence. It is proper to note that this is a statement of fact rather than a ruling of law, and is not exceptionable.

The defendant's second exception is to a statement of the trial Judge, which in the exception is interpreted to be a ruling that where each party claims a different line to be the boundary line between their adjacent lots, "one must be selected." We do not think the interpretation placed upon this statement by the defendant is fully justified by the language used by the court. Calling attention to the fact that each party at the trial pointed out a line claimed by them respectively to be the true line marking the southeasterly bounds of the northwesterly half of lot 35, and that abundant evidence was furnished in support of the respective contentions, the judge commented upon the inconsistencies and seemingly unreasonable conditions involved in an acceptance of either line, and then said,

"but it is nowhere suggested that either one or the other of these two lines is not in fact the true one, and one must be selected." We have outlined the positions taken and contentions presented by the parties in our discussion of the first exception. The plaintiff insistently urged that the line run by his surveyor was the true southeasterly line of his property where it adjoined that of the defendant's. He showed, and the defendant admitted, acts which were trespasses upon the plaintiff's land, if the plaintiff's claim was established. With equal insistence the defendant justified his admitted acts, upon the ground that the northwest line of his property, which was also the southeast line of the plaintiff's land, was located as found by his surveyor. No evidence of any other location of this dividing line in controversy was offered by either party. If this second exception was to a ruling of law, which it is not, it is fully answered, we think, by the academic principle of law that findings must be based upon the evidence in the case, and in accordance with the issues presented by the pleadings and the evidence.

The justice concluded his findings with the statement, that he "finds as a matter of fact, in consequence of the effect of what seems to be a fair preponderance of evidence supporting it, that the line substantially as claimed by the plaintiff is, as between the two contended for, the true line in the establishment of the southerly limit of the land in controversy owned by the plaintiff"; and commenting upon the admission by the defendant of the acts complained of, rendered judgment for the plaintiff, and assessed damages. The last three exceptions presented are directed to this final conclusion, and are grounded upon the argument that there is no evidence to support the facts upon which the judgment is based, and that the only inference to be drawn from the facts proven negatives the plaintiff's claim.

It is now a settled rule of law in this court, that where there is no evidence to support the findings of a judge hearing a case without a jury, with right of exceptions reserved, or when only one inference can be drawn from the facts, and that inference does not support the judgment, the finding is an erroneous decision of the legal conclusions to be drawn from the evidence, and is an exceptionable error in law. *Investment Co.* v. *Palmer*, 113 Maine, 397. *Chabot & Richard Co.* v. *Chabot*, 109 Maine, 403. *Morey* v. *Milliken*, 86 Maine, 464. But a careful reading of the evidence and study of the plans sent up and made a part of the bill of exceptions, convinces us that this rule has

no application to this case. There was probative value in the testimony offered by the plaintiff. Evidence of long use and occupation in accord with the line which the plaintiff claims, is found in the location of walls and the demarcation of woodland from mowing field and tillage land. The call for the "Danville line" as a part of the description of the point of beginning in the defendant's deed is not conclusive. It was the duty of the sitting Judge to consider the inconsistency arising from the use of this descriptive term, in the light of other evidence offered in the case, and if satisfied by the weight of the evidence that the call for the "Danville line" was erroneous, to reject it. *Jones* v. *Buck*, 54 Maine, 304. *Abbott* v. *Abbott*, 51 Maine, 575. *Linscott* v. *Fernald*, 5 Greenleaf, 496.

The evidence was conflicting, but there was some evidence in support of the plaintiff's contention, and inferences favorable to his claim might be drawn. The weight of the evidence was a matter for the presiding Judge, and it is not open to us to revise his conclusion as to the weight that may be given to it as matter of fact. The weight or the sufficiency of the evidence lies with the tribunal selected by the parties. We think the record discloses evidence upon which, if submitted to a jury, they could legally find a verdict for the plaintiff upon the questions in issue, and cannot, therefore, under the rule stated in *Pettengill* v. *Shoenbar*, 84 Maine, 104, sustain these three latter exceptions to the decision of the presiding Judge, who, in reference to this matter, has been substituted for the jury.

Exceptions overruled.

MERTON H. SWIFT, Conservator

vs.

PATRONS' ANDROSCOGGIN MUTUAL FIRE INSURANCE CO.

Kennebec. Opinion April 10, 1926.

A contract of insurance is to be construed in accordance with the intention of the parties, which is to be ascertained from an examination of the whole instrument.

As a general rule the use of a prohibited article, or the keeping and using of it, must be permanent or habitual in order to violate a policy prohibition against it.

In the instant case, threshing grain, cutting ensilage, and pressing hay being of common knowledge seasonal operations, it must be assumed that that fact was known to the assured as well as to the insurer at the time the contract was made. The permanency of the location and use of gasoline engines in threshing, ensilage cutting and hay pressing contemplated by the parties to this contract, therefore, was only that required to complete the season's work, and the location and use of the gasoline engine appearing to have been in the course of the hay pressing operation for that season, the policy prohibition was violated.

The fact that the engine was located and used in the barn by the hay pressers without knowledge or consent of the assured or his conservator is immaterial. When control of the premises was committed to the hay pressers the assured became responsible for their acts in violation of the policy.

On report on an agreed statement of facts. An action on a fire insurance policy. On January 17, 1925, a set of farm buildings located in the town of Sidney, of which plaintiff was conservator, was destroyed by fire. In the barn which was covered by the policy was located and used a gasoline engine in hay pressing operations. The general issue was pleaded and under a brief statement liability was denied on the ground that the location and use in the barn of a gasoline engine was prohibited in a clause in the policy, rendering the policy void. Judgment for the defendant.

The case is fully stated in the opinion.

Pattangall, Locke & Perkins, for plaintiff.

Harry Manser, for defendant.

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

STURGIS, J. This is an action on a fire insurance policy brought by the plaintiff as conservator of his ward's estate. The case is before this court upon an agreed statement of facts.

It appears that while Wadleigh Brothers, of Belgrade, were engaged in pressing the assured's hay, using a combination gasoline engine and hay press assembled in a single unit, which, without the knowledge of the assured or his conservator, was located and in operation in a barn covered by the policy, the barn burned. The cause of the fire is not stated, and the originating responsibility of the engine is left problematical.

This policy was in the regular standard form, and contained, in addition to the usual provisions, the following: "It is also a part of the consideration of this policy and it is especially agreed that the location and use of any gasoline engine in any building described in the application for this policy, for furnishing power to thresh grain, cut ensilage or press hay renders this policy void. Gasoline engines may be set up on outside of barns and other buildings and power transmitted to machines within by means of a long belt. Small gasoline engines of from one to three horse power and of standard and approved makes may be used in insured buildings for pumping water, making electricity, running milking machines and other light farm work when same are set up in a place kept clean and free from oily rags and other inflammable material and gasoline tank filled only by daylight or incandescent electric light." By the stipulation of the parties, the defendant's denial of liability is based on the foregoing provision in the policy.

A contract of insurance, like any other contract, is to be construed in accordance with the intention of the parties, which is to be ascertained from an examination of the whole instrument. All parts and clauses must be considered together that it may be seen if and how far one clause is explained, modified, limited or controlled by the others. *Blinn* v. *Ins. Co.*, 85 Maine, 389. *Smith* v. *Blake*, 88 Maine, 247.

This restrictive provision in this policy under consideration is a special condition of the contract, additional to the general prohibited articles clause. Reading the entire provision together, it appears

that permission is in fact given to set up gasoline engines outside of buildings insured, transmitting power to the machines within by means of a long belt. It is only the location and use of gasoline engines within buildings insured for furnishing power to thresh grain, cut ensilage, or press hay, which is prohibited. The effect of the entire provision is to restrict the place and manner of use, but not the use itself.

As a general rule, the use of a prohibited article, or the keeping and using of it, must be permanent or habitual in order to violate a policy prohibition against it. This rule is of general acceptance, and has been applied in leading American and English decisions. See 13 A. & E. Ann. Cases, 540. 26 C. J., 222.

In *Bouchard* v. *Insurance Co.*, 113 Maine, 17, the general prohibited articles clause provided that the policy should be void if certain enumerated articles "shall be kept or used by the insured on the premises insured." One of the buildings insured burned while a gasoline engine was being used in it to thresh grain, and the case turned on whether or not the keeping or using of the gasoline in the tank of the engine was in violation of the policy inhibition. The court held that the prohibition in that policy contemplated an habitual and customary keeping or using of gasoline, and that the use of the fluid in the manner and under the conditions stated was temporary only and did not avoid the policy.

In the instant case it is the "location and use" of the engine itself in a place and for a purpose specifically prohibited by the policy which is in issue. To "locate" is "to set or establish in a particular spot or position; to settle; station; place." Webster New Int. Dic. The idea of permanency springing from "use" is well recognized. And while the words "location and use" in this policy restriction do not, perhaps, import the same degree of permanency which is found in "kept or used" in the Bouchard case, we think they do convey an idea of something more than a mere temporary or incidental operation of the engine.

It does not appear in the agreed statement of facts how long the engine in question had been in operation within the barn at the time of the fire, nor how long it would take to press the hay. It is common knowledge, however, that hay pressing is seasonal and temporary rather than permanent or habitual, and is usually completed in a few days or weeks at the most on the average farm. Ensilage cutting

and threshing of grain are of a like seasonal and temporary character. These facts, we must assume, were known to the assured as well as the insurer at the time the contract was made, and must be taken into consideration in construing the rights of the parties thereunder. *Bouchard* v. *Ins. Co.*, supra. *Guptill* v. *Ins. Co.*, 109 Maine, 323.

The permanency of the location and use of gasoline engines in threshing, ensilage cutting and hay pressing, contemplated by the parties to this contract, was that required to complete the season's work. It was not intended as a year round or customary operation. Inferring, as we must, that the location and use of this gasoline engine was in course of the hay pressing operation for that season, we think the location and use was of that degree of permanency which the insured as well as the insurer intended to contract against.

In *Wilson* v. *Vermont Mut. Fire Ins. Co.*, 75 Vt., 328, a portable steam engine was used to operate an ensilage cutter within a prohibited distance from the barn destroyed; and upon the plaintiff's contention that the use was temporary the court says: "Applying a liberal rule of construction to the word 'use' as employed in the restrictive clause, we think the use of the engine was in violation of this contract. Its use was as permanent as the work of filling the silo required."

We are of the opinion that when the parties included in an insurance contract an express prohibition of a particular use of limited permanency which was well known at the time, the court cannot by construction find an implied permission therefor by adding the same to the contract which the parties made. It is the function of the court to interpret the contract made by the parties. It has no power to add to it or take from it. *Dunning* v. *Accident Association*, 99 Maine, 394. *Imperial Fire Ins. Co.* v. *Coos Co.*, 151 U. S., 452.

The assured contends, however, that the use of the engine in the manner stated was necessarily incident to his farming operations, and therefore presumed to be recognized and impliedly permitted by the insurer. If the facts warranted his claim, his contention would be supported by authority. *Bouchard* v. *Ins. Co.*, supra, and cases cited 26 C. J., 223. The rule, however, is based on necessity; and where there is no necessity, as in this case, it can have no application. Express permission is given in this policy for use of gasoline engines outside of the buildings, with transmission of power to the machines within by a long belt; and it does not appear that this

provision for the necessities of the assured in his farm operations is inadequate, or that material inconvenience or inefficiency results from the substitution of belt transmission for direct drive.

The final contention of the plaintiff is that the location and use of this engine in pressing the assured's hay in the barn is not a violation of the prohibition under consideration, because the location and use was unauthorized, and without the knowledge, consent or direction of the assured or his conservator. Authorities do not sustain this contention. Wadleigh Brothers, who were operating the engine at the time of the fire, were pressing the assured's hay under a contract with his conservator. They were in no sense strangers or trespassers. When the assured engaged that the prohibited thing should not be done, and when he committed the control of the insured premises to Wadleigh Brothers, he became responsible for their acts in violation of the policy. *Liverpool & London Ins. Co.* v. *Gunther*, 116 U. S., 113. "It is equally unimportant that the respondent was ignorant that such business was carried on. The question whether a warranty has been broken, can never depend upon the knowledge or ignorance or intent of the party making it, touching the acts or the fact constituting the breach." *Mead* v. *Northwestern Ins. Co.*, 7 N. Y., (3 Seld.), 530.

The real question at issue is whether the contract of insurance has in fact been broken. If it has, then by its own terms it is rendered void. It is immaterial whether the fire was caused by the engine or not. The policy was forfeited when in the course of the season's pressing the engine was first used, and the plaintiff and his ward were uninsured thereafter. *Bouchard* v. *Ins. Co.*, supra, at page 23. *Dolliver* v. *Ins. Co.*, 111 Maine, 275.

Judgment for defendant.

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

Knox. Opinion April 17, 1926.

If the language used in a declaration is susceptible of the meaning claimed for it, and of no other, there is no variance.

The admission by the court of depositions taken by a notary outside of the State is not exceptional error in absence of an abuse of sound judicial discretion.

Giving a juror a ride by counsel in the case while it is on trial, held to be improper conduct and entitles a party to the action to have a verdict set aside.

In the case at bar the evidence shows that after the testimony and arguments of counsel had been heard, and before the delivery of the charge, counsel for the plaintiff tendered to one of the jurors gratuitous conveyance in the automobile of such counsel over a distance which would by public conveyance have entailed upon the juror the expenditure of money.

The act of the attorney may have been but an ordinary and neighborly kindness, and the value of the gratuity but slight, but jurors should be free from the influence of parties and counsel outside the court room.

On exception and general motion by defendant. An action of assumpsit on a promissory note. During the trial the defendant contended that there was a variance in the language of the declaration and the proof and excepted to an adverse ruling. Plaintiff offered some depositions taken by a notary outside the State and defendant objected to their admission on the ground of alleged informalities in the manner of taking them, and excepted to an adverse ruling. A verdict for plaintiff was rendered and defendant filed a general motion for a new trial alleging improper conduct by counsel for plaintiff toward a juror. Exceptions overruled. Motion sustained. A new trial granted.

The case is fully stated in the opinion.

Oscar H. Emery, for plaintiff.

J. H. Montgomery, for defendant.

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

DUNN, J., dissenting in part.

BARNES, J. This case was tried before a jury, with verdict for the plaintiff, and comes up on exceptions, and upon defendant's motion for a new trial for alleged misconduct of the plaintiff's attorney and one of the jurors before whom the case was tried.

The action is assumpsit on a promissory note; it is before this court for the second time upon a question of pleading or practice or other issue foreign to the merits of the plaintiff's case; a verdict is had and an end to the litigation should be reached. The exceptions are two in number. The writ is a declaration, in the ordinary form against a corporation, containing a second count for money loaned, with specification that the note was given in consideration for the loan, and a third count for money had and received.

At trial, defendant directed the attention of the presiding Justice to the wording of the note, "we promise to pay," and the signature of the maker, "Camden Lumber & Fuel Co. Per J. W. Ingraham Treas. R. L. Bean Pres.," and claimed variance between pleading and evidence. The justice found no variance and ordered that the trial proceed, whereupon defendant noted his first exception.

That the note was not written in the precise phrasing recommended by technical grammarians to set out a promise by a corporation, with the use of the neuter pronoun and appropriate form of the verb, cannot avail to prove variance, and this exception fails.

The language used is susceptible of the meaning claimed for it, and of no other. And if it did not sustain the count on the note, it was admissible under the other counts as evidence of money loaned or of money had and received.

Further, plaintiff offered depositions of Mrs. R. L. Bean and R. L. Bean, taken in Oklahoma City, Oklahoma, executed on the 30th day of March, 1925, before Maurice Breedin, who signed as Notary Public, and whose seal was affixed to each deposition, together with notices of request that such be taken, served on defendant's attorney the 5th of the same month. Defendant objected to the admission of the depositions, for informalities alleged to be such as to render them void, in that, First; the two deponents were to present themselves at the same place and hour to give their depositions:

Second; because the person to take the depositions was not designated in the notice:

Third; because but one caption was returned with the depositions and in this the notary recorded the day of the depositions and not the hour when either was taken:

Fourth; because it does not appear that the notary was disinterested; or that the depositions, or either of them, were written in the presence of either of the deponents or under their respective directions; and

Fifth; because neither deponent signed, and it does not appear that his deposition was read to either deponent.

It may truthfully be said that both notice and depositions might have been written with greater particularity. But provision was made by our fathers for the execution and use of depositions to aid in the presentation of facts, and to shorten and render less expensive the course of litigation. When taken by a notary, outside the State, they may be admitted or rejected at the discretion of the court. R. S., Chap. 112, Sec. 20.

Defendant's motion was denied, the court admitted the depositions, and we think nothing was saved by this exception.

The office and functions of a notary are of long standing in the jurisprudence of the English speaking people, and the work of a notary of another state of the union, if fair and reasonably regular upon its face, and giving evidence of having been taken, after actual and sufficient notice and with substantial compliance with the requirements of our statutes may be received in our courts.

In this case actual and sufficient notice was given of the time and place of taking the depositions. That the deposition of a man and his wife were to be taken at the same time and place, and that they be attached to one caption certainly cannot be held to work any hardship on the defendant.

That the person who was to take the depositions was not designated in the notice is not detrimental, if it prove that he is a person empowered so to act; and that such person does not avow himself to be disinterested or that he read his deposition to each deponent, or lastly that deponents did not sign their several depositions, none nor all of these alleged omissions compel rejection.

The court finds no abuse of sound judicial discretion in this case. The depositions appear to have been taken before a notary public

who affixed thereto his name, official character and seal, and these are prima facie evidence of his qualification to act. *State* v. *Kimball*, 50 Maine, 409. *Freeland* v. *Prince*, 41 Maine, 105.

Upon the motion the court is asked to set the verdict aside because of alleged improper conduct of plaintiff's attorney and one of the jurymen before whom the case was tried.

The evidence in support of the motion shows beyond peradventure that after the testimony and arguments of counsel had been heard, and before the delivery of the charge, counsel for the plaintiff tendered to one of the jurors and the latter accepted gratuitous conveyance in the automobile of such counsel over a distance which would by public conveyance have entailed upon the juror the expenditure of money. For just such a case as this the Legislature has provided—"If either party, in a cause in which a verdict is returned, during the same term of the court, before or after the trial, gives to any of the jurors who try the cause, any treat or gratuity . . . . . the court, on motion of the adverse party, may set aside the verdict and order a new trial." R. S., Chap. 87, Sec. 109. The act of the attorney in this case may have been but an ordinary and neighborly kindness, and the value of the gratuity but slight. But as this court has recently said, "More than once, and in no uncertain language, we have placed the seal of condemnation, not alone upon the attempts of parties by word or deed to influence or prejudice jurors outside the court room, but also upon the indiscretion of their friends along the same line. And we have not stopped to inquire whether the attempt was successful, nor whether the mind of a juror was actually influenced, but only whether or not the mind of a juror might have been influenced by the attempt, or whether the attempt might have any tendency to influence the mind of a juror." *York* v. *Wyman*, 115 Maine, 354.

If conveyance may be furnished, why not entertainment? Jurors should be free from the influence of parties and counsel outside the court room, and that the verdict in this case may be above criticism, the entry should be,—

Exceptions overruled.
Motion sustained.
New trial granted.

DUNN, J. (dissenting in part):

By authority of the statute, and at the instance of him to whom a verdict is adverse, the verdict may be set aside and a new trial granted, where treat or gratuity was had by a juror. R. S., Chap. 87, Sec. 109.

"Treat" seemingly is used in the sense of entertainment, and "gratuity" in that of the receiving of something voluntarily given in return for favor or services.

After the arguments below, and the adjournment of that court for the day, the plaintiff's attorney in starting for his automobile to motor home, met with one of the trial jurors, who lived neighbor to the attorney in one of the nearby towns, and who like the attorney and to the latter's knowledge, was accustomed to stay in his own house at night, whither the juror journeyed in public conveyance, or traveled whenever chance to do so afforded, in the private carriage of another, by the unrecompensed courtesy of such other.

The invitation from the attorney was accepted. The two got into the automobile, as did a third person, but this person did not go quite so far as the others.

In twenty minutes the ride was over. The juror stepped out from the rear seat whereon he alone had ridden the entire way, without any discussion of or reference to the pending case, and without having expended for train fare, the thirty cents which in coming by that means he would have.

On the next day, the juror was back in his place, the judge charged the jury, and verdict favorable to the plaintiff was returned.

The above is the history of what happened till the verdict.

On learning that the juror had had the ride, the defendant moved the avoiding of the verdict for that reason, and the vital question which the sitting justice reserved for decision by this court is, whether the motion shall obtain?

The general aspect would be the better, let it be remarked in emphasis, had the invitation neither been extended nor accepted. But, notwithstanding, there is no suggestion, nor could there be in record foundation, that the verdict is in conflict with law or evidence.

The presented situation is one of actuality and not of potentiality. And no reason is perceived by me, for exercising purely permissive power, on the posture of what might have been, when were the verdict the opposite of what it is, namely, if the defendant instead of the plaintiff had gained it, it would have been so insecurely posited as to be unable to withstand the directed force of usual-form motion to void.

LEE H. JONES *vs.* JOHN I. BRIGGS, JR.

Cumberland. Opinion April 17, 1926.

An action at law is not to be dismissed for mere defects in pleading that are amendable or may be cured by verdict if it appears that the court has jurisdiction and the plaintiff has stated a good cause of action.

Where there is a variance between evidence and the declaration when an amendment could have been made, if the question of a variance is not raised at the trial, it is too late to raise it after verdict.

False representations by a real estate broker to a prospective purchaser do not constitute a defense in an action by him against his principal for commissions, if such false representations were made to him by his principal.

Ordinarily a broker has completed his contract when he has procured for the owner a purchaser who is willing, able and ready to purchase on the terms proffered in good faith.

In the instant case the verdict which embraced all of the contentions of the defendant was warranted on the evidence, and in accord with the instructions of the court.

On exceptions and general motion by defendant. An action in assumpsit to recover broker's commission for procuring a prospective purchaser of real estate who was ready, able and willing to purchase the property on the proffered terms until he discovered that the broker had made false representations to him relative to the amount of an incumbrance on the property, which representations the plaintiff admitted he made to the prospective purchaser but believing them to be true as such representations were made to him by his principal, the owner, as being true. Defendant excepted to certain instructions by the court, and also excepted to a refusal to give requested instructions, and after a verdict for the plaintiff filed a general motion for a new trial. Exceptions and motion overruled.

The case fully appears in the opinion.

Henry N. Taylor and John J. Devine, for plaintiff.

H. C. Libby, for defendant.

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

BARNES, J. Defendant suffered an adverse verdict and appeals, relying on two exceptions taken to instructions to the jury, and upon allegations under the general motion for a new trial.

At trial term, issue was joined on a declaration in assumpsit, intended to include demand for a broker's commission in finding a purchaser for real estate of the defendant.

The declaration could be treated as containing two counts for the same item, account annexed, and for money had and received.

To the former objection might then have been raised, because at the drafting of the writ, if the sheet in common use was availed of, counsel for plaintiff had stricken therefrom the words, printed in such sheet, alleging that defendant at Portland, on the day of purchase of the writ was indebted to the plaintiff in the sum demanded according to the account annexed, and in consideration thereof promised to pay the same. No account was annexed to the writ, but the item for commission for the sale of property appears in the declaration.

Nothing appears of record as directing attention of court or plaintiff's counsel to the halting gait of the pleadings, but a large portion of defendant's brief is devoted to the apparent omission.

Objection might have been raised at the trial by special demurrer, with probable result that amendment would have been granted and a verdict reached. An action at law is not to be dismissed for mere defects in pleading that are amendable or may be cured by verdict if it appears that the court has jurisdiction and the plaintiff has stated a good cause of action. *Littlefield* v. *Railroad Co.*, 104 Maine, 126.

It is no doubt a rule of pleading, that facts, essential to sustain a prosecution or defense, should be stated directly, and not by way of argument or inference; and if this rule is not observed, it is good cause of special demurrer. But after verdict, all defects of mere form, and many which would be fatal upon general demurrer, are cured. *Elliot* v. *Stuart*, 15 Maine, 160.

It does appear of record that trial proceeded as though amendment had been made. It further appears in defendant's brief, "the case was tried upon the assumption that the plaintiff's declaration was

complete . . . . as containing the allegation of a promise on the part of the defendant." This waiver of the defect finally removes from our discussion any further allusion to the inartificially drawn declaration.

As to the Exceptions:

The evidence shows that a purchaser was found for the real estate, at the terms at which it was offered for sale by plaintiff as defendant's agent; but that soon after agreeing to proffered terms of sale, the prospective purchaser learned that certain representations made by plaintiff regarding the actual value of the property were false, and refused to purchase. Plaintiff admits that the representations were made by him as claimed, and testifies that he repeated them to his prospective purchaser precisely as given him by defendant.

In his charge to the jury the judge instructed them, in effect, that if they should find that defendant furnished plaintiff with representations which the jury find to be misrepresentations, affecting the value of the property to be sold, and that plaintiff made such representations relying on statements made to him by defendant, or further, if the jury should find from all the circumstances in the case that plaintiff when he made them was justified in believing such representations to be true they cannot operate as a defense.

To this instruction defendant excepted, and alleges that while such instruction might be proper in defense to an action for deceit by means of false representations, it is improper in this case as matter of law. The representations in question were as to the holder and terms of a mortgage which purchaser was to assume and pay, the amount of rent the property was then earning, and the sum paid as municipal tax; both clearly available to defendant, and certainly material as directly affecting the fair value of the property.

Under the well settled doctrine of agency it was the duty of defendant, in describing the property committed to his agent for sale, to give a frank and honest statement as to all points affecting its market value which were known to him, and particularly such as were peculiarly within his knowledge.

The representations in issue were capable of precise statement and were not easily attainable otherwise than by statement of the owner. It would be contrary to all rules of fair dealing to hold that the plain-

tiff could not safely announce to one desiring to purchase statements as above exactly as given him by his principal, and hence the instruction of the learned judge was correct, and the first exception fails.

At the completion of the charge, defendant requested an instruction in the following words,—"I further instruct you that the plaintiff, having attempted to draw a contract between the parties in this deal, and having drawn a paper that is insufficient in law to constitute a contract and insufficient in law to bind the parties, is not entitled to recover." This the judge declined to give, and defendant argues that the jury was thereby misled and his client suffers in consequence.

A broker may bind himself to present to the seller a valid contract, reduced to writing, according to whose terms the purchaser has bound himself to accept a deed of the property and pay the price. Most contracts made with agents for the sale of real estate are not of this sort.

True, there is introduced as plaintiff's exhibit in this case a paper purporting to show some of the terms of the contract of sale.

According to the testimony it does not contain the details of the trade. According to the ruling of the judge it is not a binding contract of purchase and sale.

But there is another contract whose terms the jury must determine.

It was the contract entered into by plaintiff and defendant.

Such commission as is here demanded is earned only by compliance with the terms of a contract of agency.

Did plaintiff agree to serve defendant by securing a purchaser who had affixed his signature to a valid contract of purchase, reduced to writing? On the other hand was plaintiff's contract merely the more usual one of procuring and presenting to defendant one who proposes to purchase, on the terms proffered in good faith, willing, able and ready to purchase? These, with others, were questions for the jury, and giving to the jury the instruction requested would have taken from them plaintiff's right to have their answer to the second of the above questions, with others pertinent; wherefore the second exception is to a refusal to give an instruction which the law required the Judge to withhold.

ON THE MOTION:

It remains to be determined whether the verdict is supported by the evidence and the weight thereof and is in accord with the charge

given. It is in evidence that the project which defendant favored was an exchange of properties, at agreed values, which would leave a balance to be paid by defendant; so if the jury found that it was the plaintiff's agreement to present a willing, able and ready purchaser, it is evident that the purchaser presented met the requirement of ability, and the issue is narrowed to whether the purchaser was willing and ready.

On this point the jury were to find from all the evidence, first, whether the purchaser would accept the property as offered, with the balance computed to equal the difference in values, and second, whether in offering defendant's property false representations were made on the material point of its market value, and if so whether such false representations were made by the defendant.

Bearing in mind that the jury must have found that the negotiations were carried on during interviews between the parties, and between the several parties to the trade and the plaintiff, and that each and all testified at the trial, an examination of the record satisfies the court that there was testimony of such kind and in such quantity as fairly to convince the jury and authorize their verdict.

They were to determine what was the contract between plaintiff and defendant, and to decide whether or no plaintiff had complied with the terms of his agreement.

It was for them to decide whether the property was what it was represented to the purchaser when he agreed to purchase, and if not whether the faulty description was given by defendant or another.

Their verdict determined these points, and it appears to be in accord with the instructions of the judge.

The mandate will therefore be,

Motion and exceptions overruled.

ADRIAN L. MORRIS *vs.* ALEXANDER BELLFLEUR.

Aroostook. Opinion April 17, 1926.

A verdict for defendant cannot be set aside on a general motion in an action on a note secured by a mortgage where under foreclosure proceedings the equity of redemption had expired before issue was joined, the value of the property being in excess of the amount due on the note.

In the instant case the title to the property having become absolute in the mortgagee, the plaintiff, by completion of the foreclosure before issue joined, upon proof that the property was at least equal in value to the amount due upon the note in suit, the note must be deemed paid or discharged. It had performed its office and ceased to have a legal existence. It was no longer a valid contract. This defense should have been raised by a plea to the further maintenance of the suit; but a verdict rendered on a plea of the general issue, with a brief statement setting up this payment or discharge, cannot be set aside upon a general motion.

On motion for a new trial by plaintiff. An action on the second promissory note of a series of notes dated at the same time but maturing at different times of which defendant was a joint and several maker, which notes were secured by a mortgage on real estate given by the co-maker of the notes, and after the action was brought the plaintiff as mortgagee instituted foreclosure proceedings under which the equity of redemption expired before the issue was joined in the action, the value of the real estate the title to which had become absolute in the plaintiff under the foreclosure proceedings was in excess of the amount due on the note in suit. A verdict was rendered for the defendant and the plaintiff filed a general motion for a new trial. Motion overruled.

The case fully appears in the opinion.

W. P. Hamilton, for plaintiff.

Powers & Mathews, for defendant.

SITTING: WILSON, C. J., PHILBROOK, MORRILL, STURGIS, BASSETT, JJ.

STURGIS, J. On June 21, 1922, the plaintiff sold a farm known as the "Chase farm," in Limestone, to Edmund Bellfleur, a son of the defendant, for fifteen thousand dollars. The purchase price was paid by a series of notes secured by a mortgage on the farm for the full amount, and the first three notes to mature were signed by the defendant as a joint and several maker. This suit is against him to recover the amount of the second note of the series.

This second note was due March 21, 1924; and not being paid at maturity,—on April 10, 1924, this suit was brought against the defendant. On May 1, 1924, the plaintiff entered the premises and began foreclosure. The writ was entered at the following September term, and the case was continued on the docket. On the 6th day of the September term, 1925, the case was submitted to a jury and a verdict rendered for the defendant; and the case is before this court on a general motion.

By stipulation of the parties, it appears that foreclosure was completed on May 1, 1925, after the commencement of this suit, but before issue was joined. At the trial, evidence was admitted without objection which clearly shows that the value of the farm, at the time foreclosure was completed, was substantially in excess of the amount of the notes secured by the mortgage then due and unpaid.

Upon these facts, the verdict was proper. At the time of the trial, title had become absolute in the mortgagee; and the property mortgaged, being of a value at least equal to the amount due on the note in suit, constituted a payment or discharge of it. *Railway* v. *Pierce*, 88 Maine, 86, 94; *Hurd* v. *Coleman*, 42 Maine, 182, 191; *Haynes* v. *Wellington*, 25 Maine, 458. The note thereby became *functus officio*, and was no longer a valid contract. It had performed its office and ceased to have a legal existence. *Ballard* v. *Greenbush*, 24 Maine, 336; *Quimby* v. *Varnum*, 190 Mass., 211.

While this defense should have been raised by a plea to the further maintenance of the suit, *Rowell* v. *Hayden*, 40 Maine, 582, a verdict rendered upon a plea of general issue, with a brief statement of such payment or discharge, cannot be set aside upon this motion. *Cobbett* v. *Grey*, 4 Exch. Rep., 729.

Motion overruled.

WILLIAM G. MOREY *vs.* MAINE CENTRAL RAILROAD COMPANY.

Androscoggin. Opinion April 29, 1926.

When a workman contracts to perform dangerous work, or to work in a dangerous place, he contracts with reference to that danger and assumes the open and obvious risks incident to the work, or as sometimes expressed, such dangers as are normally and necessarily incident to the occupation. This is a contractual assumption of risk.

With reference to risks and dangers covered by the contract, the employer owes the employee no duty, and so cannot be held guilty of negligence.

A primary duty of a railroad company is to use due care in providing a reasonably safe place and reasonably safe appliances for the use of its employees. It does not undertake to provide a reasonably safe place and reasonably safe appliances, but it does undertake to use due care to do so, and that is the measure of its duty.

An employee has a right to assume that the railroad company will perform its duty, and his contractual assumption of risk does not cover risks arising from his employer's negligence in failing to perform its duty.

There may be a voluntary assumption, by the workman, of risks arising from the failure of the employer to perform his duty, and this occurs when the workman becomes aware of them, or they are so plainly to be seen that he must be presumed to have known and appreciated them.

Negligence of the employer being established, voluntary assumption of the risks arising therefrom must be proved by the defendant, if he would avoid the consequences of his negligence.

In the instant case there is no claim of negligence, in not giving warning of danger. The danger was obvious. There is no duty to warn or instruct a competent and experienced employee as to obvious dangers connected with his work.

Without attempting a statement, comprehensive of all cases, involving other elements and conditions, it must be held that, as to car-loading, the contract of employment of a brakeman on a freight train includes the assumption of all obvious, unconcealed dangers incident to operation of trains of cars loaded in accordance with rules of the railroad company designed to accomplish efficient transportation with reasonable safety for the employees, the property in transit and the roadbed and equipment in use.

The plaintiff's lack of observation of surrounding conditions plainly observable to a man of his age, intelligence and adequate experience cannot establish or enlarge the master's liability.

The risk which resulted in the plaintiff's injury was assumed in the contract of employment; the defendant was not negligent in accepting for transportation the car of lumber on which the accident occurred, loaded in conformity to its rules.

But, whether the decision is based upon a contractual assumption of risk, or upon a voluntary assumption of a risk caused by negligence in accepting for transportation the car of lumber piled as shown in this case, the verdict is clearly wrong.

On general motion for new trial by defendant. An action to recover damages for personal injuries suffered by plaintiff while in the employ of defendant as a brakeman on one of its freight trains. In passing over the tops of the cars, the train being in motion, in going to the cab in the locomotive, the plaintiff had to pass over two cars loaded with lumber, and in passing from one lumber ladened car to the second he slipped and fell between the cars and his left leg was severed from his body. Plaintiff alleged negligence on the part of defendant in not using due care in providing a reasonably safe place in which to work and reasonably safe appliances. The general issue was pleaded and under a brief statement assumption of risk and contributory negligence was set up. A verdict of $15,000.00 was rendered for plaintiff and defendant filed a general motion for a new trial. Motion sustained. New trial granted.

The case is very fully stated in the opinion.

Herbert E. Locke, for plaintiff.

Charles B. Carter, for defendant.

SITTING: WILSON, C. J., PHILBROOK, MORRILL, STURGIS, BASSETT, JJ.

MORRILL, J. On February 2, 1924, the plaintiff while employed by the defendant as a brakeman upon a train engaged in interstate commerce, fell from a moving train and received an injury which resulted in the amputation of his left leg above the knee. In this action to recover damages for that injury, brought under the Federal Employers' Liability Act, the plaintiff has a verdict, and the case is before us upon a general motion for a new trial.

The accident happened on a flat car loaded with lumber. The plaintiff alleges (1) "failure of the defendant to provide the plaintiff a safe place in which to work, (2) the failure of the defendant to provide reasonably proper and necessary safety appliances and arrangements, and (3) the negligence of the defendant in requiring the plaintiff to proceed in his work over and upon a car so piled with lumber and accepted for shipment by the defendant so piled with

lumber that it was impossible for a man with safety to cross the same." Failure to comply with the Federal Acts for the use of safety appliances is not claimed and was expressly disavowed by counsel; the allegation (2) of failure to provide reasonably proper and necessary safety appliances and arrangements refers to alleged failure to provide a "ladder or other device for him to climb down from said pile of lumber."

The above are the only allegations of negligence to which the injury is attributed.

The defendant pleaded the general issue, and by way of brief statement, (1) that at the time of the accident the plaintiff was engaged in the movement of interstate commerce, and was within the Federal Employers' Liability Act (which is conceded), (2) "that the alleged injury was received as the outflow of a danger inherent to and a part of the said plaintiff's contract of employment, and that the risk of such danger was assumed by the said plaintiff, and (3) that the negligence of the plaintiff is indicated by such acts of his that make his negligence the sole cause of the accident or if not, that the acts of the plaintiff contributed largely to the causation of the accident."

After an accident resulting in such serious injury as here occurred, human sympathy for the injured man is strongly aroused, and we must need recall the familiar principle, that the mere fact of the accident carries with it no presumption of negligence on the part of the employer; that the employer's negligence is an affirmative fact to be established by the injured employee.

Nor does the fact that the work performed is dangerous, or is performed in a dangerous place, and injury results, necessarily show negligence. Dangerous work must be performed; and work must be done in dangerous places; and when a workman makes a contract to do such work, or to work in a dangerous place, he contracts with reference to that danger and assumes the "open and obvious risks incident to the work," or as sometimes expressed, "such dangers as are normally and necessarily incident to the occupation." This is a contractual assumption of risk. *Ashton* v. *B. & M. R. R.*, 222 Mass., 65, 69. *Seaboard A. L. Co.* v. *Horton*, 233 U. S., 492, 504; 58 L. Ed., 1062, 1070. With reference to risks and dangers covered by the contract, the employer owes the employee no duty, and so cannot be held guilty of negligence. *Ashton* v. *B. & M. R. R.*, supra. *Murch* v. *Wilson's Sons Co.*, 168 Mass., 408, 411.

A primary duty of a railroad company is to use due care in providing a reasonably safe place and reasonably safe appliances for the use of its employees. It does not undertake to provide a reasonably safe place and reasonably safe appliances, but it does undertake to use due care to do so, and that is the measure of its duty. (*Sheaf* v. *Huff*, 119 Maine, 469). The rule of the defendant, much relied upon by plaintiff that "no car must go forward which exceeds the clearance dimensions or is loaded in a manner to make it unsafe," does not enlarge the legal duty of defendant; it was an injunction to employees to observe the legal duty resting upon the defendant. An employee has a right to assume that the railroad company will perform its duty, and his contractual assumption of risk does not cover risks arising from his employer's negligence in failing to perform its duty. *P. & R. Ry. Co.* v. *Marland*, 239 Fed. 1, 7.

But there may be a voluntary assumption, by the workman, of risks arising from the failure of the employer to perform his duty, and this occurs when the workman becomes aware of them, or they are so plainly to be seen that he must be presumed to have known and appreciated them. *Ashton* v. *B. & M. R. R.*, supra. *P. & R. Ry.* v. *Marland*, supra. *Cin., N. O. & T. P. Ry. Co.* v. *Thompson*, 236 Fed. 1. Negligence of the employer being established, voluntary assumption of the risks arising therefrom must be proved by the defendant, if he would avoid the consequences of his negligence. *Ashton* v. *B. & M. R. R.*, supra.

Cases between employer and employee to recover damages for injuries received during employment, where the question of assumption of risk is involved, fall into one or the other of these classes.

The questions presented to the Law Court are whether upon the evidence the jury was warranted in finding, as they must have found, (1) that there was no contractual assumption of risk, (2) that there was no voluntary assumption of risk, and (3) that the injury was not caused solely by the plaintiff's negligence; in the last analysis the first two issues involve the finding that the defendant was negligent in accepting for transportation a car of lumber loaded in conformity to its rules, as the car in question was.

There is very little, if any, dispute as to the material facts. The plaintiff is a young man, twenty-eight years of age, six feet tall, weighing one hundred and eighty-eight pounds, who had been employed by defendant as a brakeman since May, 1923; he was head

brakeman in a "ring crew" operating extra freight trains between Waterville and Bangor; he was expecting to take his examination for a flagman's position in the near future; he appears to have been alert, familiar with his duties as head brakeman, and efficient, a fine type of employee.

The train crew left Waterville at 1:30 A. M., on the day of the accident, and arrived at Northern Maine Junction at 6:00 A. M.; the train West was already made up, consisting of forty-six loaded cars, and with the same engine left on the return trip at 7:45 A. M. The morning was fair, the thermometer at 19° above zero at seven o'clock. In this train were four flat cars of lumber, near the forward end of the train, with one or two box cars between them and the tender. The last of these lumber cars designated as "B. & A. No. 70131," on which the accident happened, was a fully loaded car, the fifth or sixth car from the tender; in front of it was a partially loaded flat car of lumber; behind it was a box car.

All the lumber referred to, loaded on two cars of different destinations, was tendered by the Bangor & Aroostook Railroad Company to the defendant on January 30; the cars were rejected because loaded in excess of the prescribed maximum weight; the Bangor & Aroostook Railroad Company reduced the load on each car to the maximum load by removing lumber from the top; the lumber so removed was loaded on other cars. The reloaded cars were again offered to defendant on February 1, and accepted. The photographs of the cars taken upon arrival of the train at Waterville show that car B. & A. No. 70131 was a carload of mixed lumber; the lower part of the load was joist; above the joist were boards; lumber upon the car next in front, removed from the car in the rear, appears to be narrow boards, some tied in bundles.

After the engine was coupled to the train at Northern Maine Junction, the plaintiff went along the side of the train inspecting the brakes and air hose, letting off the brakes, coupling the air hose, where necessary, and looking for air leaks; in performing this duty he passed the lumber cars four times; he then went forward to the engine. His place of duty was near the head of the train; when entering or leaving double track, or passing over a railroad crossing, or passing yard limits, it was his duty to be on top of the moving train; he must also be in a position, on the ground or on the train, to relay signals from the conductor to the engineer. It was customary for the head

brakeman to ride in the engine cab; no printed rule of the road required it, nor was he ordered to do so. When the train left Northern Maine Junction the plaintiff was on the engine.

The first stop was at Newport for water, twenty-one miles from Northern Maine Junction; where the plaintiff was during this stop does not appear; he was on the engine when the train started from Newport. As the conductor swung aboard the caboose on the moving train, before it had cleared the Newport yard, his way bills dropped from his pocket; he applied the air brakes, and as the train stopped, the plaintiff left the cab, went back on the ground, and climbed to the top of a car two or three cars in the rear of the lumber cars, where he could relay the starting signal of the conductor. Having relayed the signal he started forward over the tops of the cars; he was not ordered to do so; there was no rule requiring him to go forward over the tops of the cars; such a rule manifestly would be unworkable, considering the different classes of cars making up an ordinary freight train and their varied loads; nor was there any rule or order forbidding him to go forward over the tops of the cars while the train was in motion; it is common knowledge that trainmen frequently, as occasions require, go over the tops of freight cars while the train is in motion. When he came to the forward end of the box car next behind the last lumber car, he had no difficulty in passing from the box car to the top of the lumber, which was some three feet lower than the running board on top of the box car. As he came to the forward end of the lumber car the accident occurred; no person saw it, and we quote the plaintiff's description of the occurrence:

"Q. Will you go on and tell the jury what you did from the time you reached the end of that car of lumber?

"A. As I got to the end of this car of lumber, this high car, I see it was quite difficult to go down over it, so I kneeled down and got down, swung around my hands on top of this lumber and tried to crawl down step by step over the edge of this lumber; and as I worked myself down, as I remember there was some snow on the edge of these boards and I slipped, lost my balance and fell backwards. As I fell I got hold of this brake here, tried to save myself; and the brake wasn't in good conditon as it should have—

"Q. Leave that out.

"Mr. CARTER: I object.

"Mr. LOCKE: That may be stricken out. You may tell about the brake but don't comment on what you—

"A. The brake, as I grabbed hold of it, it was loose—there was a play in it, and as I grabbed hold of it, instead of holding it pushed forward—it wasn't firm—and, of course, I lost my balance and fell off the car."

Again, still on direct examination:

"Q. I show you chalks marked Plf. Exhs. Nos. 1-4 on which you will note I have marked X at the top of the pile of lumber, and ask you whether or not the end of the car marked X is where your accident occurred?

"A. Yes.

"Mr. CARTER: Mr. Morey answered something to you in a whisper.

"Q. He said, 'Yes, I fell down right here.'

"A. I just wanted the cross where I tried to get down.

"Q. Now, I want you to describe a little more carefully how you attempted to lower yourself down over this car. Which way did you face, in the first place? Did you face toward the car you were getting down over or toward the car in front of you?

"A. When I was walking along before I started to get down I was facing the next car of lumber, but I turned around in trying to get down and kneeled down and put my hands on top of the car there where the X is on the lumber and lowered myself down and worked myself down on hands and feet, stepping down gradually.

"Q. In doing that were you facing toward—

"A. I was.

"Q. Were you facing toward the car you were on?

"A. Yes, sir.

"Q. You turned and faced toward the car you were on?

"A. Yes, sir.

"Q. Tried to lower yourself down over the side?

"A. Yes, sir."

He repeated his remembrance of the accident several times in answer to his counsel substantially as above, and on cross-examination he said:

"Q. When you started to come down how were you facing?

"A. I got all mixed up with that. I figured the other way.

"The COURT: There is a higher load of lumber, is there, one you were on?

"A. Yes.

"The COURT: Were you headed right towards that car where the higher load was or—

"A. Then according to that my back would be to the engine, coming down this way.

"The COURT: You were sort of backing down?

"A. My back would be to the engine.

"Q. You sort of got down on your hands and knees?

"A. Yes, I tried to work down.

"Q. With your back to the engine?

"A. Yes, sir.

"The COURT: That is the way I understood it in the original explanation."

. . . . . .

"Q. When you made a grab for that brake wheel did you have to reach down or was it right about even?

"A. I don't just remember. As near as I remember I reached out to grab it to save myself and when I grabbed hold of it, it was such a play in it it went over to that cant.

"Q. What did you grab, the staff or the wheel?

"A. I grabbed the wheel, and I didn't get a grip on it. I kind of hit it and it was loose and it went over to the right, right away from me.

"Q. In other words, when you started falling you didn't touch the wheel until after you had lost your footing and was falling?

"A. Yes, when I was falling.

"Q. You had gone?

"A. Well, I was going.

"Q You had gone. If you had grabbed the wheel and held on—

"A. If I had got to the wheel I would have been all right.

"Q. If you had grabbed the wheel and saved yourself you would have been all right?

"A. Yes.

"Q. You had lost control of yourself?

"A. Yes.

"Q. You had slipped, had taken your hands off the load, and you had gone, and in falling down by you saw the wheel and made a grab for it and missed it?

"A. Yes, sir."

The testimony as reported gives a very inadequate conception of the manner in which the lumber was loaded on the car. The photographs before referred to, made a part of the case, clearly show the situation; the cross on No. 4 shows clearly where the plaintiff attempted to come down, near the brake; No. 1 shows the side of the load.

As already stated, this car was loaded with mixed lumber, the joist being at the bottom of the load, the boards on top. The height of the load was six and one half feet above the floor of the car, by actual measurement; the height of the floor above the top of the rail is estimated at forty-three inches; the height of the running board on top of the box car, next back of the car of lumber was thirteen feet two and one half inches above the top of the rail; allowing for the slight difference in height, above the rail, of the floors of the box car and the flat car, the top of the load of lumber was about three feet lower than the running board of the car in the rear. This is well shown in photograph No. 3. The plaintiff had no difficulty in "stepping" from the higher car to the lower, although his memory is evidently not very clear as to it.

The car of lumber, B. & A. No. 70131, was put into the train with the brake end towards the engine; the brake shaft was to the right, looking forward, of the center of the car, and thirty inches from the right hand side of the car; the brake wheel was twenty-six inches above the platform of the car, and sixteen inches in diameter; the brake shaft above the sill was one and one quarter inches in diameter. The brake when inspected upon arrival of the train at Waterville was found in good condition; the shaft was not bent, and had no greater play with the brakes released than is necessary. The plaintiff is mistaken when he gives the impression that the brake shaft swung away from him when he attempted to grasp the wheel as he fell; the brake wheel and shaft may have turned in the socket, the brakes being released; but the appliance was unquestionably in good condition; and as before noted there is no allegation that it was defective.

After the overload had been removed by the Bangor & Aroostook Railroad Company's men, the car when received for transportation

by the defendant was loaded in conformity with the rules of the defendant road. It was properly staked; the load was properly bound with wire, and supplied with the requisite number of binders or crosspieces. The shorter lumber was piled on the right-hand side of the car looking forward, to leave the prescribed clearance around the brake wheel; on the left-hand side the long lumber was piled, but did not overhang the end of the car, in compliance with the rules. On the top of the load for the entire width of the car longer boards were piled, extending forward substantially to the end of the car, and over the clearance space around the brake wheel. Looking at the photograph No. 4 showing the side of the loaded car the manner of loading is clearly seen. Next to the stakes the joist was placed on edge, and next above the eighth joist, thirty-two inches above the floor of the car, a binder was inserted, the end of which projected from the side of the car at least the thickness of the stake, four inches; this point was forty-six inches below the top of the load; on the left-hand side of the front end of the car a ledge is clearly to be seen where the longer joist projected forward. Next above the lower binder are four joist on edge, the top of which was forty-eight inches from the floor, and thirty inches from the top of the load. At this point, three inches, or the thickness of a joist, in from the side of the load, another ledge made by a joist longer than the boards above it, may be seen. Above the joist, next to the stakes are twenty boards, apparently narrow and tied in bundles; on top of these boards is the second binder; above the second binder the longer boards were loaded, ten of them next to the stake, apparently tied in two bundles. Assuming that the boards were one inch in thickness, and the binders of the same thickness, the top of the upper binder was seventy inches above the floor of the car, and the layer of long boards was ten inches thick, giving a total height of load of eighty inches, against seventy-eight inches by actual measurement; probably the boards were not quite one inch thick.

To the left of the brake wheel, eight inches above it and forty-four inches below the top of the load was a projecting stick; and at the right forward corner of the car were other projecting sticks. The stakes projected above the top of the load.

It must be remembered that the plaintiff was not, under the circumstances, obliged to go over the boards in order to reach the engine. The train, a heavy one, had just started on an up grade and

on a curve, and it would take several minutes for it to gain much speed. The plaintiff could have descended to the ground by the ladder on the box car, and run forward. He had the choice.

Upon this examination of the case, we are of the opinion that the defendant was not negligent in accepting for transportation this car loaded in conformity to its rules; that the risk which resulted in Mr. Morey's injury was assumed in the contract of employment, and that the defendant was not wanting in due care to provide a reasonably safe place in which the plaintiff should do the work for which he was employed.

That the situation was dangerous may be conceded. So is any duty of a brakeman dangerous; it was dangerous for Mr. Morey to jump from the top of the box car over the drawbars to the load of lumber three feet below; so it is dangerous to pass from one car to another while the train is in motion; but a brakeman assumes such risks, and the employer's liability is not to be guaged by the employee's good or ill fortune in working in the face of danger,—by Mr. Morey's misfortune, or by the good fortune of the man who took his place on the run, in successfully going down by stepping on the brake-wheel.

There is no claim of negligence in this case, in not giving warning of the danger,—no allegation of that kind in the declaration. The danger was obvious. There is no duty to warn or instruct a competent and experienced employee as to obvious dangers connected with his work. *Kelly* v. *Boston El. Ry.*, 214 Mass., 461-2. *Brosseau* v. *Edward J. Cross Co.*, 215 Mass., 541-2. *Amero* v. *Adams et als.*, 217 Mass., 367-8. In that respect the case differs from *Portland Terminal Co.* v. *Jarvis*, 227 Fed., 8, strongly relied upon by plaintiff, in which the negligence charged was in not giving warning of an unusually low bridge, so low that the injured man on an unusually high car, having thrown himself flat on the roof when warned by the "tell tales," was swept from the car. So in *Norton* v. *Railroad Co.*, 116 Maine, 147, the alleged negligence was in failing to warn the plaintiff of the unusual construction of a bridge at which the plaintiff was injured in the night time.

Nor is this a case in which a risk assumed by the contract of employment was changed and increased by an intervening negligent act of a co-employee, which the injured man might not anticipate and the danger from which he might not have appreciated. *C. & O. R. R. Co.* v. *DeAtley*, 241 U. S., 310, 314; 60 L. Ed., 1016, 1020.

Nor is this a case where a load was improperly loaded and wired, and a brakeman was injured by a part of the load falling from the car while in transit. *Mich. Cent. R. Co.* v. *Schaffer*, 220 Fed., 809.

Without attempting a statement, comprehensive of all cases involving other elements and conditions, we think that it must be held that, as to car-loading, the contract of employment of a brakeman on a freight train includes the assumption of all obvious, unconcealed dangers incident to operation of trains of cars loaded in accordance with rules of the railroad company designed to accomplish efficient transportation with reasonable safety for the employees, the property in transit, and the roadbed and equipment in use. The employment is "necessarily fraught with danger to the workman—danger that must be and is confronted in the line of his duty. Such dangers as are normally and necessarily incident to the occupation are presumably taken into account in fixing the rate of wages." *Seaboard A. L. Ry. Co.* v. *Horton*, 233 U. S., 492, 504; 58 L. Ed., 1062, 1070. In the course of his work the brakeman may have occasion to go over the tops of trains in motion, passing from car to car, the danger in each case being increased or lessened with the type of car and kind of load. He must be presumed to be acquainted with the rules; at least he is entitled to assume that the cars will be loaded in conformity to the rules; it is established that the car in question was so loaded.

That the danger here was obvious is indisputable. The plaintiff only says that he did not observe the car, yet he passed it four times before the car left Northern Maine Junction and once as he went down the train before climbing to the top of the cars, all in broad daylight. He must be chargeable with knowledge of the conditions, which were plainly observable. His lack of observation of surrounding conditions plainly observable to a man of his age, intelligence and adequate experience cannot establish or enlarge the master's liability. *Brousseau* v. *Edward J. Cross Co.*, 215 Mass., 541. *Gleason* v. *Smith*, 172 Mass., 50. *Walsh* v. *Dairying Assoc.*, 223 Mass., 388.

The operating rules of a railroad are the result of experience; they are of general application, and are intended to establish a standard for the operation of the road consistent with its duty to the public; an employee engaged in operating the railroad must be held to contract with reference to them; they enter into the contract and govern the legal relation of the parties, when they are observed as well as when they are disregarded. It is not claimed and nothing appears to show that the operating rules were not reasonably effective for the safety of the employees.

These cars of lumber were tendered to the defendant by a connecting carrier at Northern Maine Junction for transportation to Massachusetts points, beyond the defendant's road, loaded while on the connecting road in conformity to defendant's rules. A ruling directing a verdict for defendant, on the ground of a contractual assumption of risk, would have been sound as a matter of law; on that ground we prefer to place the decision.

But, whether the decision is placed upon the ground of a contractual assumption of risk, or of a voluntary assumption of a risk caused by negligence in accepting the car of lumber so piled, the verdict is clearly wrong. The plaintiff was "manifestly confronted with all the difficulties and dangers to be encountered in reaching his place on the engine. It would be fatuous to say he was not aware of them, and it would be an impeachment of the mental capacity of a competent man to say that he did not appreciate them." *Briggs* v. *U. P. Ry. Co.* (Kan.), 175 Pac., 105.

It is undoubtedly true, as remarked by Mr. Justice Moody in *Butler* v. *Frazee*, 211 U. S., 459, 466, 53 L. Ed., 281, 285, that the complicated conditions of modern industry and the imperative need of employment have created a strong influence against the application of the rule of assumption of risk, "as shown by the notorious unwillingness of juries to apply the rule, and by the legislative modifications of it which from time to time have been made, as, for instance, by Congress in the safety appliance law." But the rule prevails, and where it is relevant, we must apply it however great our sympathy for the injured employee. To sustain a verdict in this case would go far toward making a railroad company liable to its trainmen for all injuries arising from the dangerous character of their work.

Motion sustained.
New trial granted.

MARGARET E. NICKERSON'S CASE.

Waldo. Opinion May 6, 1926.

Under the Workmen's Compensation Act, when an employee is totally incapacitated for work from injuries not of the character enumerated in the last sentence of Section 14, in which permanent total disability is conclusively presumed, nor included in the schedule of injuries in Section 16 in which the disability is deemed to be total for certain specified periods, and death ensues after the injured employee has been paid compensation, the rights of dependents are not fixed by Section 14, but must be referred to Section 12 for determination.

Under Section 12 the dependent widow of an injured employee, who has received compensation, is entitled to compensation beginning from the date of the last payment to the injured employee and continuing not more than 300 weeks from the date of the injury, not exceeding $3500 under the Act of 1919, Chap. 238, Sec. 12, or $4000 under the amendment of 1921, Chap. 221, Sec. 4.

When death follows an injury after compensation has been paid to the injured employee, the employer is not entitled to credit for the amount paid to the injured employee under Section 14 upon his liability to dependents under Section 12.

On appeal. On November 5, 1920, Roy Nickerson while in the employ of the Penobscot Coal & Wharf Company, received an injury, and by agreement compensation was awarded and paid to Mr. Nickerson until his death, February 21, 1922, and on a petition by his dependent widow the same weekly compensation was ordered and to continue according to the provisions of Section 12 of the Compensation Act, which was paid until the aggregate paid to Mr. Nickerson and to his widow amounted to $3500 when the employer and insurance carrier filed a petition praying to be relieved from further obligation, alleging that they had fulfilled their obligation under Section 12 of the Act, on which petition they were ordered by the Commission to continue the weekly payments of $15 to the widow, commencing from the date of the last payment to her, until they had paid her $3500 or until a period of 300 weeks from the date

of the accident had expired, from which decree an appeal was taken. Appeal dismissed. Decree below affirmed with costs.

The case fully appears in the opinion.

Buzzell & Thornton, for claimant.

Robert Payson, for respondents.

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

PHILBROOK, J., non-concurring.

MORRILL, J. This case is an appeal under the Workmen's Compensation Act by the employer of one Roy Nickerson, and the insurance carrier, from a decree of the Chairman of the Industrial Accident Commission upon their petition for a determination of their liability under a decree of the Chairman dated December 19, 1923, upon the petition of Margaret E. Nickerson, dependent widow of said Roy Nickerson. The facts are undisputed. On November 5, 1920 the said Roy Nickerson was injured while employed by Penobscot Coal & Wharf Company. An agreement for compensation, duly approved by the Commissioner of Labor and Industry, was made between the parties by the terms of which Mr. Nickerson was to receive compensation in the sum of $15 per week, (the maximum amount then payable) beginning November 15, 1920 and continuing during period of disability. Compensation was paid accordingly until the death of Mr. Nickerson which occurred February 21, 1922.

On March 1, 1923, Margaret E. Nickerson filed a petition for compensation, as the dependent widow of Roy Nickerson, alleging that her husband died as a result of the injuries sustained on November 5, 1920; the respondent answered, denying that the death resulted from said injuries, and a hearing was had. On December 19, 1923 the Chairman filed his decree, finding "that Roy Nickerson died on February 21, 1922, as a direct result of the injuries received by him while in the employ of the Penobscot Coal & Wharf Co. on November 5, 1920," and ordering compensation paid to Mrs. Nickerson "in the sum of fifteen dollars per week, commencing February 21, 1922, and continuing according to the provisions of Section 12 of the Compensation Act."

This order of December 19, 1923 was complied with, and Mrs. Nickerson was paid in accordance with its terms until the amount so paid, added to the amount paid to Mr. Nickerson, and a check of Five Dollars tendered to Mrs. Nickerson as a final payment and refused by her for that reason, aggregated $3500. The employer and insurance carrier then filed their petition dated June 27, 1925, claiming that the total payments made to said deceased and his said dependent widow in the sum of $3500, fulfill their obligation under Section 12 of the Compensation Act, and praying for a ruling as to whether or not the decree of December 19, 1923 had been fulfilled. Upon hearing the employee and insurance carrier were ordered "to continue the weekly payments of compensation to Margaret Nickerson in the sum of $15 each, commencing from the date of the last payment to her and continuing until they have paid to Margaret E. Nickerson the sum of $3500 or until a period of 300 weeks from the date of the accident has expired." From this order the appeal before us was taken.

Briefly stated, it is the contention of appellants that the Legislature intended to limit to $3500 the amount which the employer may be required to pay for compensation for injury, or for injury and death, should death follow injury after compensation has been paid to the injured employee, as held in *Sinclair's Case*, 248 Mass., 414, 143 N. E., 330. Mindful that The Workmen's Compensation Act is to be liberally construed so that its beneficent purpose may be reasonably accomplished (*Simmons' Case*, 117 Maine, 175, 177; *Scott's Case*, 117 Maine, 436, 443; *White* v. *Ins. Co.*, 120 Maine, 62, 69), we think that Sinclair's Case is not decisive of the case before us. That decision is based upon a construction of the Massachusetts Act (G. L. 1921, Chap. 152, Secs. 31, 34) in which there is the same limitation ($4000) upon liability in case of death and liability for total disability. The law of Maine has never had such uniform limitations.

The instant case is governed by The Workmen's Compensation Act of 1919, Chap. 238, Secs. 12, 14; in Section 12 a limitation of liability in case of death resulting from injury is fixed at $3500 and in Section 14 a limitation of liability in case of total incapacity is fixed at $4200; by later legislation (Public Laws 1921, Chap. 222, Secs. 4 and 5) those limitations are $4000 and $6000 respectively. Both sections also contain provisions for continued payments to dependents after the death of an injured employee who has been receiving compensation in his lifetime, provisions which upon first reading appear contradictory.

The record discloses that the injuries received by Mr. Nickerson resulted in a total incapacity for work, although they were not of the character enumerated in the last sentence of Section 14 in which permanent total disability is conclusively presumed; nor were they included in the schedule of injuries in Section 16 in which the disability is deemed to be total for certain specified periods. But under Section 14 he was entitled to receive $15 a week, while the total incapacity continued, for a period not greater than 500 weeks, and to an amount not exceeding $4200. Mr. Nickerson died while totally incapacitated, about fifteen and one half months after the injury. What then were the rights of the dependent wife? We quote from Section 14:

"If the employee shall die before having received compensation to which he is entitled or which he is receiving as provided in this act, the same shall be payable to the dependents of the said employee for the specified period, and the dependents shall have the same rights and powers under this act as the said employee would have had if he had lived."

Does this mean that in the instant case the rights of dependents are fixed by this section, and that the widow becomes entitled to receive $15 dollars a week for the remainder of the period of 500 weeks, not exceeding the balance of $4200? A literal interpretation of the language might lead to that conclusion, but we think that such could not have been the intention of the Legislature. It will be noticed that the rights of dependents are not made contingent upon death resulting from the injury; but death from any cause before the injured employee has "received compensation to which he is entitled or which he is receiving as provided in this act," fixes the rights of dependents. If this provision is applied literally to a case like the present case, it would be possible, upon the death of an injured employee, who was recovering from a total incapacity not conclusively presumed to be permanent, nor presumed to be total for a specified period (Section 16), for the dependent to receive compensation for a longer period and to a greater amount than the employee would have received, if he had lived, because there would be no way of ascertaining with certainty when the period of total incapacity would have ceased. We think that the passage quoted refers to cases of presumed total incapacity to work, and that the words "specified period" refer to the period of total disability

conclusively presumed to be permanent in cases specified in the following sentence, viz.: 500 weeks, and to the periods of presumed total disability fixed in Section 16. It follows that in cases like the present, where there is no presumed period of total incapacity to labor, the rights of dependents are not fixed by Section 14, but must be referred to Section 12 for determination.

When the original Workmen's Compensation Act of 1915 (R. S., 1916, Chap. 50, Secs. 1-48) was repealed and the Act of 1919 substituted therefor the provisions of Section 12, relating to compensation to dependents in cases of death of the employee resulting from the injury, modified as to the amount of weekly compensation, were retained, with a single amendment.

After the clause limiting the period of compensation to 300 weeks, the Legislature inserted the words, "and in no case to exceed three thousand five hundred dollars." Appellants claim that this clause was intended as a limitation upon their liability for injury and for injury and death, should death follow injury after compensation has been paid to the injured employee. In other words, they claim a credit for the amount paid to the injured employee under Section 14 upon their liability to dependents under Section 12.

This contention cannot be sustained. The rights of an employee totally incapacitated for work are fixed by Section 14 which applies to such injuries and "nothing else" (*Phillips' Case*, 123 Maine, 501, 503); the rights of dependents of an employee who dies as the result of an injury are fixed by Section 12; in these sections the limitations of the periods during which compensation is to be paid, and of the aggregate amounts of compensation are different, thus clearly indicating that they are intended to apply only to proceedings under the sections in which they are respectively found; the words, "in no case," must refer to cases arising under the particular section to which the limitation is applicable.

The significance of the clause in Section 12, inserted by the Legislature of 1919, is this: without the limitation a dependent entitled to the highest weekly compensation ($15) would receive for 300 weeks $4500; with the limitation compensation ceased at $3500. As the law now stands, since the amendment of 1925 Chap. 201, a dependent entitled to the highest weekly compensation ($18) would receive for 300 weeks $5400, but by the limitation compensation ceases at $4000.

The controlling principle is well stated in *Jackson* v. *Berlin Construction Co.*, 93 Conn., 155; 105 Atl., 326, in which the employer claimed to credit upon its liability to a dependent the sum of $1010 paid by it to the injured employee before his death. The Superior Court allowed the credit; the Supreme Court of Errors reversed the judgment. After dicussing and overruling the contention that a certain provision of the Connecticut statute permitted such credit, the opinion of the latter court says:

"The compensation to the employee is distinct from that to the dependent. The allowance of payments made to the employee cannot be made against the compensation to the dependent, and vice versa.

"A different construction might lead to the anomaly of having the entire claim of the dependent exhausted by a credit of sums paid the employee for the injury which later resulted in death.

"The compensation expressly given the dependent by this act should not be permitted to be diminished by crediting sums paid the employee in his lifetime, *unless this course is plainly sanctioned by the statute.*"

There is no language in the Maine statute which plainly sanctions the present contention of the appellants. The first part of Section 12 deals broadly with cases of death resulting from compensable injuries without any intervening period of incapacity for which compensation has been paid. Near the end of the section, after provisions for the benefit of dependents, those wholly as well as those partially dependent, is found the only provision specifically applicable where death, resulting from the injury, occurs after compensation has been paid to the injured employee, viz.:

"When weekly payments have been made to an injured employee before his death the compensation to dependents shall begin from the date of the last of such payments, but shall not continue more than three hundred weeks from the date of the injury."

This sentence is for the benefit of the employer and protects him from paying compensation twice for the same period. The Pennsylvania Law has a similar provision. *Nupp* v. *Estep Bros. Coal Mining Co.*, 272 Pa., 159, 116 Atl., 391. See *Phillips' Case*, supra, Page 504.

The action of the Legislature of 1919 in placing a limit of $3500 upon liability in case of death, when a corresponding limit of $3000, increased by the same act to $4200, upon liability for total disability had existed since the passage of the original act of 1915, cannot be fairly considered as giving such sanction.

On the contrary, the provision of Section 12, last quoted, upon the familiar maxim, "expressio unius est exclusio alterius," excludes the idea that there is to be a further credit of the amount paid to the deceased, and a corresponding reduction of the compensation due a dependent.

The "anomaly" referred to by the Connecticut court is very apparent upon an examination of the Maine statute. As the law stood in 1919, if the injured man had lived 200 weeks, he would have drawn $3000, probably all expended in the support of his family, and his wife would have been entitled to compensation for 100 weeks, less ten days, at $15 per week, say $1500. If the insurer is entitled to credit for the amount paid the deceased, the dependent wife would receive $500; if he had lived 230 weeks, he would have drawn $3450 and upon the same theory his dependent wife would receive a paltry $50, although 70 weeks of the 300-week period would remain. As the law now stands, since the amendment of 1925, Chapter 201, if an injured employee entitled to the maximum payment of $18 per week lives for 225 weeks, he will have drawn $4050, and upon the same theory his dependent wife will receive nothing, although 75 weeks of the 300-week period will remain.

We are unwilling to accede to a construction which leads to such results, subversive of the beneficent purposes of the Act, without a clear and positive legislative declaration to that effect.

In certain states a reduction of the amount payable to dependents, equivalent to the amount paid to the injured employee in his lifetime, as here claimed, seems to be expressly allowed: Wisconsin, *Milwaukee Coke & Gas Co.*, v. *Industrial Com.*, 160 Wis., 247, 251; Illinois, Act of 1913, Sec. 8, Sub. Sec. (g), as amended by Act of 1919; Minnesota, Act of 1913, Chap. 467, Sec. 13, Sub. Sec. (f) as amended by Chap. 44, extra session of 1919; Michigan, Act of 1912, Part II., Sec. 12, as amended by Act No. 64 of 1919; and perhaps others.

The conclusion at which we have arrived is in harmony with the spirit and reasoning in *Phillips' Case*, 123 Maine, 501.

Appeal dismissed.
Decree below affirmed,
with costs.

ELLA F. GUILD *vs.* EASTERN TRUST AND BANKING COMPANY.

Penobscot. Opinion May 10, 1926.

The decision of this court, that a check in part payment of a larger sum, payment of which was based upon an oral promise to marry, is unenforceable under the statute of frauds, as held in Guild v. *Banking Co., 124 Maine, 208, reaffirmed.*

In this case the defendant introduced a written statement, signed by the plaintiff, "a full and frank statement of her relations with Mr. Hill," *Guild* v. *Banking Co.*, supra. The facts contained in that statement must be considered in the light of admissions against interest but since this is an action against a representative party the living party cannot testify upon facts occurring before the decease of Mr. Hill and the plaintiff's testimony was properly excluded.

On exceptions by plaintiff. An action in assumpsit against defendant bank as executor of the estate of Frederick W. Hill to recover the amount of a check drawn by Mr. Hill upon defendant bank payable to the order of the plaintiff, delivered to her a few hours before his death, but not presented to the bank for payment during the life of Mr. Hill. The defendant contended that the check was without legal consideration, being a part payment of a larger sum, payment of which was based upon an oral promise to marry and hence unenforceable under the statute of frauds. A motion for a directed verdict in favor of defendant was granted and plaintiff excepted. An exception also was taken by plaintiff to the exclusion of certain testimony. Exceptions overruled. This case has twice before been before the Law Court. 122 Maine, 514; 124 Maine, 208.

The case fully appears in the opinion.

Louis C. Stearns and Albert A. Schaefer, for plaintiff.

Ryder & Simpson, for defendant.

SITTING: PHILBROOK, MORRILL, DEASY, STURGIS, BARNES, BASSETT, JJ. AND SPEAR, A. R. J.

DEASY, J. AND SPEAR, A. R. J., dissenting.

PHILBROOK, J. This is an action in assumpsit wherein the defendant is now sole executor of the last will and testament of Frederick W. Hill.

On the tenth day of April, 1920, said Hill drew a check on the defendant bank for the sum of seventy-five thousand dollars, payable to the order of the plaintiff. The signature of Mr. Hill was witnessed by his nurse, Agnes J. Sharpe. The check, immediately after being signed, was delivered to the plaintiff. This transaction took place on Saturday. Within a few hours after he drew the check Mr. Hill died. On the following Monday, April 12, Mrs. Guild presented the check to the Trust Company for payment, but the bank declined to accept and pay the same. This suit is brought against the bank, as executor, to compel payment of the check out of assets of the estate. The case has been before the trial court at nisi prius three times, and now, for the third time, is before the Law Court.

At the first trial of the cause, when the plaintiff had presented her evidence, and rested her case, on motion by counsel for defendant, the presiding Justice directed a verdict for the defendant. To this ruling the plaintiff excepted and her exceptions were sustained. *Guild* v. *Banking Company*, 122 Maine, 514.

At the second trial the case was submitted to a jury. Verdict resulted for the plaintiff in the sum of $88,350. Before the jury took the case from the presiding Justice, counsel for the defendant filed a motion for a directed verdict in favor of the defendant. This motion was denied, to which denial exception was taken. After verdict defendant filed a general motion for a new trial. The exception was sustained, likewise the motion, and new trial was thereby ordered. *Guild* v. *Banking Company*, 124 Maine, 208.

At the third trial, upon motion for a directed verdict in favor of the defendant, the same was granted, to which ruling the plaintiff filed exception. This exception, together with one relating to exclusion of certain evidence offered by the plaintiff, brings the case before us for a third time.

As the case is now presented there is no general motion for a new trial. Upon the validity or invalidity of the exceptions the plaintiff must win or lose.

EXCEPTION TO DIRECTED VERDICT.

At the third trial, at nisi prius, practically the same evidence and legal contentions were presented to the sitting Justice as had been before the court in the second trial, and which were considered in

Guild v. *Banking Company*, 124 Maine, 208, the controlling question being whether the check on which this suit was brought is based upon such a legal consideration as would sustain a verdict against the provisions of the statute of frauds. In the latter opinion, without dissent, we held that such legal consideration did not exist. In urging her contention that the case should again be submitted to a jury the plaintiff is practically asking this court to reverse its finding in its last opinion. The exhaustive arguments of counsel upon the facts, and the long lists of authorities, upon which those arguments are based, have again been examined with great care. To demand herein another full discussion of those arguments and authorities would be asking us to supererogate. If convinced of error in our last opinion we would cheerfully correct the error, but we are not so convinced.

EXCEPTION AS TO EXCLUSION OF EVIDENCE.

When the plaintiff had rested her case in the second trial the defendant offered a written statement, signed and sworn to by the plaintiff after the death of Mr. Hill, but before this suit was commenced, in fact bearing date of March 5, 1921. For convenience and brevity of expression we refer to this written statement as the affidavit. In the second opinion this affidavit is referred to as "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 the plaintiff's behalf in the present case; the facts so stated must be considered in the light of admissions against interest." In the same opinion, when the proof of claim was before the court, as well as the affidavit, and the probative value of the proof of claim was noted, the court observed: "It is not admissible as evidence in behalf 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." Thus, in clear and correct diction, the exact probative value of the affidavit was stated both substantially and comparatively.

At the third trial defendant, without objection, offered the same affidavit. Thereupon the plaintiff, claiming the right to testify in rebuttal, took the stand. Referring to the occasion when the check was signed and delivered, we take the following from the testimony offered in rebuttal by the plaintiff:

"Q. Will you tell what Mr. Hill said to you, and what you said to Mr. Hill?"

This question was objected to by the defendant, was excluded by the court, and the plaintiff excepted.

And later, in the same examination; "Now, will you state whether or not that affidavit contains all of the facts relating to the transactions covered by the affidavit?" To this question counsel for defendant objected, "on the ground that the question necessarily covers matters, either directly, or indirectly by implication, taking place prior to the death of Mr. Hill." The court overruled the objection to the extent of allowing the witness to answer categorically in the negative.

Then followed this question; "Now, will you state in what particulars there are certain facts not contained in this affidavit which are material to this transaction?" This question was excluded, but the plaintiff's counsel was allowed an exception and was also allowed to make a statement as to the purpose of the question. That statement was as follows: "I want it to go into the record that in asking the witness, Mrs. Guild, to state the facts which were not contained in the affidavit and which were material to the transaction, I expected to prove that, at the time of the giving of the check, Mr. Hill made the statement that 'here is this check for seventy-five thousand dollars as a part of what I agreed or promised to give you. You will cash it, and as soon as we are married, if you then wish to change it for securities, I will arrange to have you do so. I want you to give me your promise, however, that you will cash it.' "

In support of this exception counsel for plaintiff argued that the materiality of this statement, made by Mr. Hill after the delivery of the check, is apparent; that it clearly discloses that when the check was given Mr. Hill still understood that the engagement theretofore existing between him and Mrs. Guild was in existence and that he was still desirous of marriage. While admitting the familiar rule which disqualifies the living party from testifying in suits where the other party is an administrator or executor of the estate of a deceased person, the plaintiff still contends that when the

defendant offered the affidavit of the plaintiff, narrating in detail the relations existing between the plaintiff and the defendant's testate, it thereby removed the common law disability so far as a full recital of all the facts which the defendant had partially disclosed is concerned.

In support of her legal position the plaintiff cited *Cline* v. *Dexter*, 101 N. W., 246, a case decided by the Nebraska Court in 1904. This was an action by an administrator to recover from a bank the balance of a deposit claimed to be due from the bank to the plaintiff's intestate. The bank filed an answer admitting the possession of the deposit, disclaiming any right to it, but alleging that it was claimed by another. The claimant, thereupon, was permitted to intervene and the case proceeded as between the administrator and the intervener.

The administrator introduced in evidence a letter from the intervener to the widow of the plaintiff's intestate which recited the original transaction between the intervener and the plaintiff's intestate upon the strength of which the intervener claimed that the deposit belonged to him and not to the estate of the deceased. The intervener, thereupon, sought to testify in regard to the entire transaction, but his testimony was excluded by the court. The court, in reversing the judgment, said,

"The principle is general that, where a particular witness or a certain kind of testimony may be excluded, if the party who has the right to insist upon the exlcusion waives that right and himself calls the witness, or introduces the testimony, he cannot, after he has obtained what he desires, insist upon the exclusion so far at least as to prevent a full development of the matters which he has partially presented.

"The letter which was introduced by the administrator was a narrative of the transaction with the deceased by the adverse party, which was evidently offered by the administrator upon the theory that its contents were an admission against the interest of the person writing it, and that it would aid the administrator in maintaining his theory of the case. It was offered for the purpose of showing what the transaction actually was, and though it was not the oral testimony of the adverse party, it seems to us that, since it was his declaration and statement, and was offered as evidence for the purpose of showing the facts as to the transaction, the principle is the same as if he had been placed upon the witness stand by the administrator and had given testimony for the same purpose. Having offered evidence of the original transaction, the administrator cannot now say that the adverse party should not also testify to it. He cannot take the benefit of the

story of the transaction recited in the letter and at the same time refuse to give the adverse party the opportunity to testify in regard to the same matter."

We think the learned counsel for the plaintiff, who claims that this decision of the Nebraska Court is squarely in point, overlooked the clear distinction between the purpose, for which the testimony in that case was declared admissible, and the decision of this court as to the probative value of the affidavit now under consideration. In the Nebraska case the court says (supra) that the letter "was offered for the purpose of showing what the transaction actually was." We have declared, 124 Maine, 208, that the affidavit "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."

Moreover, the Nebraska statute, Code of Civil Procedure, Section 329, throws light upon the decison in *Cline* v. *Dexter*, supra. It is there provided; "no person having a direct legal interest in the result of any civil action or proceeding, when the adverse party is the representative of a deceased person, shall be permitted to testify to any transaction or conversation had between the deceased person and the witness, . . . unless such representative shall have introduced a witness who shall have testified in regard to such transaction or conversation, in which case the person having such direct legal interest may be examined in regard to the facts testified to by . . . such witness, but shall not be permitted to further testify in regard to such transaction or conversation." These provisions of the Nebraska statute clearly differentiate themselves from those of our statute. Vide *Sherman* v. *Hall*, 89 Maine, 411.

Finally, for another reason we hold that the sitting Justice committed no error in excluding the testimony of Mrs. Guild. By examining the statement of counsel as to the purpose in offering that testimony it clearly appears that, if admitted, it could not change the result reached by this court upon the question of sufficiency of legal consideration as a basis upon which to hold a verdict in behalf the plaintiff. Therefore the plaintiff is not legally aggrieved by the exclusion of the proferred testimony.

Exceptions overruled.

WILBUR H. BAKER *vs.* BERNICE W. BROWN, EXRX.

Penobscot. Opinion May 22, 1926.

The words "in their discretion" in a clause in a will giving instruction to executors relative to a payment of a legacy, construed that the time of payment only of the legacy was "in their discretion" and not the payment of the legacy itself.

In the instant case the provision in question must be construed as giving the plaintiff an absolute legacy in consideration of services he had already performed in the employ of the testator, and the words "in their discretion" can only be made to harmonize with the rest of the language of the will if construed to mean in their discretion as to time of payment.

That the legacy to the plaintiff was in the nature of a demonstrative legacy, and the fact that the fund out of which the testator may have intended it to be paid did not materialize, at least in the manner anticipated by the testator, will not deprive the plaintiff of the legacy.

On report. An action of debt to recover one thousand dollars as a legacy under the second clause of the will of Wilbur A. Estabrook, deceased husband of the defendant. The question involved was the interpretation of certain language used in the will in giving instructions to the executors, viz.: "in their discretion to pay the plaintiff the sum of one thousand dollars" on the final disposal of the testator's business. By agreement the cause was reported to the Law Court. Judgment for the plaintiff for $1,000 with interest from the date of the writ.

The case sufficiently appears in the opinion.

Terence B. Towle, for plaintiff.

Fellows & Fellows, for defendant.

SITTING: WILSON, C. J., PHILBROOK, DUNN, MORRILL, STURGIS, BASSETT, JJ.

WILSON, C. J. An action of debt to recover a legacy alleged to have been bequeathed to plaintiff by the husband of the defendant in his last will and testament. The case comes to this court on a report of evidence taken out before the trial court, or as the report reads, "upon so much of the evidence as is legally admissible."

The only points urged by counsel relate to the interpretation of the will, the defendant raising no question, if the legacy is an absolute one, as to the maintenance of the present action.

Wilbur A. Estabrook, husband of the defendant, who since his death has remarried, in February, 1920, made his will which contained the following provisions:

"2. To Wilbur H. Baker I give my watch; and on the final disposal of my business as hereinafter provided I instruct my executors, in their discretion, to pay said Wilbur H. Baker, the sum of one thousand dollars, in token of his faithful services."

"4. It is my desire that the business heretofore carried on by me should be sold, but I do not wish my estate to be diminished through a forced or hasty sale. I therefore instruct my executors to carry on my business as a going concern, until such time and opportunity presents itself for disposal to advantage. During the continuance of the business, and before the sale of the same by my executors, I request that Wilbur H. Baker be continued in employment, and that he receive a salary of fifty dollars per week; my wife to have all the net profits of the store during its continuance as a business and before sale."

All the rest of his estate was given to his wife, who was named as co-executrix with his counsel.

The plaintiff, Wilbur H. Baker, who was a cousin of the testator, had at the time of making the will been in the employ of the testator about thirteen years, and was a trusted employee, and during the testator's last illness had general charge of the business which is described in the evidence as a tobacco business.

Following the death of Mr. Estabrook in November, 1921, the executors proceeded to carry out his instructions as to the carrying on of the business. The plaintiff, however, refused to work for the sum mentioned in the fourth paragraph of the will, and demanded and received seventy-five dollars per week until September, 1923, when he left for reasons not disclosed by the evidence. In the meantime the co-executor had resigned and the defendant became the sole executrix.

The business was never sold, but in March, 1925, a fire occurred, and the stock destroyed, or was disposed of, and the insurance collected by the defendant. Following the closing up of the business this action was brought.

The plaintiff contends that the bequest contained in the second paragraph was an absolute bequest payable at the discretion of the executors after the business was sold; while the defendant contends that it was a conditional bequest payable only in the discretion of the executors, if the plaintiff continued as a faithful employee and at the salary named, and dependent upon the price received when sold, and that the defendant was acting within the authority vested in her under the will in refusing to pay, inasmuch as the plaintiff did not continue to work till the sale was made, at the salary named, but took advantage of her necessities and forced her to meet his demands for more pay, and there has been no sale.

Whether he was still faithful during the time of employment following the testator's death, or what the result of the loss by fire was, does not appear from the evidence. It is admitted, however, that there is sufficient funds in the estate to pay the legacy to the plaintiff.

The language of paragraph 2, was not well chosen to make clear the testator's intent beyond doubt. It is the testator's intent which must govern, and which must be gathered from the instrument itself. Very little of the plaintiff's testimony was legally admissible, but his incompetency as a witness appears to have been waived, since the objections to such portions of it as were objected to, were urged on other grounds. Nor does it throw much light on the issues involved, except the length of time he had been in the testator's employ and the nature of his services.

We cannot conceive of the testator using the language he did, if he intended that whether the sum named should be paid the plaintiff, was left discretionary with the executors, and dependent in any degree upon the manner in which he performed his services after the death of the testator, or upon the price received for the business.

We think the second paragraph must be construed as giving to the plaintiff an absolute legacy of one thousand dollars in consideration of the faithful services he had already performed.

The legacy was no doubt intended to be paid from the proceeds of the business when sold, or a form of demonstrative legacy. The testator instructed, —an absolute term,—the executors upon the sale of the business to pay the legacy. The words "in their discretion" can only be made to harmonize with the rest of the language, if construed to mean, in their discretion as to time of payment. They, or the present executrix, cannot arbitrarily withhold it.

The fact that the fund out of which it was to be paid did not materialize, at least in the manner anticipated by the testator, would not deprive the plaintiff of the legacy. Even the failure of the fund altogether would not deprive him of the right to the sum intended to be his in token of services faithfully performed. *Stilphen Applt.*, 100 Maine, 146.

No question being raised by the defendant as to her right to exercise discretion as to time of payment or that the estate would be embarrassed in any way by the payment at the time this action was brought, we think judgment may be ordered for plaintiff with interest from the date of the writ.

So ordered.

STATE *vs.* MICHAEL J. BUCKLEY.

Penobscot. Opinion June 2, 1926.

Unexplained, the possession of large quantities of intoxicating liquors is sufficient evidence of unlawful sale by the accused.

In criminal cases the burden of proof never shifts, but the burden of evidence may shift with alternating frequency.

An inference or presumption of unlawful intent, however, does not shift the burden of proof which remains upon the State throughout the trial to prove the guilt of the respondent beyond a reasonable doubt.

As to the burden of evidence, a different rule obtains. When such a presumption exists as in the instant case, the respondent, unless he is satisfied to rely upon the presumption of innocence which attends him, is bound to explain the facts on which the presumption rests.

On exceptions. Upon a complaint charging illegal possession of intoxicating liquors, respondent was tried, found guilty, and sentence imposed, and respondent excepted to a part of the charge. Exceptions overruled. Judgment for the State.

The case sufficiently appears in the opinion.

Artemus Weatherbee, County Attorney, for the State.

Edward P. Murray and George E. Thompson, for the respondent.

SITTING: WILSON, C. J., PHILBROOK, DUNN, MORRILL, STURGIS, BASSETT, JJ.

STURGIS, J. In the course of a search of the premises occupied by the respondent, State and Federal officers found and seized twenty-two quarts of Scotch whiskey. At the trial below, upon a complaint charging illegal possession of intoxicating liquors under R. S., Chap. 127, Sec. 27, as amended, the presiding Judge instructed the jury fully and correctly that the State must prove that the respondent is guilty of the offense charged beyond a reasonable doubt. He then defined reasonable doubt fully and with legal exactness; and having given general instructions as to the respective duties of the jury and the court, included the following in his charge:

"If you should find as a matter of fact that there was an unusually large quantity of liquors seized at this time, then you are entitled to take that fact into consideration, and if you should be so satisfied and so find, there is a burden of explanation on the respondent in this case to explain that situation."

To this portion of the charge the respondent reserved an exception which he presents to this court.

Unexplained, the possession of large quantities of intoxicating liquor is sufficient evidence of intended unlawful sale by the accused. *State* v. *Intox. Liquors*, 106 Maine, 135. *State* v. *Intox. Liquors*, 106 Maine, 138. Such inference or presumption of unlawful intent, however, does not shift the burden of proof, which remains upon the State throughout the trial to prove the guilt of the respondent beyond a reasonable doubt. The respondent is not bound to prove his own innocence. He may rely on the presumption of his innocence which the law affords him, to rebut the inference or presumption of fact arising from the quantity of liquor found in his possession, and sit silent. If he does, the jury must still be satisfied of his guilt beyond a reasonable doubt. If he permits such prima facie proof of his unlawful intent to remain with the jury unexplained, he hazards an adverse verdict which his explanation might have avoided.

As this court says in *State* v. *Flye*, 26 Maine, 312, 318,—"There is a wide distinction between the requirement in a criminal prosecution, that the accused shall prove his innocence, when a presumption is raised against him, and the necessity of his explaining in some degree the facts on which that presumption rests."

The principle involved in this case is well considered in the opinion in *Commonwealth* v. *Dana*, 2 Metc. (Mass.), 329. The instruction in that case was,—"If from the whole of the evidence on the part of the Commonwealth, they were led to the belief, that the defendant did sell and deal in lottery tickets, and had them in his possession for that purpose, as charged in the indictment, they would be authorized to find him guilty, unless he should have succeeded on his part, as had become his duty, to explain those facts and circumstances consistently with his innocence of that unlawful intention." In sustaining the legal sufficiency of this instruction that court says:

"It has been objected, that by the charge the burden of proof was thrown on the defendant to prove his innocence. But we think this is not the meaning of the charge; for the jury were instructed, that they were not authorized to find the defendant guilty, unless the evidence was such as to lead them to believe that he was guilty. The remark that it was the duty of the defendant to explain those facts and circumstances proved against him, consistently with his innocence, meant no more than he ought so to do. But still if he failed, they were not to find a verdict against him, unless on the whole evidence they believed him guilty. If they doubted, they were to acquit him. So the case was left to the jury on the right footing, namely, that the burden of proof was not shifted, but still remained on the Commonwealth to prove the guilt of the defendant, and if a reasonable doubt remained, the defendant was to be acquitted."

There is a manifest distinction between the burden of proof and the burden of evidence. Generally the burden of proof upon any affirmative proposition necessary to be established as the foundation of an issue does not shift, while the burden of evidence or the burden of explanation may shift from one side to the other according to the testimony. *Buswell* v. *Fuller*, 89 Maine, 600; *Foss* v. *McRae*, 105 Maine, 140. In criminal cases the burden of proof never shifts, but the burden of evidence may shift with alternating frequency. Underhill's Criminal Evidence (3d Ed.) Sec. 50. The instruction that the burden of explanation of his possession of twenty-two quarts of Scotch whiskey was upon the accused in the instant case, rested upon the hypothesis that the jury found such possession and drew an inference of unlawful intent therefrom. Upon such an affirmative finding beyond a reasonable doubt, as the previous instructions

clearly required, the jury could and should have brought in a verdict of guilty, unless the accused by his explanation created a reasonable doubt of his guilt.

In the sense in which the expression "burden of explanation" was used by the presiding Judge, we think it was intended only as a statement of the law as to the burden of evidence and must have been so understood by the jury. In the light of the previous instructions as to the burden of proof resting upon the State and the presumption of innocence attending the accused, we cannot believe that the instructions in question could have been understood by the jury as taking from them the right to weigh the evidence for themselves, or as an instruction that proof of possession by the accused of the quantity of whiskey charged, relieved the State of the burden of proof resting upon it. For these reasons the exception must be overruled.

Exception overruled.
Judgment for the State.

FRANK O. BELDING ET ALS. IN EQUITY

vs.

MABEL R. COWARD ET ALS.

Hancock. Opinion June 15, 1926.

It is an established rule, in construing devises, that all estates are to be holden to be vested except estates in the devise of which a condition precedent to the vesting is so clearly expressed that the courts cannot treat them as vested without deciding in direct opposition to the terms of the will.

Where there is a bequest to a child, it is a general rule that there is a vested interest unless the contrary intention is shown by the will.

The presumption that the legacy was intended to be vested applies with far greater force where a testator is making provision for a child or a grandchild than where the gift is to a stranger or a collateral relative.

By the common law a vested interest is descendible, devisable and alienable. This common law rule has not been modified by our Legislature.

In the instant case the younger son having died before reaching the age of thirty-five years, his vested interest would pass to his older brother under the provision of law relative to descendibility of vested interests; and by the terms of the will that interest would also pass, since the testator expressly provided that at the termination of the trust, if there be but one son surviving, then the whole of the estate is to be paid to that survivor.

The older son made a will before the time at which the trust terminated under the father's will, but since a vested interest may be devised, then the will of the older son operated, not only upon his own vested interest, but the vested interest of his younger brother which had passed by due process of law to the older brother.

At the death of the older son the trust became a mere passive, dry, naked trust, and his devisees are entitled to have the property transferred at once.

On report. A bill in equity seeking the construction and interpretation of the will of Charles Fry, a resident of Bar Harbor, who died September 3, 1910. The principal questions involved were whether the interests of two sons of testator as legatees were contingent or vested interests. A hearing was had on bill and answer, and by

agreement of the parties the cause was reported to the Law Court. Bill sustained and decree in accordance with the opinion.

The case fully appears in the opinion.

Frank O. Belding of Boston, Massachusetts, for complainants.

Lynam & Rodick and Hale & Hamlin, for respondents.

SITTING: WILSON, C. J., PHILBROOK, DUNN, MORRILL, STURGIS, BASSETT, JJ.

PHILBROOK, J. The complainants, Frank O. Belding and Frederic M. Burnham, are administrators d. b. n. c. t. a., of the estate of Charles Fry, and executors of the will of John Fry, son of Charles.

Charles Fry died September 3, 1910, leaving no widow. There survived him two sons, John and Charles, Jr., also two sisters, Elizabeth Fry Ridgway and Isabel Fry Norris. His will was dated January 20, 1910.

Isabel died January 20, 1922, intestate, her husband having predeceased her, leaving as her heirs at law, J. Parker Norris, Henry Norris, Edith Norris Shober, John R. Norris, Mary Norris Biggs, Philip Norris, Alice Norris, and William P. Norris.

Elizabeth died June 19, 1925, intestate, her husband having predeceased her, leaving as her heirs at law Mabel R. Coward, Violet R. Jaeckel, and Thomas Ridgway.

These heirs of Isabel and Elizabeth, eleven in number, are all impleaded, and, for convenience and brevity of expression, may be referred to as the first group of defendants.

The second group of defendants are devisees under the will of John Fry, son of Charles, namely, trustees of a fund to provide cash prizes for students of the Bar Harbor High School, an endowment fund for a church at Bar Harbor, and a similar fund for the Young Men's Christian Association in the same town.

These two groups make contending claims upon the property in the hands of the complainants and the latter present this bill in equity praying,

First, that this court will construe the will of Charles Fry, and particularly as to the rights and interests of the parties arising under paragraph six of said will, and in and to the property covered by said sixth paragraph;

Second, that this court will construe the will of John Fry, and particularly as to the disposition of the property in question;

Third, that this court will instruct the complainants as to the heirs at law and interest of Charles Fry, Jr., and particularly as to his portion, if any, and the disposition of the estate mentioned in the sixth paragraph of Charles Fry, Sr.

By the first four paragraphs of the will of Charles Sr., he provides for the appointment of executors and trustees, and makes certain minor bequests. In the fifth paragraph he devises to John and Charles Jr., equally, share and share alike, "all my personal property, except stocks, bonds and other securities."

Then follows the paragraph which gives rise to the present controversy and reads as follows:

"Sixth; As to all stocks, bonds and other securities or real estate of which I may die possessed, I direct my said heretofore mentioned trustees, to hold the same with full power to change any investments at their discretion; whether the same be legal investments or otherwise, until the younger of my two sons shall reach the age of thirty-five years, until that time shall arrive, the income therefrom shall be equally divided between the two. If at that time there be but one son surviving, then the whole of that estate is to be paid over to him, but if both be living that the same is to be equally divided between the two, heirs and assigns forever."

The younger of the two sons, Charles, Jr., was born November 18, 1891, and died, intestate, October 9, 1918, at the age of twenty-six years and eleven months. In other words, this younger son did not live to reach the age of thirty-five years mentioned in his father's will. He left no widow nor issue.

The older son, John, was born May 24, 1888, was twenty-two years old when his father died, himself died April 18, 1925, aged thirty-six years and eleven months. He died testate leaving no widow nor issue.

It is alleged in the bill, and admitted by the answers, that the trustees mentioned in the will of Charles, Sr., never qualified for the performance of that duty but that in fact they acted as trustees under the will of Charles Fry, until one of those trustees, Thomas Leaming, died December 14, 1911, and after that date no trustee was appointed and qualified to take his place, and that John, the son of Charles, acted as sole trustee. It is also alleged and admitted that

the income arising under said sixth paragraph was divided equally between the sons, John and Charles, Jr., until the death of the latter, and thereafter the entire income was paid to John until his death on April 18, 1925.

Waiving the technicality of legal qualification of trustees, we have in effect a typical case of an express, active trust before us. Trustees competent to act were named, the cestuis que trustent were designated, the object of the trust was declared, the method of its administration was declared, and a limit of time within legal rules was pronounced. It should be noted, however, that the cestuis and the remainder men are the same persons in this case, hence some decided cases in which the remainder men are other than the cestuis may not be wholly pertinent to the issues here involved.

The first group of defendants declares that the real question is whether this trust property goes to the now heirs of the original testator, Charles Fry, of his own blood, or whether it was acquired by John Fry, (whose heirs in part at least would be on his mother's side and not of Charles Fry's own blood) and whether John Fry has made a valid disposition of this same property under his will to strangers.

The second group of defendants declare the issue somewhat differently, viz., intestacy as to part of Charles Fry's estate developed due to failure of a contingency in his will and lack of a residuary clause, hence a question arises as to whether his heirs at law as of the date of his death or his heirs at law living at the date of the failure of the contingency take the estate which failed.

The "pole star" of testamentary construction is the intention of the testator, when clearly expressed in the will. When so expressed, and it violates no rule of law or public policy, it must be given effect. It overrides precedents and technical rules of construction. *Bradbury* v. *Jackson,* 97 Maine, 449. All rules of construction are designed to ascertain and give effect to the intention of the testator, and that intention is to be ascertained exclusively by the words of the will as applied to the subject matter under the surrounding circumstances. *Andrews* v. *Applegate,* 223 Ill., 535; 79 N. E., 176; 12 L. R. A., (N. S.), 661. The intention of the testator, expressed in his will, must prevail, provided it be consistent with rules of law, and this rule is one to which all other rules must bend, says Chief Justice Marshall in *Smith* v. *Bell,* 6 Pet., 68; 8 U. S., (L. ed), 322. See also

Methodist Church v. *Fairbanks*, 124 Maine, 187; *Barry* v. *Austin*, 118 Maine, 51; *Gregg* v. *Bailey*, 120 Maine, 263.

As we have already observed, this will was executed January 20, 1910. At that time John was more than twenty-one years of age, Charles, Jr. about nineteen. The two sisters, Elizabeth and Isabel, were both alive. Although there was no paragraph in the will which, in explicit terms disposed of the residuum of the estate, yet any one cannot read the instrument without discovering the plain intention of the testator, under the surrounding circumstances, as to three things at least; first, taking all parts of the testament into consideration he intended to dispose of his entire estate, leaving none to be administered as intestate property; second, that exclusive of the minor legacies mentioned in the second, third and fourth paragraphs, his two sons and their "heirs and assigns forever" were to be the sole objects of his testamentary favor; third, that "under the surrounding circumstances" he did not intend that his sisters or their descendants should be beneficiaries of his bounty.

Keeping constantly in mind the fundamental rule of testamentary interpretation above referred to, and the fact peculiar to this case, namely, that the cestuis que trustent were the only children of the testator, was the interest created by the sixth paragraph of the will a contingent or a vested one?

Contingent remainders (whereby no present interest passes) are those where the estate in remainder is limited to take effect, either to a dubious and uncertain person, or upon a dubious and uncertain event; so that the particular estate may chance to be determined and the remainder never take effect. Vested remainders (whereby a present interest passes to the party, though to be enjoyed *in futuro*) are those where the estate is invariably fixed, to remain to a determinate person, after the particular estate is spent, 2 Blackstone 168, 169. In his work on Real Property, Book II., Page 224, Professor Washburn says; "The broad distinction between vested and contingent remainders is this: in the first there is some person *in esse* known and ascertained who, by the will or deed creating the estate, is to take and enjoy the estate upon the expiration of the existing particular estate, and whose right to such remainder no contingency can defeat. In the second it depends upon the happening of a contingent event whether the estate limited as a remainder shall ever take effect at all. The event may either never happen, or it may not happen until after

the particular estate upon which it depended shall have determined, so that the estate in remainder will never take effect." *Woodman* v. *Woodman*, 89 Maine, 128; *Bryant* v. *Plummer*, 111 Maine, 511. But Professor Washburn also declares that a remainder should never be deemed to be a contingent one when it can be construed to be vested, within the intention of the one who creates it. Book II., Page 226.

A legacy or devise should be considered as giving a vested rather than a contingent interest. It has long been an established rule, in construing devises, that all estates are to be holden to be vested, except estates in the devise of which a condition precedent to the vesting is so clearly expressed that the courts cannot treat them as vested without deciding in direct opposition to the terms of the will. If there be the least doubt, advantage is taken of the circumstances occasioning the doubt; and what seems to make a condition is holden to have only the effect of postponing the right of possession. *Kimball* v. *Crocker*, 53 Maine, 263; cited in *Strout* v. *Strout*, 117 Maine, 357.

Where there is a bequest to a child it is a general rule that there is a vested interest unless the contrary intention is shown by the will. *Bryant* v. *Plummer*, supra; *Morse* v. *Ballou*, 109 Maine, 264. *Hicks* v. *Hicks*, (N. J.), 132 Atl., 857.

So strong is the presumption that testators intend the vesting of estates that it is an elementary rule of construction that estates legal or equitable, given by will, should always be regarded as vesting unless the testator has by very clear words manifested an intention that they should be contingent upon a future event. And so clear must be his expression that it is held that in cases of doubt or ambiguity as to the time when it was intended the estate should vest, the remainder will be regarded as vested rather than contingent. *Blaine* v. *Dow*, 111 Maine, 480.

Under the fifth paragraph of the will the testator had devised and bequeathed all his personal property except stocks, bonds and other securities to his two sons, John and Charles, their heirs and assigns, to be equally divided between them, share and share alike.

Under the sixth paragraph, now under examination, a substantial amount of property, real and personal, was to constitute a trust fund, the income of which was to be paid to the two sons in equal shares until the younger should reach an age of presumable discretion. The testator knew that the thirty-fifth birthday of the younger son would occur on November 18, 1926, a date which was sure to be reached

as time moved onward. He might have named that date in explicit words if he had chosen to do so, but he did not, preferring to use the expression "until the younger of my two sons shall reach the age of thirty-five years," an event which might never happen and in fact never did happen. It is natural to assume that the testator, having at the date of his will two boys one of whom was nearing and the other just past the age of majority, expected those boys to live to young or middle manhood, and he expressly provided that if both sons were living when the younger reached the age of thirty-five the trust property was to be equally divided between them and their "heirs and assigns forever," but if only one son were then living the whole of the estate was to be paid to him. In Ruling Case Law, Vol. 23, Page 531, we find the following, supported by authorities: "Since reaching a specified age, which is a common possibility, is not regarded as an uncertain event which will prevent the vesting of an estate, a grant or devise of a remainder to a person named on attaining a specified age, usually twenty-one, creates a vested remainder on the making of the grant or on the death of a testator. A devise will be regarded as vested, and not contingent, if the property is devised to trustees to be by them divided among the children of the testator on the youngest attaining the age of twenty-one years, where the will, taken as a whole, indicates an intention of the father to vest his estate at his death in his then living children, subject to the trust estate in his executors."

The presumption that a legacy was intended to be vested applies with far greater force where a testator is making provision for a child or a grandchild than where the gift is to a stranger or to a collateral relative. *Wengard's Estate*, 143 Pa. St., 615; 22 Atl., 869; *Atchinson* v. *Francis*, 182 Ia., 37, 165 N. W., 587, the latter being a case where the opinion shows much careful research.

In the instant case we hold that the two sons, John and Charles, Jr., took a vested and not a contingent interest in the remainder of the property mentioned in said sixth paragraph of the father's will. The intention of the testator is so plain, which intention is not inconsistent with rules of law, that to it "all other rules must bend." In this conclusion we also recognize the principle, so well established as to require no citation of authorities, that the law favors the vesting of estates, and that, in the absence of any intention of the testator appearing to the contrary, the estate will vest at the time of his death.

By the common law a vested interest is descendible, devisable and alienable, 23 R. C. L., 572. As we are not now considering contingent interests we are not concerned with the provisions of R. S., Chap. 78, Sec. 3. Our Legislature has not modified the common law rule regarding vested interests as above stated. There has never been any question but that vested interests descend to the heirs of the remainderman who dies before the termination of the particular estate. *Waddell* v. *Waddell*, 99 Mo., 338, 17 A. S. R., 575; *Cole* v. *Creyon*, 26 Am. Dec., 208; *Bufford* v. *Holliman*, 60 Am. Dec., 223; *Jones* v. *Knappen*, 63 Vt., 391, 22 Atl., 630. It follows then that the vested interest of Charles, Jr., upon his death, would pass to his brother John, under provision of law relating to descendibility of vested interests.

Another avenue is open through which the interests of Charles, Jr. would plainly pass to his brother John, and that avenue may be found by the terms of the will of Charles, Sr. in the same sixth paragraph which is now being discussed. The testator expressly provides that at the termination of the trust, if there be but one son surviving then the whole of the estate is to be paid to the survivor, each brother besides his vested interest having a contingent interest in his brother's share depending on his survivorship, which became vested in the survivor upon the contingency happening during the period of the trust.

A vested interest can be devised. The authority for this rule is distinctly stated in *Roberts* v. *Roberts*, 102 Md., 131, 62 Atl., 161. This is an outstanding case of such importance and authority that it may be found in III., A. S. R., 344, 5 Ann. Cas., 805, 1 L. R. A., (N. S.), 782. There will also be found in this case, as well as in *Ducker* v. *Burnham*, 146 Ill., 9; 37 Am. St. Rep., 135, learned, exhaustive, and supporting opinions upon the principles which we have herein above discussed. In Ruling Case Law, 576, the author says "There can, of course, be no question but that vested remainders may be devised." We hold, and answer the prayers in this bill as follows:

1. The two sons of Charles Fry, John and Charles, Jr., by the terms of his will took vested interests under said sixth paragraph;

2. That upon the decease of Charles, Jr., intestate, his vested interest passes under the terms of the father's will to John, as the survivor, or, if not so passing by the will, would become vested in John by right of inheritance.

3. That the vested interest of John, together with the vested interest which he received from his brother, Charles, Jr., was devisable;

4. That the devisable interests passed by the will of John to the various persons and institutions named in his will;

5. That the trust terminates on November 18, 1926;

6. That at John's death it became a mere passive, dry or naked trust, and his devisees are entitled to have the property transferred at once.

7. Counsel fees to be allowed out of the estate, the amount of such fees to be determined by the Justice below who signs the final decree.

Decree in accordance with this opinion.

DUMOND'S CASE.

Aroostook. Opinion June 17, 1926.

Under the Workmen's Compensation Act, a contribution by a son to a father to save an investment in a business venture whether applied on account of principal or interest of a mortgage loan may not be regarded as contribution for support.

While contributions to sustain a failing business venture are not contributions for support within the meaning of the Compensation Act; a failure in business may produce conditions that will result in partial or even entire dependency on one's children for support.

Dependency entitling a claimant to compensation does not require that the claimant be actually and solely dependent upon the earnings of the injured person for the bare necessities of life. The Act must be construed liberally in this respect, and dependency held to exist, whenever it appears that the contributions were relied upon by the claimant for his or her reasonable means of support suitable to his or her station in life.

In the instant case only so far as the claimant is able to show that he was relying upon the financial assistance of his son at the time of the injury for the support of himself and those dependent upon him, as reasonably necessary, and in a manner suited to their station in life, can an employer be compelled to contribute for the loss.

On appeal. Claimant is an alleged dependent father of Victorie Dumond who was fatally injured while in the employ of Boone & Brewer Construction Company on August 18, 1924. The only question involved was the dependency of the father. A hearing was had and compensation for partial dependency was awarded, and from an affirming decree an appeal was taken by respondents. Appeal sustained. Decree to be modified in accordance with the opinion.

The case is fully stated in the opinion.

C. F. Small, for claimant.

Robert Payson, for respondents.

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

WILSON, C. J. An appeal from a decree based upon the findings of the Deputy Chairman of the Industrial Accident Commission.

The employee was fatally injured in an accident arising out of and in the course of his employment. The claimant is the father of the deceased employee and the question involved is whether the father was a dependent within the meaning of the Compensation Act, and, if so, to what extent.

Over four years prior to the accident the claimant was the owner of two farms and apparently in comfortable circumstances. At the insistence of the deceased, he sold his two small farms and purchased a larger farm upon the understanding that the deceased would remain at home, when needed, to aid in carrying on the farm, and contribute, so far as he was able, from his earnings outside, toward the payment of the purchase money mortgages; and at the death of the father the farm should become his. The agreement or understanding to this effect, however, was oral and never reduced to writing. The deceased worked at home a part of each year and contributed a part, at least, of his earnings when at work away toward the carrying out of this arrangement.

The purchase price of the farm was eighteen thousand dollars of which six thousand was paid in cash obtained from the sale of the two small farms and the balance of twelve thousand was obtained on two mortgages, one for eight thousand and a second for four thousand dollars.

The new venture, however, proved disastrous financially during the years preceding the accident, as was the case with many other

farmers during that period in Aroostook County; and at the time of the accident in August, 1924, the farm was hardly worth the amount of the mortgage indebtedness. The father was also indebted to various other parties in considerable sums, and for a year or more previous to the death of the son was, undoubtedly, insolvent, if forced to liquidate.

Since the purchase of the farm he had paid the interest on the first mortgage and reduced the principal to seven thousand four hundred and thirty-seven dollars and twenty-three cents. Two hundred and twenty-eight dollars and twenty-nine cents was paid on the principal during the year prior to the accident and from the earnings of the deceased. Nothing had been paid on the second mortgage, not even the interest. The above facts were all found by the Deputy Commissioner who presided at the hearing.

The Deputy Commissioner also found that the claimant was dependent upon the deceased to the full extent of his contributions in cash of three hundred and thirty-nine dollars and the value of his labor on the farm upon the ground that the payment of interest on a mortgage may be held to be in the nature of support within the meaning of the act; and held that, inasmuch as the unpaid interest on the second mortgage more than offset the sum paid on the principal of the first mortgage, no reduction should be made by reason of the application of any part of his cash contribution to the payment of the principal of the mortgage indebtedness.

The insurance carrier who prosecutes the appeal contends that inasmuch as the farm was purchased as an investment and in the nature of a business venture, contributions by the deceased in accordance with such an arrangement as was shown to exist in this case, cannot be held to be contributions for support within the meaning of the Act; that financial distress brought on by a bad investment, while it may produce need of financial assistance, does not, necessarily, result in dependency under the Compensation Act.

It may well be that contributions to sustain a failing business venture are not contributions for support, but a failure in one's business may produce a condition that will result in a partial, or even an entire dependence upon others for support. Such a situation, we think the Deputy Commissioner was warranted in finding in the instant case.

The business venture on which the father at the suggestion of the son embarked in 1919 had, through a succession of bad crops, resulted in the father being compelled to depend on the aid of his children, not only to save his investment, but for the support of his family. In so far as the contributions were to save the investment in the farm, we think they cannot be regarded as contributions for support, whether applied to the payment of principal or interest. The payment of interest in such a case is not like the payment of interest on a mortgage of a house in which the dependent lives, which may be treated as rent, as has been held in some instances. *Milwaukee Basket Co.* v. *Ind. Com.*, 173 Wis., 391.

We do not think it was intended under the Compensation Act to compel contributions by an employer to one to whom an injured employee had been furnishing financial assistance to further some business enterprise merely because the person so assisted was dependent on such assistance to save himself from financial loss. Only in so far as the claimant is able to show that he was relying on such assistance at the time of the injury as reasonably necessary for the support of himself and those dependent upon him in a manner suited to their station in life can the employer and the industry be compelled to contribute.

We think the Deputy Commissioner erred in treating as contributions for support payments by the deceased to his father that were applied on the investment in the farm, whether on the principal or in payment of interest, and the testimony of the father was that all the deceased's cash contributions for the preceding year were so applied.

Dependency within the meaning of the Act does not require that one be actually and solely dependent upon the earnings of some one for the bare necessities of life. *MacDonald's Case*, 120 Maine, 52, 57; *Rhyner* v. *Hueber Bldg. Co.*, 156 N. Y. S., 903; nor under the Compensation Act of this state does dependency follow from mere contributions by the injured workman as it apparently does under the Illinois statute. *Humphrey* v. *Indus. Com.*, 285 Ill., 372; *Rockford Cabinet Co.* v. *Indus. Com.*, 295 Ill., 332. The Act, however, should be construed liberally, and dependency is held to exist whenever it appears that the contributions were relied upon by the claimant for his or her reasonable means of support, and suitable to his or her station in life. In re Stewart, 72 Ind., App., 463; *Powers* v. *Hotel Bond Co.*, 89 Conn., 143; *Blanton* v. *Wheeler & Howes Co.*, 91 Conn., 226.

As the court said in re Carrol, 65 Ind. App., 146, "To confine the inquiry to the question whether the family of the deceased workman could have supported life without any contributions from him, or whether such contributions were absolutely necessary, in order that the family might be reasonably maintained is not a fair test of dependency; but rather the inquiry should include the question whether the contributions from the workman were looked to, depended and relied on in whole, or in part, by the family for means of reasonable support." See also *In re Peters*, 65 Ind., App., 174. *McMahon's Case*, 229 Mass., 48.

The test, therefore, is not whether the family could support life without the contributions of the deceased, but whether they in fact reasonably depended upon him in some degree for their means of living according to their position in life. Bradbury's Workman's Compensation Law, 2d Ed., Page 571-573; *Howells* v. *Vivian & Sons*, 85 L. T., 529, 4 W. C. C., 106.

The evidence is unsatisfactory as a basis for determining to just what extent the father relied upon the deceased for the support of himself and those dependent upon him; but under the above test, we are not disposed to disturb the Deputy Commissioner's finding that there was a partial dependency, but only to the extent of the value of the deceased's labor on the farm. A remanding of the case for further evidence might produce more tangible evidence upon which to base a conclusion as to the actual extent of this dependency; but from evidence of the claimant and having in mind the manner of living of the ordinary farmer and the evident difficulty on the part of the claimant in understanding the questions and making himself clear, we think it very doubtful whether any more satisfactory result would be arrived at by a further hearing.

We do not, however, arrive at the same result as the Deputy Commissioner as to the total earning of the deceased or the value of his contributions to the father in the form of labor on the farm. However, we adopt his findings as to wages where the evidence does not appear to us conclusive.

From the evidence it appears that the deceased, in the year previous to his death, worked on the road at the employment in which he was engaged at the time of the accident from June 1st to August 18th, or a period of eleven weeks and one day, and at three dollars and eighty-five cents per day, or $23.10 per week, and earned at that rate $257.85.

From April 1st to June 1st, or a period of eight weeks and four days, he worked on the farm, at home at the rate of twenty-two dollars per week, including room and board at seven dollars per week. From November 1st of the previous year to April 1st, he worked in the woods, at a per diem not clear from the evidence; but for a total wage, found by the Deputy Commissioner to be $628.00. From August 18th of the previous year to November 1st, the evidence is that he was at work on the farm. We, therefore, find the total value of his services on the farm for the year preceding his death at the price fixed by the claimant to be $425.34, or a total yearly earning of $1311.19.

We cannot accept the contention of the insurance carrier that the evidence shows an agreement by counsel that his average daily wage at the various occupations was $3.85, plus one dollar per day for board; and find that the above sum is the total amount of his earnings for the year prior to his death, of which he contributed to the support of the claimant nineteen weeks and two days' labor on the farm at $15 per week, or $2.50 per day,—his contribution to the father being merely the value of his labor—or a total of $290.00 or .221 per cent. of his total earnings. We do not think any deduction can be made for the expense and upkeep of an automobile owned by the claimant. The evidence does not show that any of the contributions of the deceased went for this purpose, as appeared in *MacDonald's Case*, 120 Maine, 52, or that the automobile was used otherwise than in connection with the claimant's business. It is agreed that two thirds of the deceased's average weekly wage is $14.81, .221 per cent. of which is $3.27, which is the weekly sum the insurance carrier should pay the claimant for the period fixed by the Act.

The mandate will be:

Appeal sustained.
Decree to be modified in accordance with this opinion.

STATE *vs.* RALPH WEBBER.

Knox. Opinion June 17, 1926.

The rule of pleading and evidence inserted in Chapter 116, Public Laws, 1925, that "in any prosecution under this Section, it shall not be incumbent on the State to allege or prove that the respondent did not possess such a permit," is unconstitutional.

A statute may be, however, in part constitutional and in part unconstitutional, and that part of Chapter 116 which defines the offense and prescribes the penalty is valid.

In the instant case the complaint or indictment must negative the possession of a permit, and proof beyond the attendant presumption is not required of the Government to establish a prima facie case.

The respondent takes nothing by his exception to the overruling of the motion in arrest of judgment. The complaint under which the respondent was convicted, fully and accurately alleged that he did not possess a permit issued as prescribed by the statute.

On exceptions. The respondent after a conviction in the Rockland Police Court of illegal transportation of intoxicating liquors without a Federal permit, in violation of Chapter 116, Public Laws of 1925, appealed to the Supreme Judicial Court where he was tried before a jury and found guilty, and then seasonably filed a motion in arrest of judgment on the ground that the statute on which the complaint and warrant is found is contrary to the Constitution of the State of Maine and to the Constitution of the United States, which motion was overruled by the presiding Justice and respondent excepted. Exception overruled. Judgment for the State.

The case is fully stated in the opinion.

Leonard C. Campbell, County Attorney, for the State.

Frank A. Tirrell, Jr., and Rodney I. Thompson, for the respondent.

SITTING: WILSON, C. J., PHILBROOK, DUNN, MORRILL, STURGIS, BASSETT, JJ.

STURGIS, J. The respondent was convicted in the municipal court on a complaint charging him with illegal transportation of intoxicating liquors without a Federal permit, in violation of Chapter

116, Public Laws, 1925. Upon appeal, after trial and a verdict of guilty, he seasonably filed a motion in arrest of judgment on the following grounds:

"The complaint and warrant and matters therein alleged, in the manner and form in which they are therein stated, are not sufficient in law for any judgment to be rendered thereon, and the said complaint and warrant is bad because the statute on which said complaint and warrant is found is contrary to the Constitution of the State of Maine and to the Constitution of the United States."

The presiding Justice overruled this motion, and the case is before this court upon the respondent's exception to such ruling. Exceptions taken to the admissibility of evidence during the trial are not presented by the bill of exceptions and must be considered withdrawn.

The statute under which this complaint is drawn reads: "No person shall knowingly transport into this state or from place to place therein any intoxicating liquor, or aid any person in such transportation without being in possession of a permit therefor duly issued under authority conferred by the provisions of the national prohibition act of October twenty-eight, nineteen hundred and nineteen, and amendments thereto, providing for the enforcement of the eighteenth amendment to the constitution of the United States; and in any prosecution under this section it shall not be incumbent on the state to allege and prove that the respondent did not possess such a permit."

The real question presented by the exception is the constitutionality of Chapter 116, Public Laws, 1925.

The power of the Legislature to prohibit the transportation of intoxicating liquors into this State, or from place to place therein, knowingly and without a permit issued under the authority of the National Prohibition Act, is not challenged; but it is charged that the Legislature transcended its power in including permits issued under amendments to that Act,—the construction placed upon the statute by the respondent being, that by the language used future amendments to the National Prohibition Act are incorporated by reference.

The prohibition against the transportation of intoxicating liquors without a Federal permit was first enacted in this State as Sec. 1, of Chap. 167, of the Public Laws of 1923. It was an amendment of Sec. 20, of Chap. 127, of the R. S.,—that section being struck out in

its entirety and the new provision inserted in place thereof. In description of the offense, the 1925 Act is identical with the 1923 Act. The latter was approved April 4, 1923, and the former April 2, 1925. Prior to both these dates the National Prohibition Act had already been amended by an Act Supplemental to the National Prohibition Act, dated November 23, 1921, being Chapter 134, of U. S. Statutes of that year. Supplementing this fact of amendment with the common knowledge which we share that the phrase "and amendments thereto" is often appended to statutory reference in legislative draft and enactment, regardless of the fact that no amendment exists, we find little ground for assuming that future amendments were included in the legislative intention.

The presumption is to the contrary. The court is bound to assume that in the passage of this law the Legislature acted with full knowledge of all constitutional restrictions. It is said that this rule, by the uniformity of its application, finds expression in the legal maxim that "All acts of the Legislature are presumed to be constitutional." *Laughlin* v. *City of Portland*, 111 Maine, 486; *State* v. *Pooler*, 105 Maine, 224. It is not to be supposed that the Legislature intended to incorporate Federal amendments not then made, the contents of which, as affecting permits to transport intoxicating liquors, they could have no knowledge. It is to be presumed that they enacted this law with full knowledge that incorporation by reference into our Statutes of future pharmacopoeial revisions or enactments of Congress constituted an unlawful delegation of legislative power, as stated in *State* v. *Holland*, 117 Maine, 288, and *State* v. *Vino Medical Co.*, 121 Maine, 438.

For the reasons stated we are of the opinion that the reference in Chapter 116, Public Laws, 1925, to amendments to the National Prohibition Act, refers only to amendments then made, and the incorporation of the same into the statute does not render it invalid.

But a further attack is made upon the validity of the statute. In enacting this amendment the Legislature struck out from Chapter 167, Public Laws, 1923, a provision as to the evidential effect of failure of a person to exhibit a Federal permit, and substituted therefor the rule of pleading and evidence that "in any prosecution under this section it shall not be incumbent on the state to allege and prove that the respondent did not possess such a permit." By this provision

the respondent says he is deprived of his right guaranteed by the Constitution to demand and be informed of the nature and cause of the accusation against him.

The offense described in the enacting clause of Chapter 116, Public Laws, 1925, stripped of formal language, is the transportation of intoxicating liquors into or from place to place within the State, without being in possession of a permit therefor duly issued under authority conferred by the National Prohibition Act. The elements of the offense include the lack of possession of such a permit, and the offense itself cannot be accurately and definitely stated if the exception be omitted from the description. Such being the character of this statutory offense, we think the rules of pleading and constitutional limitations require that the State allege that the respondent did not possess a Federal permit.

At common law the omission of such an allegation would be fatal to the indictment. In *State* v. *Keen*, 34 Maine, 500, this court said: "No rule of criminal pleading is better established, than that, when the enacting clause describes the offense with certain exceptions, it is necessary to negative all the exceptions." To the same effect see *State* v. *Godfrey*, 24 Maine, 232; *State* v. *Gurney*, 37 Maine, 155; *Hinckley* v. *Penobscot*, 42 Maine, 89; *State* v. *Boyington*, 56 Maine, 512. A more definite statement of this rule is, that where a statute defining an offense contains an exception or proviso in the enacting clause which is so incorporated with the language describing and defining the offense that the ingredients of the offense cannot be accurately and clearly described if the exception is omitted, an indictment founded on the statute must allege enough to show that the accused is not within the exception. *United States* v. *Cook*, 84 U. S., 168. The rule is affirmed in *Commonwealth* v. *Hart*, 11 Cush., 130, and that court says: "The word 'except' is not necessary in order to constitute an exception within the rule. The words 'unless,' 'other than,' 'not being,' 'not having,' &c., have the same legal effect, and require the same form of pleading." That "without being in possession of" has the same legal effect, we have no doubt.

It was the undoubted purpose of the Legislature to simplify and modify this rule of pleading; and while it is well settled in this State that the Legislature may abbreviate, simplify, and in many other respects modify and change the forms of complaints and indictments, even to the extent of authorizing the omission of allegations which

do not serve any useful purpose,—it is equally well established that it cannot deprive a person accused of crime of such rights as are essential to his protection and which are guaranteed by the Constitution. One of the most important of these rights is that the accusation shall be formally, fully, and precisely set forth. *State* v. *Bartley*, 92 Maine, 422; *State* v. *Mace*, 76 Maine, 64. The language of this court in *State* v. *Crouse*, 117 Maine, 363, is pertinent and worthy of repetition: "The memorable and time-honored declaration, that, in all criminal proceedings, the accused shall have a right to demand the nature and cause of the accusation (Con. of Maine, Article 1, Section 6), entitles him to insist that the facts alleged to constitute a crime shall be stated in the indictment with that certainty and precision of designation requisite to enable him to meet the exact charge, and to plead the judgment, either of acquittal or conviction, which may be rendered upon it, in bar of a later prosecution for the same offense. The description of the offense must be certain, positive, and complete."

We think, to quote the language of this court in *State* v. *Mace*, supra, that "in its laudable desire to prune away the great prolixity of the forms required by the common law, (the Legislature) cut too deep and did not leave enough to meet the requirements of the situation." The failure to possess the permit required by the statute is one of the ingredients of the offense described, and if the same be omitted, the description of the offense will not be "certain, positive, and complete."

It is an elementary rule, however, that the same statute may be in part constitutional and in part unconstitutional. In *Commonwealth* v. *Petranich*, 183 Mass., 217, the court says: "It is an established principle that where a statutory provision is unconstitutional, if it is in its nature separable from the other parts of the statute, so that they may well stand independently of it, and if there is no such connection between the valid and the invalid parts that the Legislature would not be expected to enact the valid part without the other, the statute will be held good, except in that part which is in conflict with the Constitution. But if the objectionable part is so connected with the rest that they are dependent on each other and cannot well be separated, or that the valid part, if left alone, would so change the character of the original statute that the Legislature would not be presumed to have enacted it without the other, the whole must be

set aside." This rule in principle has been fully adopted in this State. *State* v. *Mitchell,* 97 Maine, 66; *Cole* v. *County Commissioners,* 78 Maine, 538; *Barbour* v. *Camden,* 51 Maine, 611.

We are of opinion that this rule is applicable to the statute under consideration. The provision authorizing the omission of allegation and proof of non-possession of a Federal permit is clearly separable from the other parts of the statute. The Legislature of 1923 enacted the substantive definition of the offense and prescribed the penalty therefor, without the invalid provision appended. The Act of 1925 is but a re-enactment of the substantive part of the 1923 Act, with a rule of pleading and evidence added. That part of the statute defining the offense and prescribing the penalty, we think, is constitutional.

The provision authorizing the State to omit proof of the non-possession of the permit stands in such relation to the invalid authority to omit allegation of that fact, that it must be included in the rejected portion of the statute. It neither stands independently of it, nor is it in its nature separable. This result is unimportant, however. Though the indictment or complaint negatives the possession of a license or permit, (as it must), yet proof thereof beyond the attendant presumption is not required of the Government to establish a prima facie case. *State* v. *Woodward,* 34 Maine, 293; *State* v. *Churchill,* 25 Maine, 306; *State* v. *Crowell,* 25 Maine, 171. Bishop on Statutory Crimes, Section 1051.

The respondent takes nothing by his exception, however. The complaint under which he was convicted fully and accurately alleges that he did not possess a permit issued as prescribed by the statute. The State is not precluded from using averments that are sufficient in law to constitute a good accusation because statutory forms have been otherwise prescribed. *State* v. *Jones,* 115 Maine, 201; *State* v. *Reed,* 67 Maine, 127.

The entry therefore must be, exception overruled.

Exception overruled.
Judgment for the State.

STATE *vs.* DAVID ALBERT.

Androscoggin. Opinion June 17, 1926.

The language "and the persons whose names are in the box are liable to be drawn and to serve on any jury, at any court for which they are drawn, once in every three years and not oftener, except as herein provided" in Sec. 4, Chap. 111, R. S., creates an exemption and not a disqualification, and such exemption is a personal privilege which may be asserted or waived by the juror. It furnishes no ground of challenge to the parties.

On exceptions. At the trial of this case at the June, 1925, Term of the Superior Court for Androscoggin County, a juror disclosed on his voir dire that he had served as a juror at the preceding April Term of the same court, and was challenged for cause by counsel for the respondent on the ground that the juror had served within three years and was thus disqualified under Sec. 4, Chap. 111, R. S., but the presiding Justice overruled the objection and refused to exclude him from the panel, and respondent excepted. Exceptions overruled. Judgment for the State.

The case fully appears in the opinion.

Benjamin L. Berman, County Attorney, and Elton H. Fales, Assistant County Attorney, for the State.

Herbert E. Holmes, for the respondent.

SITTING: WILSON, C. J., PHILBROOK, DUNN, MORRILL, STURGIS, BASSETT, JJ.

STURGIS, J. At the trial of this case in the court below, a juror disclosed on his voir dire that he had served in the same court within a period of three months prior to the time of the trial. He was challenged for cause and exception taken to the refusal of the trial Judge to exclude him from the panel.

By Sec. 4, Chap. 111, of the R. S., after a list of jurors has been duly prepared and approved, the names of those listed shall be placed on tickets in the jury box, "and the persons whose names are in the

box are liable to be drawn and to serve on any jury, at any court for which they are drawn, once in every three years and not oftener, except as herein provided."

Section 11 of the same chapter provides that persons whose names are drawn from the jury box upon venires from the court "shall be returned as jurors unless they have served on the jury within three years," or by reason of sickness or absence from the town are considered unable to attend.

Section 12 immediately following declares, "In either of said cases (draft of person who has served within three years or is sick or absent) others shall be drawn in their stead; but any person thus excused, or returned and attending court, and there excused, shall not be excused on another draft, although within three years; and when all the persons whose names are in the box, have served within three years, or are not liable to serve, the selectmen shall draw out the required number of those who have not served for eighteen months."

The question raised by the exception is one of legislative intent to be gathered from the whole statute. Applying this rule, what do we find? There is no express disqualification of persons as jurors who have served as such within the previous three years. Nor do we think the language warrants an interpretation which would imply such a disqualification. Reading together all the provisions of the statute which bears upon the question of prior jury service, it appears that any person whose name is in the jury box is liable to serve not only once in three years but under certain circumstances oftener. If the box be emptied of names of persons who have not served within that period, then the draft shall be made from those who have not served within eighteen months. Again, if a person is drawn and at the draft or in the court he be excused, he is subject to all future drafts and resulting service. If the general provision against liability to draft and service oftener than once in three years was intended to effect an absolute disqualification, is it reasonable to presume that in the same Act provision would be made to meet the exigency of an empty jury box by calling disqualified jurors back to service, or taking away from them their disqualification if they had once been excused? We think not. The reasonable construction to be placed upon these several provisions is that they are intended to give to the citizen the privilege of an exemption from service more than once in three years, unless the list be exhausted or he be once excused.

Definition supports this construction. Webster defines "liable" as "bound or obliged in law or equity." The same meaning is given to the word in Black's Law Dictionary. In *Booth* v. *Commonwealth*, 16 Gratt. (Va.), 519, quoted in Words & Phrases, First Series, Vol. 5, Page 4110, "liable," as used in the Virginia statute declaring all free white male persons who are between the ages of twenty-one and sixty "shall be liable to serve as jurors," is held to mean "bound" or "obliged." And that court, in deciding that the statute creates an exemption and not a disqualification, says: "The word 'qualified' is neither expressed nor implied in the act. The word both expressed and implied is 'liable,' which has a very different meaning from 'qualified'."

In other states, statutes of the same general import have been held to create exemptions only. The statute of Arkansas (Mansfield's Dig., Section 3995), declaring "No person shall be compelled to serve as a grand or petit juryman more than one term in any one year," is held in *Nat. Bank of Boyertown* v. *Schufelt*, 145 Fed., 509, "not (to) operate as a disqualification but only as a personal exemption which the person called as a juror could assert or waive as he chose." The statute of Florida (R. S., Sec. 1152), providing that "No person shall be drawn to serve on a petit jury more than once during the same calendar year, was construed in *Yates* v. *State*, 43 Fla., 177, to create a personal privilege to an exemption if claimed by the juror, but not to disqualify.

In this State, while the question of prior service has not been before this court, the general intent and purpose of this legislation has been considered in its application to other sections of the same statute. By Sec. 3, of Chap. 111, R. S., persons holding certain public offices or engaged in stated professions, etc., are exempted from service, and the statute declares that such names "shall not be placed on the list." But this directory provision is construed to create an exemption only. *State* v. *Quimby*, 51 Maine, 395. Section 2 of the same chapter provides that the board of municipal officers "at least once in every three years, shall prepare a list of persons, under the age of seventy years, qualified to serve as jurors." In holding that a juror seventy-four years of age was competent to serve, in *State* v. *Day*, 79 Maine, 127, the court said: "Statutes similar to the one in question exist in many of the states in this Country, as well as in England. But the general doctrine applicable

to these statutes is that they do not disqualify, but merely excuse the persons named." We think this doctrine extends to the provisions of the statute under consideration.

Upon the question of the respondent's right to challenge the juror for cause, the law is well settled in this State. An exemption is a personal privilege with which the parties to the cause have no concern, and which furnishes them no cause of challenge. The juror may assert or waive his privilege. If he assert it, the court would of course excuse him; if he waive it, the parties have no ground of complaint. *State* v. *Wright*, 53 Maine, 328; *State* v. *Quimby*, supra; *State* v. *Day*, supra.

There being no error in the ruling of the trial Judge, the entry must be,

Exception overruled.
Judgment for the State.

ALBERTA N. DAY, Pro Ami *vs.* RALPH L. CUNNINGHAM.

Penobscot. Opinion June 30, 1926.

The duties of a motorist approaching the rear of a stationary street car are regulated by statute. If the car has to stop to land or take on passengers, he must bring it (automobile) to a full stop.

But when the automobile is approaching to meet a street car, the statute does not purport to apply. In such case the mutual rights and duties of the parties depend upon the common law.

By the common law the motorist and pedestrian must each exercise due care. But the due care rule demands of the motorist greater vigilance than is required of a pedestrian. The care to be exercised by the motorist must be commensurate with the danger arising from lack of it.

No man has a right to operate an automobile through a street blindfolded. When his vision is temporarily destroyed (as by a glaring light) it is his duty to stop his car.

A pedestrian about to cross a street or pass from a street car to the curbstone is not, as a matter of law, bound to look and listen. But if the road is a city or village street, having considerable automobile traffic, failure to look for approaching vehicles may be strong evidence of negligence.

A pedestrian does his full duty if, before crossing a street, he or she looks for approaching cars and waits until it reasonably appears that a prompt crossing can be safely affected, if approaching automobiles are lawfully controlled. Failure to anticipate negligence on the part of the driver of a motor vehicle does not render the pedestrian negligent as a matter of law.

The law does not expect of a child an adult's caution. But it does require of children that degree of care which ordinarily prudent children of their age and experience are accustomed to use under similar circumstances. A child of eight years accompanied by her mother cannot ordinarily be charged with contributory negligence, though she fails to look for approaching automobiles, if the mother assumes to direct, and does direct, the child where and when to cross the street.

In the instant case the jury were justified in finding (1) that the defendant was negligent, because when blinded by a glaring light he did not stop his car, nor attempt to do so, but merely put the car in neutral, and because he failed to exercise that degree of care required of a motorist in passing a stationary street car; (2) that the child who was injured was not guilty of contributory negligence, because in attempting to cross the street, she acted under her mother's immediate direction, and (3) that the mother was not guilty of contributory negligence, because before directing her child to make the crossing, she waited until it reasonably appeared that the street could be safely crossed, if approaching automobiles were lawfully controlled.

On motion by defendant for a new trial. An action to recover damages sustained by plaintiff, a minor eight years of age, by being knocked down and injured by an automobile driven by defendant. The case was tried to a jury and a verdict of $383.33 was rendered for plaintiff, and defendant filed a general motion for a new trial. Motion overruled.

The case fully appears in the opinion.

William Cole, for plaintiff.

George E. Thompson and Ross St. Germain, for defendant.

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

DEASY, J. Automobile Accident Case. Time of accident: Nov. 26, 1924 at about 5:30 P. M. Place: South Main St., Brewer. The plaintiff has a verdict. The defendant presents a general motion for new trial.

Just before the happening of the accident Mrs. Lena Day with her three children, Alberta, the plaintiff, eight years old, a boy of

six and a babe in arms, alighted from the forward right hand door of a South bound trolley car. Having to reach the Eastern side of the street the little group waited until the street car had started and gone by them and then passing its rear and walking toward the Eastern curb, Alberta, the plaintiff, was knocked down and injured by a north bound automobile driven by the defendant.

The duties of a motorist approaching the rear of a stationary street car and desiring to pass it are, in part, at least, regulated by statute. Act of 1921, Chap. 211, Sec. 9. He is required to "bring it (the automobile) to a full stop."

But when, as in the instant case, the automobile is approaching to meet a street car the statute does not purport to apply. In such case the mutual rights and duties of the parties depend upon the common law.

By the common law the motorist and pedestrian must each exercise due care. Huddy on Automobiles 6th Ed., Sec. 414.

But the due care rule demands of the motorist greater vigilance than is required of the pedestrian.

The care to be exercised by him who drives an automobile upon the public streets must be "commensurate with the danger to be avoided," (*Savoy* v. *McLeod*, 111 Maine, 235), "correspond with the capacity to injure," (*Weidner* v. *Otter*, 171 Ky., 167, 188 S. W., 335), be "commensurate with the danger arising from lack of it," (*Aiken* v. *Metcalf*, 90 Vt., 196, 97 Atl., 669).

The jury was warranted in finding the defendant negligent. According to his own testimony, "The light was blinding me." Thereupon he put the car in neutral and allowed it to run by its own momentum 13 to 15 miles an hour i. e. 19 to 21 feet per second until almost the instant of the impact when, seeing the little girl, he applied his emergency brake and reverse gear thus stopping his machine in three car lengths from the point of collision.

There was evidence introduced by the defendant tending to show that he "saw them (the plaintiff and her companions) get off and saw them crossing the street."

This the defendant denies. But his own testimony is sufficient to justify the finding of negligence. The jury may have reasoned that the defendant should have applied his brake when he became blinded by the street car's glaring headlight, without waiting until

he saw the plaintiff (to quote his language) "right out in front of my radiator" when it was too late to save her. Such reasoning was not erroneous.

"It is the duty of a driver of an automobile to stop his car when for any reason he cannot see where he is going." *Buddenburg* v. *Kavanagh*, 17 Ohio App., 252.

"No man is entitled to operate an automobile through a public street, blindfolded. When his vision is temporarily destroyed (by a glaring light) it is his duty to stop his car." *Hammond* v. *Morrison*, (N. J.), 100 Atl., 154. *Osbun* v. *De Young*, (N. J.), 122 Atl., 809.

For another reason the jury were justified in charging the defendant with negligence. Independently of the statute, which does not apply in the pending case, the law requires increased care on the part of the motorist in passing a street car which has stopped to take in or land passengers. Huddy 6th Ed., Sec. 423. Due care is care that is "commensurate with the danger to be avoided." *Savoy* v. *McLeod*, supra.

"Not only must he expect passengers on the side of the car from which they alight, but he must anticipate that some passengers may pass behind the car to the other side" Huddy 6th Ed., 423. *Johnson* v. *Johnson*, 137 Minn., 198; 163 N. W., 160; *McMonagle* v. *Simpers*, (Penn.), 110 Atl., 83.

The defendant in his testimony evinced perfect familiarity with the statutory rule which applies only when the automobile and street car are headed the same way. (Act of 1921, Chap. 211, Sec. 9), but both by language and conduct he seemed oblivious of any duty to persons circumstanced as was the plaintiff.

Nor is the defense of contributory negligence established. A pedestrian about to cross a road or, as in the present case, to walk from a street car to the sidewalk, is not as a matter of law bound to look and listen. *Shaw* v. *Bolton*, 122 Maine, 234. But if the road is a city or village street having considerable automobile traffic, failure to look for approaching vehicles may be strong evidence of negligence. Huddy 6th Ed., Sec. 549.

There is indeed no evidence that the plaintiff herself looked up or down the street either before or after starting. But she was only eight years old. She was accompanied by her mother who directed her movements. When her mother told her to go she went toward the sidewalk.

The law does not expect of a child an adult's caution. But it does require of children, even of the plaintiff's age that degree of care "which ordinarily prudent children of their age and experience are accustomed to use under similar circumstances." *Crosby* v. *R. R. Co.*, 113 Maine, 274; *Moran* v. *Smith*, 114 Maine, 55; *Colomb* v. *Railway*, 100 Maine, 420; *Levesque* v. *Dumont*, 116 Maine, 25. Huddy 6th Ed., 478.

An ordinarily prudent child of eight years if unaccompanied by a parent or other custodian would probably, before crossing a city or village street, look for approaching automobiles. This, children are taught to do in homes and schools. But the jury may well have found that an ordinarily prudent and intelligent child of eight years, accompanying her mother, would confidently rely upon her mother's judgment and unhesitatingly follow her mother's directions as to the place and time of crossing streets. If the jury so found they committed no error of law. The defendant is not entitled to a new trial by reason of any contributory negligence of the plaintiff herself.

But it is urged that Mrs. Day the mother of the plaintiff failed to exercise due care and that her negligence is imputable to her daughter. If the plaintiff had been a child of very tender years incapable of exercising any degree of care, the doctrine of imputed negligence would apply. Huddy 6th Ed., 480.

We hold that it also applies in case of children old enough and of sufficient intelligence to exercise some degree of care, if such children are accompanied by a parent who directs their movements.

It therefore becomes necessary to consider whether the case discloses due care on the part of Mrs. Day.

As to her care Mrs. Day testified thus: "We stood where we were until the (trolley) car pulled its length by . . . . I stopped and looked in both directions so as to be sure the street was clear . . . . When I saw the street was clear I told her to go, she and her brother."

The jury apparently believed this testimony. If true it establishes Mrs. Day's due care. It is said that she did not look, else she would have seen the defendant's machine which must have been near. The obvious answer, the answer that must have satisfied the jury, is that when she gave the word "Go," the receding street car was still between her and the defendant's automobile.

When Mrs. Day said in her testimony, "I saw the street was clear" she did not mean that the whole of South Main Street was free from traffic. This would have been much more than the law required of her. She did her full duty if, before starting her little procession, she waited until it reasonably appeared that a prompt crossing could be safely effected if approaching automobiles were lawfully controlled. *Marden* v. *Railway*, 100 Maine, 41; *Wetzler* v. *Gould*, 119 Maine, 276. She had the right to assume that approaching motorists would obey the law.

"His (a pedestrian's) failure to anticipate negligence on the part of the driver of a motor vehicle does not render him negligent as a matter of law." Huddy on Automobiles 6th Ed., Sec. 471 and cases cited.

"The passenger may pass around the rear of the street car and attempt to cross the street on the left side of the car, and he may assume that automobilists will exercise reasonable care to avoid a collision with him." Huddy 6th Ed., Sec. 475; *Sternfield* v. *Willison*, 161 N. Y. S., 472; *Frary* v. *Taxicab Co.* (Mich.), 198 N. W., 897.

In many cases wherein motorists have been held liable for injuries to street car passengers, crossing to or from the curb, the evidence of care on the part of the passenger has been no better or stronger than in the present case.

See *Wetzler* v. *Gould*, 119 Maine 276, *Arseneau* v. *Sweet*, 106 Minn., 257, 119 N. W. 46, *Ouellette* v. *Machine Works*, 157 Wis., 531, 147 N. W., 1014, *Mann* v. *Scott*, 180 Cal., 550, 182 Pac. 281, *Frary v. Taxicab Co.* (Mich.), 198 N. W., 897, *Braun* v. *Bell* (Mass.), 142 N. E., 93. *Moss* v. *Koetter*, (Tex.), 249 S. W., 259.

The jury found that the defendant's negligence was the sole cause of the accident. The verdict must stand.

Motion overruled.

PERCY F. EASLER *vs.* DOWNIE AMUSEMENT CO., INC.

JASPER M. EASLER, Pro Ami *vs.* SAME.

Somerset. Opinion July 3, 1926.

Liability cannot attach to a corporation exhibiting a circus for an injury to a patron resulting from an indulgement by the employees in a game of ball on the circus grounds while off duty and outside of the hours of their employment, under the doctrine of respondent superior, but it may attach under the doctrine that it is the duty of the invitor to the invitee to see that the premises occupied by him are in a reasonably safe condition, and that they are kept so to prevent jeopardizing the safety of his invitees.

In the instant case the plaintiff, Jasper M. Easler, was present on the circus grounds by the invitation of the defendant, and was within its invitation at the time and in the place he was injured. Hence the defendant owed him the duty, as one of the public invited to its public exhibition, of using reasonable care, not only to see that the premises which it occupied were in a reasonably safe condition, but also that they were kept so.

It had an active duty to use reasonable care to prevent games or sports which jeopardized the safety of its invitees, or if the same were permitted to see to it that due precautions were taken.

Ignorance of the game and attendant circumstances is not a defense. If the officers of the defendant corporation were unaware of the game and the dangers arising from it, their ignorance was negligent ignorance which in law is equivalent to actual knowledge.

The plaintiff, Jasper M. Easler, was of record twelve years of age, and of the usual intelligence of children of his age. He was bound, therefore, to use only that degree of care which ordinarily prudent children of that age and like intelligence are accustomed to use under like circumstances.

On motions for new trial by defendant. Two actions on the case, tried together, one by Jasper M. Easler, a minor, to recover damages for personal injuries, and the other by his father to recover for disbursements for the minor. A verdict of $527.16 was rendered in the

minor case and one for $107.08 rendered in the other case, and defendant file a motion for a new trial in each case. Motion in each case overruled.

The cases fully appear in the opinion.

Gower & Shumway, for plaintiffs.

Fred F. Lawrence, for defendant.

SITTING: WILSON, C. J., DUNN, MORRILL, STURGIS, BASSETT, JJ.

STURGIS, J. The defendant corporation exhibited its circus, known as the Walter L. Mains Circus, at Skowhegan, July 11, 1924. Just before the evening performance, while the plaintiff, Jasper M. Easler, was watching a ball game played by some of the circus employees, his right arm was broken by a stake which slipped from one of the players' hands. These actions, brought by Jasper M. Easler by his next friend to recover for his injuries, and by Percy F. Easler, his father, to recover for expenses incurred, are before this court on general motions.

The circus grounds were leased of a local owner; and there is abundant evidence to justify the conclusion that the injured plaintiff and some of the players, including the one who was using the stake which hit the plaintiff, were within the leasehold limits.

The players were chiefly colored cookhouse employees who had finished their day's work and were off duty. The ball game was not a scheduled attraction, but recreation indulged in outside of the hours of the players' employment. Liability, therefore, cannot attach to this defendant under the doctrine of respondeat superior. *Harrington* v. *Border City Manufacturing Co.,* 240 Mass., 170; *Karahleos* v. *Dillingham,* 119 Maine, 165; *Maddox* v. *Brown,* 71 Maine, 432.

The duties and responsibilities of the proprietors of a public exhibition, however, are measured by a different rule. The defendant having invited the public to its circus grounds was chargeable with the duty of using reasonable care, not only to see that the premises which it occupied were in a reasonably safe condition, but also that they were kept so; and if games and sports of a character to jeopardize the safety of those who were present at the defendant's invitation were permitted, the duty rested upon the latter to take due precaution to guard against injury to the spectators. *Thornton* v. *Agricultural Society,* 97 Maine, 108; *Graffam* v. *Saco Grange*

Patrons of Husbandry, 112 Maine, 508; *Hoyt* v. *Fair Association*, 121 Maine, 461. Its duty was not merely a passive one of refraining from authorizing such games and sports. It had an active duty to use reasonable care to prevent the same, or see to it that due precautions were taken. *Higgins* v. *Agricultural Society*, 100 Maine, 565; *Lusk* v. *Peck*, 116 N. Y. S., 1051.

The plaintiff, Jasper M. Easler, came to the circus grounds early in the afternoon, visited the side shows, bought peanuts, watched the watering of the elephants and camels, and while waiting for his parents' arrival for supper on the grounds and attendance at the evening performance, boy-like moved about as curiosity directed, and the things which interest the average boy attracted and allured him. It is not alone the performance in the big tent, nor the side shows of the midway, which interest and allure the patrons of the circus. Adults as well as children view with interest the machinery, equipment, and operation of the circus outside the tents, and to them all this is part of the exhibition. It is "all things to all men." This is common knowledge to all men, and born of recollection to most of us. We are of opinion that the management of this circus must be presumed to share in this knowledge, and, except as they bar the public from particular parts of the grounds or prohibit entrance thereon outside of stated hours, to have intended to include within their general invitation to the public access and view of all parts of the circus grounds between shows, as well as during the regular performances. The evidence justifies such a finding by the jury, and brings the plaintiff within the rule of invitee laid down in *Sweeny* v. *Old Colony & Newport Ry. Co.*, 10 Allen, 368, approved and adopted in *Hoyt* v. *Fair Association*, supra.

Was the duty owed to this boy plaintiff violated by this defendant? Twenty or thirty feet from the main tent, back from its entrance to be sure but in plain view, these employees of the defendant began to play ball. The game attracted thirty or forty spectators from among those then on the grounds, who gathered near the batter's position, some standing within fifteen feet of the plate. The boy plaintiff seeing the game going on, joined the group watching it, taking his position a little back of the front row of spectators; and it was here that a player in striking at the ball let the tent stake, which he was using for a bat, fly from his hands, striking the boy and inflicting the injuries complained of.

A base ball game played by skilled players, with regulation equipment, is attended with some elements of danger to the spectators. A "scrub" game played with tent stakes for bats is even more dangerous, and the safety of all within the striking distance of a flying stake is jeopardized whenever a player strikes at the ball. The duty owed this plaintiff by the defendant, we think, required that warning be given of this danger, or protection be furnished, if the game was allowed to proceed. It is uncontroverted that no warning was given and no protection furnished. The officers of the corporation, inferentially at least, admit this. They assert that the game was played without their permission, and deny knowledge that it was in progress. They go further and say that their ignorance of the existence of the game and the dangers arising from it relieves them from liability in this action.

We do not think this defense can prevail. The defendant was charged with the affirmative duty of keeping the premises reasonably safe for its invitees. Having failed to perform this duty, and the premises being in fact in an unsafe condition, its knowledge or ignorance of the dangerous condition is immaterial. 26 R. C. L., 714; *Currier* v. *Boston Music Hall*, 135 Mass., 414; *Hart* v. *Washington Park Association*, 157 Ill., 9; *Lusk* v. *Peck*, supra. A proper supervision of the grounds, and even slight attention on the part of those in charge of the defendant's exhibition, would have brought to them knowledge of the ball game, its dangers, and the lack of protection to those watching it. If the manager and other officers were ignorant of the situtation, we think theirs was negligent ignorance, which in law is equivalent to actual knowledge.

Upon the evidence, the jury were fully justified in finding that the defendant corporation was negligent.

Contributory negligence on the part of the plaintiff, Jasper M. Easler, is also advanced to defeat his recovery. He was twelve years old when he received his injuries, and possessed, so far as the record discloses, the usual intelligence of a child of those years. He was, therefore, bound to use that degree of care only which ordinarily prudent children of that age and like intelligence are accustomed to use under like circumstances; *Crosby* v. *Railroad Co.*, 113 Maine, 270; *Milliken* v. *Fenderson*, 110 Maine, 306; *Garland* v. *Hewes*, 101 Maine, 549; and unless he voluntarily exposed himself to a danger, the existence of which he knew, or in the exercise of that degree of

care to which the law holds him he ought to have known,—he neither assumed the risk of accident nor contributed negligently to his own injuries. *Chickering* v. *Power Co.*, 118 Maine, 414.

He joined a group of spectators already gathered to watch the game, and stood among them, but back a little from those in front. A jury, which ought to know boys and ball games as well as any tribunal, in returning a verdict for him, absolved him from lack of due care, and we find in the record no sufficient reason for disturbing their verdict on this ground.

The conclusions we have reached in the case brought in behalf of Jasper M. Easler, apply to the case brought by his father, Percy F. Easler, and the entry in both cases must be,

Motion overruled.

BURT E. MILLER, ADMR. *vs.* MAINE CENTRAL RAILROAD COMPANY.

Aroostook. Opinion July 6, 1926.

In interstate shipments the rights of the caretaker are determined by the Interstate Commerce Act as amended by the Hepburn Act of 1906.

It is against public policy for a common carrier to exempt itself from liability for its negligence in case of a passenger for hire.

The transportation of caretakers with live stock and perishable shipments is a practice of long standing, and so-called caretaker's "free passes" are authorized in the Federal Act.

The Federal Supreme Court, however, has interpreted the words "free pass" in this connection to mean not free in the ordinary sense, but in fact involves transportation for hire under a contract implied in the contract of shipment.

The Federal Act prohibits all other passes, except "free passes" described by its terms and which are not free in the popular sense. Such a pass as a "gratuitous free pass" is not authorized by the Act.

In the instant case the pass issued to the plaintiff's intestate was either prohibited by the Act or, if authorized, must be held to be a part of the contract of shipment.

The plaintiff's intestate was either receiving gratuitous carriage in violation of the Federal Act, in which case any conditions attached were invalid, and he was entitled to the same protection as a passenger for hire, or was being transported

as a passenger for hire under an implied contract for transportation arising out of the contract of shipment. In either case the liability of the defendant is established.

On report. An action to recover damages for the death of plaintiff's intestate, Roy Miller, who, while traveling as a caretaker in charge of four carloads of potatoes was instantly killed in a train wreck at Farmingdale, on the line of the defendant railroad on February 27, 1925. The potatoes were being transported from stations on the Bangor and Aroostook railroad to destinations outside of the State of Maine. The cause was submitted to the Law Court on an agreed statement of facts and a stipulation that if defendant liable, case to be remanded for assessment of damages by a jury. Case remanded in accordance with the stipulation.

The case fully appears in the opinion.

William T. Spear and Powers & Mathews, for plaintiff.

Perkins & Weeks, for defendant.

SITTING: WILSON, C. J., PHILBROOK, DUNN, MORRILL, STURGIS, BASSETT, JJ.

WILSON, C. J. An action to recover for personal injuries resulting in the death of the plaintiff's intestate. The case is reported to this court on an agreed statement of facts, the Law Court to pass on the question of liability, and in the event of the defendant being found liable, the case is to be remanded to the court below for an assessment of damages by a jury.

In February, 1925, certain shippers in Aroostook County on the line of the Bangor and Aroostook Railroad Co. loaded four cars with potatoes for interstate shipment over the line of the Bangor and Aroostook Railroad Co., and its connecting lines, of which the defendant was one.

Under the tariff schedules of the initial carrier, the shippers had the option of shipping such goods in "heater cars," so called, in which case the carrier assumed the risk of freezing, or at a lower rate in "lined" or "unlined" box cars, in which the shipper by express stipulation assumed all risk of injury from frost. In the latter case, however, in accordance with long established custom and usage, the shipper was permitted to install stoves suitable for the purpose in

such box cars and send with the shipment a caretaker to tend the stoves to protect the shipment from frost.

The shippers in the instant case chose the latter method. The plaintiff's intestate was jointly employed by the shippers to accompany the shipments in the capacity of caretaker, or "fireman," as he was termed in the bill of lading issued by the initial carrier. While the cars were being transported to their destination over the defendant's railroad, as the result of a wrecking of the train of which they were a part, due, it is admitted for the purposes of this case, to the defendant's negligence, the plaintiff's intestate was instantly killed.

There had been issued to the caretaker by the initial carrier a so-called "caretaker's pass," on which it was assumed he was being transported, and for which nothing was paid by him or the shippers,—unless his transportation was a part of the contract of shipment,—and in connection with which he had signed, as required by the tariff schedule of the initial carrier, a release of the initial and all connecting carriers from all liability whether due to their negligence or that of their employees, or otherwise.

The tariff schedules of the initial carrier, which had been duly filed with the Interstate Commerce Commission and published, expressly provide that the rates for such shipments cover only the commodities and "do not include the transportation of caretakers;" the transportation of caretakers being covered by a distinct tariff, under which the caretaker had the option of travelling on a "gratuitous free pass," in which case he shall release the carriers from all liability whether due to the carriers' negligence or otherwise, or of purchasing a ticket for transportation at the regular passenger rates and travelling as a passenger for hire.

The plaintiff contends that notwithstanding his intestate apparently exercised an option and accepted a caretaker's pass and signed such release, the Interstate Commerce Act as amended by the Hepburn Act does not permit the issuing by interstate carriers of gratuitous caretakers' passes; and notwithstanding the provisions of the tariffs of the initial carrier, he was being transported as a "passenger for hire," and the release executed by him was invalid as against public policy and of no effect.

The defendant, however, insists that in view of the express provisions of the tariffs of the initial carrier, the plaintiff's intestate having exercised his option and chosen to travel on a "gratuitous

free pass" and release the carrier from all liability, he was not a passenger for hire and the release is, therefore, binding. In any event, it further contends that the plaintiff is now estopped from claiming in behalf of his intestate the rights of a "rejected alternative," viz.: of purchasing a ticket at the regular passenger fare and traveling as a passenger for hire.

The issues raised are apparently new and of considerable importance. No decided case in either State or Federal jurisdictions has been called to our attention where the tariff schedules or the contract of shipment were the same as in the case at bar.

It is well settled law in this state, and the rule followed in the Federal Courts, that in case of a passenger for hire, it is against public policy for a common carrier to exempt itself by contract, or otherwise, from liability for its own negligence. In case of one traveling on a gratuitous pass, a carrier may make it a condition of the issuance and acceptance of such pass that it will not be liable even for its own negligence, though in the absence of such stipulation a person traveling on a gratuitous pass is entitled to the same care and protection from the carrier as the passenger for hire.

Buckley v. *Railroad Co.*, 113 Maine, 164; *Rogers* v. *Steamboat Co.*, 86 Maine, 261; *Quimby* v. *B. M. R. R. Co.*, 150 Mass., 365; *Griswold* v. *N. Y. & N. E. R. Co.*, 53 Conn., 371; *Railroad* v. *Lockwood*, 17 Wall., 357; *Grand Trunk Ry.* v. *Stevens*, 95 U. S., 655; *Liverpool Steam Co.* v. *Phenix Ins. Co.*, 129 U. S., 397; *Southern Pac. Co.* v. *Schuyler*, 227 U. S., 601; *Kansas City Southern Ry.* v. *Van Zant*, 260 U. S., 459.

The transportation of "drovers" with livestock shipments and "caretakers" with certain perishable freight without other compensation than that paid for the shipment of the commodity has been a practice of long standing, and the rights and liabilities of the parties have been established by a long line of decisions in both the State and Federal Courts from *Railroad Co.* v. *Lockwood*, supra, to *Norfolk Southern R. R. Co.* v. *Chatman*, 244 U. S., 276.

The history of the litigation involving the rights of caretakers traveling on passes or permits issued in connection with such shipments discloses a persistent effort on the part of carriers to devise some agreement or create some condition under which they might be relieved against their own negligence in case of injuries to such caretakers in the course of transportation.

Whenever such caretakers have been held to be traveling as passengers for hire, the courts in this country have generally held that any agreement or stipulation absolving the carrier from liability for its own negligence was invalid and no defense. *Railroad Co.* v. *Lockwood,* supra; *Norfolk Southern R. R. Co.* v. *Chatman,* supra; *Kirkendall* v. *Union Pac. R. Co.,* 200 Fed. R., 197; *Weaver* v. *Ann Arbor R. Co.,* 139 Mich., 590; *Sprigg* v. *Rutland R. Co.,* 77 Vt., 347; *Baker* v. *B. & M. R. R.,* 74 N. H., 100; *Ill. Cent. R. R. Co.* v. *Anderson,* 184 Ill., 294; *Pittsburg etc. R. R. Co.* v. *Brown,* 178 Ind., 11; *Buckley* v. *B. & A. R. Co.,* supra.

Thus far no court, which holds to the doctrine that carriers may not absolve themselves from liability to a passenger for hire for the results of their own negligence, has held such a stipulation in a caretaker's pass to be valid and binding.

The question of the rights of persons traveling on a so-called "caretaker's pass" first arose in *N. Y. C. R. R. Co.* v. *Lockwood,* 17 Wall., 357, in which a drover traveling with his livestock, in consideration of the carrying of his cattle for a lower rate, stipulated to assume all risk of injury to them and to himself resulting from the negligence of the carrier or otherwise.

The court held that a drover traveling on a pass such as was issued in that case was a passenger for hire, and a stipulation exempting the carrier from the result of its own negligence was not just and reasonable, and was contrary to public policy, and void.

Following this decision the Federal Courts in a long line of decisions, without exception, have held that passes issued to drovers or caretakers of livestock were not gratuitous passes, but were issued as a part of the contract of shipment, and such caretakers were passengers for hire. See cases above cited.

The same rule has been applied by the State courts to the caretakers of milk, *Baker* v. *B. & M. R. R.,* 74 N. H., 100, and by this court to the caretakers of potatoes in the Buckley case above cited.

An attempt was made in the Buckley case by counsel to distinguish it from the "drover's pass" cases upon the ground that the shipper in the Buckley case had an election as to the method of shipment; that the freight rate was the same, if shipped in a "box car," whether a caretaker went along or not, or whatever the season was, in which, the shipment took place; and that the caretaker in the case of a shipment of potatoes rendered no service to the carrier, nor did his presence relieve the carrier of any responsibility.

But the court held that in principle the cases could not be distinguished, and said: "We do not think that the fact that the shipper had an election by which method the potatoes should be shipped is important in this case. Nor is the fact that the defendant's freight charge was the same by whatever method, or at what season, potatoes were transported; nor the fact, if it be a fact, that the plaintiff rendered no service to the defendant, and that his presence with the potatoes was of no benefit to the company."

"Out of the election of the shipper arose, in accordance with the defendant's usage in such cases, an implied contract that the shipper was to ship his potatoes in a lined box car, and that some person was to accompany them as caretaker to keep them from freezing. It was all one contract and under it the caretaker had a right to carriage with the potatoes. The sum paid for the transportation of the potatoes included his carriage. His carriage was therefore not gratuitous."

Such has been the almost unanimous conclusion of the courts under all the forms of caretaker passes and agreements yet submitted for judicial construction and determination.

The defendant asks the court in the case at bar to distinguish it from the cases previously decided by reason of the language of its tariffs both as to the shipments and caretakers, and strenuously urges that the option given to the caretaker, and the express provision that the tariff for the shipment in question only covers the commodity shipped, and excludes the transporation of the caretaker, clearly distinguished it from the prior cases.

If it were solely a state question, the defendant's contention might have some weight, though the plaintiff insists, and not without force, that a carrier cannot by mere dictum in its tariffs change facts, or by calling a "free pass" a "gratuitous free pass" change its character or its legal status; that the tariff provisions of the initial carrier are mere subterfuges to escape liability for its own negligence; and that the alleged option for the caretaker is an option in theory only, by its very terms overstepping the mark, and disclosing that it was not conceived in good faith, in requiring a caretaker if he wishes to travel as a passenger for hire to pay full passenger rates when riding in a box car; while on his return trip he may have the same protection and travel, at least, second class upon the payment of one cent per mile.

However, the issue here is mainly, if not entirely, a Federal question, and must be determined by the Federal Statutes and the rules laid down in such cases by the Federal Courts. Congress has taken over under the Interstate Commerce Act and the several amendments thereto the entire matter of regulating common carriers engaged in interstate commerce, including the issuing of free passes and free transportation to caretakers. The rights of the parties in the case at bar, therefore, must be determined by the Interstate Commerce Act as amended, and interpreted by the Federal Supreme Court, and by the decisions of that court. *Adams Express Co.* v. *Croninger*, 226 U. S., 491, 505; *Kirkendall* v. *Union Pac. R. Co.*, 200 Fed. R., 197; *Kansas City So. Ry.* v. *Van Zant*, 260 U. S., 459.

There is no force, we think, in the defendant's contention that the case at bar is analogous to the cases involving the limitation of damages to the valuation placed on goods shipped, in order to obtain favorable freight rates. The value of the goods transported and the extent of the liability in case of loss enters into the determination of what are reasonable rates; and a representation as to value of shipment to obtain lower rates ought in all fairness to estop the shipper, who has obtained the favorable rates, from setting up a greater value to his damaged goods than that upon which he obtained his advantage. The question in such cases is not one of exemption from all liability for its own negligence, but of a reasonable limitation upon its liability based upon the shipper's own representations as to material facts. *Adams Express Co.* v. *Croninger*, supra; *Kansas So. Ry.* v. *Carl*, 227 U. S., 639, 651.

Nor do we think the fact that the tariff schedules were duly filed with the Interstate Commerce Commission and are presumed to be binding as to rates upon both parties, has any effect upon the rights of these parties.

As the court said in *Wilcox* v. *Erie R. Co.*, 147 N. Y. S., 360, 366; "The defendant claims that the case comes within the Interstate Commerce Law, which is exclusive; that it had duly filed with the Interstate Commerce Commission its schedules, rates, tariffs, and classification; as among said documents appeared the form of the contract and release under consideration, thereby said contract and release became authorized as legal by act of Congress. If the Congress of the United States by direct enactment had so legislated, of course, there could be no question as to its power. It has been

given by the Constitution complete jurisdiction of interstate commerce, if and when it chooses to exercise it. But it is a startling proposition that, without a word on the subject in any act of Congress, the settled policy of the United States, announced in innumerable cases by the Supreme Court, has been completely overturned by the mere filing of a form of contract and release with an administrative board."

The court in that case then goes on to summarize the policy of the United States as laid down in the decisions of the Supreme Court: that it was against public policy to permit a railroad company to stipulate relief from the results of its own negligence; and that in particular a drover traveling on a pass for the purpose of taking care of his stock was a passenger for hire, a rule which must also apply to all other caretakers traveling under like conditions, as was held by this court in the Buckley case above cited.

The case at bar, however, hinges on the interpretation to be put upon the Interstate Commerce Act as amended by the Hepburn Act of 1906. It provides in Section 1, that, "No common carrier subject to the provisions of this Act shall, after January 1st, 1907, directly or indirectly give any interstate free ticket, free pass, or free transportation for passengers, except" to certain expressly enumerated employees, officers, and persons, and "to necessary caretakers of livestock, poultry, milk and fruit."

Even if the tariffs of the initial carrier in the case at bar had the express sanction of the Interstate Commerce Commission, the Federal Courts would undoubtedly hold them of no validity if they authorized the issuing of free passes contrary to the provisions of the Act. At first blush, it might seem that the language of the Act, as amended, expressly authorized the issuing of gratuitous passes to caretakers, such as the plaintiff's intestate, assuming that potatoes come under the classification of fruit; but the Federal Supreme Court has placed a construction upon this provision and the meaning of the words "free pass" or "free transporation" as applied to caretakers, by which all interstate common carriers, and state courts in determining the rights of parties thereunder, are bound.

In *Norfolk Southern R. R. Co.* v. *Chatman*, supra, in which it was urged that the caretaker was traveling on a gratuitous pass issued under Section 1 of the Act, and so was not a passenger for hire, the court said: "Notwithstanding the fact, as we have seen, that such

transportation has been declared by a long line of decisions not to be 'free' in the popular sense, but to be transportation for hire, with all of the legal incidents of paid transportation, the carriers of the country have continued to issue it and to designate it as 'free'."

"With this legal and commercial history before us we must conclude that the designation 'free pass,' as applied to transportation issued or given by railroad companies to shippers and caretakers of stock, had acquired a definite and well known meaning, sanctioned by the decisions of this court and widely by the decisions of the courts of the various States, long prior to the enactment of June 29, 1906, and that, therefore, Congress must be presumed to have used the designation 'free pass' in the sense given to it by this judicial determination, when, in Section 1 of that act, by specific exception, it permitted the continuance of the then long established custom of issuing free transportation or passes to shippers or caretakers of live stock."

"It results that the settled rule of policy established by the Lockwood case, and the decisions following it, must be considered unmodified by this Act."

It is true that the Chatman case was a so-called "drover's pass" case, but as this court said in the Buckley case, there is no difference in principle between such cases and a caretaker of potatoes. The exception in the Interstate Commerce Act permitting the issuing of free transportation to necessary caretakers makes no distinction between caretakers of livestock, and caretakers of milk or fruit. It authorizes the issuance of a "free pass" to either, but, under the ruling in the Chatman case, not "free" in the popular sense of the word, but free in name only, and as a part of the consideration of the contract of shipment.

Such a thing as a "gratuitous free pass," described in the tariff of the initial carrier, is either prohibited by the Act, or if one, so designated, be authorized and sanctioned by the Interstate Commerce Commission, it must be held to mean no more than "free pass" was construed to mean in the Chatman case.

If the pass held by the plaintiff's intestate was free only in the sense defined in the Chatman case, he was clearly a passenger for hire, and the release invalid; or if gratuitous in the ordinary sense of the term, it was in violation of the Act, and any contract of release based thereon was without consideration and of no effect. Williston on Contracts, Vol. III., Secs. 1762, 1764.

The plaintiff's intestate, therefore, was either receiving gratuitous carriage without valid conditions attached, and under the law of this State was entitled to the same care and protection as a passenger for hire, *Southern Pac. Co.* v. *Schuyler*, 227 U. S., 601; *Rogers* v. *Steamboat Co.*, supra; or was being carried as a passenger for hire under an implied contract for transportation arising out of the contract of shipment as in the Buckley case. In either case the liability of the defendant is established.

Case remanded to the court below for assessment of damages by a jury in accordance with the stipulation of the parties.

ALBERT RICHARDS *vs.* MAINE CENTRAL RAILROAD COMPANY.

Cumberland. Opinion July 6, 1926.

An employee does not assume the risk resulting from his master's negligence, unless voluntarily assumed with knowledge of the danger.

In the instant case the employee may have assumed the apparent danger of the rails falling down from the ordinary starting and stopping of the train, but not from sudden and unusual stopping without warning to the employees.

This court cannot adopt an arbitrary standard for the loss of a foot or other member, to which all jury verdicts must accord. The matter of damages is for the jury. The damages in this case are not so excessively large that this court is warranted in disturbing them. The amounts awarded under Workmen's Compensation Acts afford no criterion for damages in ordinary negligence cases.

On general motion for new trial by defendant. An action brought under the Federal Employer's Liability Act to recover for personal injuries sustained by plaintiff while in the employ of defendant in unloading and distributing steel rails along the road-bed from a car in a working train for replacing the old rails. After a rail had been deposited on the ground by means of a crane the train moved along the length of a rail and another rail was thus unloaded in the process of distribution. Plaintiff alleged that his injury was caused by mov-

ing the train with a sudden jerk which threw him down on the bottom of the car and a rail fell upon his leg so injuring it that amputation resulted. A verdict of $12,500 was rendered for plaintiff and defendant filed a general motion for a new trial. Motion overruled.

The case fully appears in the opinion.

William H. Gulliver and George S. McCarty, for plaintiff.

Charles B. Carter, for defendant.

SITTING: WILSON, C. J., PHILBROOK, MORRILL, STURGIS, BASSETT, JJ.

WILSON, C. J. An action to recover damages for injuries received in unloading a car of steel rails by reason of a rail slipping or rolling down from a pile in the car against the plaintiff's leg and so injuring it as to require amputation just below the knee.

No disputed questions of law appear to be involved. The action is governed by the Federal Employer's Liability Act. The only questions in dispute are questions of fact upon which the alleged negligence of the defendant and an assumption of risk by the plaintiff are based. The car being unloaded was attached to a work train, so-called, which was hauling or pushing the car with others slowly along a track, stopping approximately at each rail length to leave a rail, which was done by means of a crane and hoister equipment transported on a separate car from the one carrying the rails. The signal for starting and stopping was being given by a brakeman of the work train from a point on top of the hoister where he could see the workmen in the rail car and be seen by the engineer, who could not see the men in the rail car; nor was the engineer informed as to the conditions in the rail car or the possible danger to the workmen therein from stopping or starting the train suddenly.

The plaintiff contends that at the time of the accident the engineer either gave his engine more steam, or kept it on longer, than was necessary to move the train one rail length, and when it had gone beyond the proper stopping point, some one called out, "Whoa, too far." The brakeman then gave the signal for a quick stop with the result the train was brought to such a sudden stop that the plaintiff and the men in the rail car were thrown down or about the rail car and a rail slid or rolled down from the pile and struck the plaintiff, causing his injury.

The defendant's contention is that there was no signal given for a quick stop; no brakes were applied, except as the air brakes were in practically continuous operation by reason of the operation of the hoister, which was operated by compressed air from the "train line," and thus automatically applying a certain degree of braking force, that no application of the brakes was made by the engineer for the stop at the time the accident occurred, and there was no more "jerk" or jar than ordinarily would or might occur in starting and stopping a train engaged in this kind of work.

The evidence is conflicting. The working crew testified to one state of facts and the train crew to another. There does not appear to be any necessarily inherent improbability in either account. It was a question for the jury to determine which account they believed. If there was no unusual stop and the rail slid or rolled down by force of gravity from a sloping pile, it was one of the hazards the plaintiff assumed when he engaged to work as one of the track crew of the defendant, or even if the rail was jarred loose by the ordinary stopping of the train; but if the jury found, as they might have done, if they believed the plaintiff's witnesses, that the men in charge of the operation of the train knowing the conditions in the rail car under which the men were working and the probable result upon a pile of rails that were one by one being loosened from a more or less compact mass with sloping sides, of a sudden and unexpected stopping of the train and failed to communicate that condition to the engineer whose duty it was to control the starting and stopping of the train, and a brakeman with the conditions in the rail car right in front of him gave a signal for a quick stop to which the engineer responded by a stop so sudden as to produce results described by the men in the rail car; then we think they might under such instruction as we must assume the Justice presiding gave as to what constitutes negligence, find the defendant negligent in this respect.

An employee does not assume the risks resulting from the master's negligence, unless voluntarily assumed with knowledge of the danger. *Rhoades* v. *Varney*, 91 Maine, 222; *Elliott* v. *Sawyer*, 107 Maine, 204. While there is much to be said in favor of the defendant's contention, we do not think the findings of the jury, especially where it is largely a question of veracity of witnesses, should be disturbed by this court.

Upon the question of damages, a jury has fixed them. It is true in similar cases, juries do not always agree upon substantially the same amount, but this court cannot fix an arbitrary standard for loss of a foot to which all jury verdicts must accord; nor do we regard the arbitrary amount fixed by Workmen's Compensation Acts as any criterion or guide. There the compensation is fixed on an entirely different basis, and regardless of whether the employer is responsible or not. We think in this case the verdict, while large, is not so excessively large that this court can say it was the result of prejudice or was arrived at without regard to the evidence and should be set aside on that account.

Motion overruled.

STATE OF MAINE *vs.* CANADIAN PACIFIC RAILWAY COMPANY.

Penobscot. Opinion July 8, 1926.

Within the purview of the franchise tax law, the operation of a railroad consists in the transportation of passengers or freight, or both, by means of cars propelled by steam or other power and running upon rails.

Two different companies cannot well operate the same railroad at the same time, though both may use the same track, in part, to operate their respective roads.

In the instant case notwithstanding that it does not own the track and that the Maine Central Railroad Company also uses the track, the Canadian Pacific Railway Company operates a railroad between Mattawamkeag and Vanceboro, and is liable to pay a franchise tax based upon the mileage between such stations.

On report. An action of debt to recover of the defendant corporation the amount of an unpaid tax balance of $38,566.30 for the year 1923, and a balance of $39,722.07 for the year 1924. The main contention between the parties involved the construction to be given to the word "operated" as used in Sec. 27 of Chap. 9 of the R. S., as amended by Chapter 42 of the Laws of 1917, which provides the method of determining the amount of the annual excise tax to be assessed against corporations operating a railroad in the State. The

cause was reported to the Law Court on agreed statement of facts. Judgment for the State.

The case fully appears in the opinion.

Raymond Fellows, Attorney General, for the plaintiff.

Ryder & Simpson, for defendant.

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

DEASY, J. The State tax assessors levied upon the defendant as its annual excise tax for the year 1923 the sum of $158,958.85, and for the year 1924, $163,714.32.

The defendant admitted liability for and paid a large part of the tax of each year, leaving, however, unpaid and disputed a balance of $38,566.30 upon the tax of 1923 and $39,722.07 upon that of 1924. Hence this suit.

The parties disagree as to the proper basis of tax assessment. If the State is right in its contention judgment must be entered against the defendant for said balances plus interest. If the defendant's is the correct theory nothing is due.

In lieu of municipal taxes upon railroads, their property and stock, which are with some exceptions exempt from other taxation, railroad companies in this State are required by statute to pay an annual excise tax. R. S., Chap. 9, Sec. 26. The rate of such taxation depends upon the gross transportation receipts per mile, the maximum being five and one half per cent. It is not disputed that the defendant is liable to pay the maximum rate.

In all cases the tax is required to be assessed upon the gross transportation receipts in the State. If the railroad is wholly within the State such gross receipts appear in the corporation's return to the Public Utilities Commission. If it lies partly within and partly without the State such gross receipts are determined according to the following statutory rule:

"The gross transportation receipts of such railroad line or system as the case may be over its whole extent within and without the State shall be divided by the total number of miles operated to obtain the average gross receipts per mile, and the gross receipts in the State shall be taken to be the average gross receipts per mile, multiplied by the number of miles operated within the State." Laws of 1917, Chapter 42.

This case involves a construction of the section of statute next above quoted. In the last analysis its decision depends upon the meaning to be attached to the phrase "number of miles (of railroad) operated within the State."

Of nearly fifteen thousand miles of road used by the defendant something less than two per cent. namely, 233.70 miles are in the State of Maine. This includes 56.60 miles between Mattawamkeag and Vanceboro. The rest, 177.10 miles, which is owned and exclusively used by the defendant, is admittedly operated by it. It concedes liability for a tax based upon such mileage, and has paid it. But the stretch between Mattawamkeag and Vanceboro, it says, it does not operate, and so far as the tax is based upon the operation of such mileage it declines to pay.

The Maine Central line between Bangor and Vanceboro runs by way of Mattawamkeag. In 1887 the Atlantic & Northwest Railway Company, the defendant's predecessor, was about to build a line of railway through the State connecting with the Maine Central at or near Mattawamkeag. Because it was admitted by both corporations to be for "the mutual benefit and interest of both parties hereto to jointly use the track of that portion of the said railroad between Mattawamkeag and Vanceboro," a contract for such joint use was on February 4th, 1887 entered into between the Atlantic & Northwest Railway Company and the Maine Central Railroad Company. The defendant has succeeded to the rights and obligations of the former corporation.

It is unnecessary to recite in full any of the fifteen sections of the contract other than the first.

The first section is as follows:

"That said party of the first part (Maine Central R. R. Co.) hereby grants, conveys, leases and hires to the said party of the second part (Atlantic & Northwest Railway Co.) the right to use said railroad between Mattawamkeag and Vanceboro, as aforesaid, for all the engines and trains of cars that said party of the second part may desire to run over it, and to transport in and upon its said trains freight and passengers of every description between Mattawamkeag and Vanceboro; it being distinctly understood and agreed that said party of the second part hereby acquires and shall enjoy full, free and equal running powers over the said railroad between Mattawamkeag and Vanceboro as aforesaid; it being further understood

and agreed that, limited only by the necessary conditions of joint operation and the equal rights of the party of the first part, these running rights shall be as full and free as if the line were its own property between the points named; it being however expressly provided and agreed that the trains, engines and cars and conductors, enginemen and other employes of the party of the second part connected with such trains, engines and cars, shall, while on the joint line, be subject to the rules and regulations of the party of the first part, and to the orders of the Manager, Superintendent, Train Masters, Train Despatchers and all other officers of the party of the first part, in all matters relating to the movement of trains or in any way affecting the safe and proper working of said joint section, and said conductors, enginemen and other employes, shall, on demand of said party of the first part, be dismissed and discharged for violating the rules of said party of the first part or the orders of its officers aforesaid, and provided further that all employes at the stations, and all trackmen and other employes of said joint section, shall be appointed by the party of the first part, but shall be subject to dismissal and discharge on the reasonable complaint of the party of the second part, the ground of such complaint being stated; and provided further that all employes on said joint section, other than trainmen, shall be deemed joint employes, and shall under no circumstances favor one company at the expense of the other, but shall give equal care and attention to forwarding the business of both."

The fourth section agrees that the party of the second part shall provide its own side tracks and other facilities at Mattawamkeag. At other points side tracks and other facilities built or to be built by the party of the first part to be jointly used.

The sixth section provides that the party of the second part shall "pay its proportion, reckoned on the basis of wheelage computed in the usual manner, of the following expenses: Repairs, maintenance and renewal of track, roadway, bridges, superstructure, buildings, water stations, fences and other structures, wages of all station men, signal men, track men, all station, track or other expenses necessary to the safe and convenient maintenance and working of said section used jointly. Repairs and renewals to be done by the party of the first part and paid for jointly as above.

The eighth section agrees that the cost of reduction of gradients, new sidings and changes in bridges "necessary to afford safe and

convenient passage for the engines and cars of the party of the second part and other work of similar nature which is to be done before connection is made between the tracks of the two parties is to be paid for equally.

We roughly summarize the other eleven sections as follows:

The party of the first part to prepare all schedules and time tables subject to change at the request of the party of the second part so far as they relate to its trains; semi-annual rental to be paid figured at five per cent. per annum of one half of the agreed cost of the road; each party to provide its own trains and train crews and to be solely responsible for damages caused by the negligence of its servants; purely local traffic over the joint section conceded to the party of the first part; trains of the party of the second part not required to stop between Mattawamkeag and Vanceboro for the accommodation of local passengers; no discrimination by agents; disputes to be arbitrated; contract subject to annulment for default.

The contract also sets forth that it shall continue in force for twenty years, with right of renewal at the option of the party of the second part. The contract and option were renewed for twenty-five years, terminating in 1932.

We need not say that the tax sought to be recovered is an excise tax, a tax not upon property but privilege. It is a tax upon the privilege of exercising franchises, to wit, doing railroad business in the State of Maine. Railroad business consists in transporting passengers and freight by means of cars propelled by steam or other power and running upon rails. This is precisely the business which the defendant and its predecessor have for nearly forty years been doing between Mattawamkeag and Vanceboro, as well as elsewhere. True, the section of track in question is used by the defendant jointly with the Maine Central Railroad Company, which is also subject to the tax. The State might forbid such joint use. It does not forbid but permits it. The privilege of joint use is apparently worth more than the privilege of running on separate tracks. The two corporations emphasize this in their contract. They say in the preamble of the contract that it is "for the mutual benefit and interest of both parties hereto to jointly use the track."

This is clearly true. Such joint use is for their mutual benefit and interest. Otherwise each would have to pay interest on the whole instead of half the cost of the right of way, roadbed and rails. Other-

wise each would have to pay the entire cost of all repairs, maintenance and renewals of track, etc., and the whole of the wages of station men, signal men, and the whole of station, track and other expenses "necessary to the safe and convenient maintenance and working of said section to be used jointly." Instead of having to pay the whole of these expenses each company pays only "its proportion reckoned on the basis of wheelage." Such joint use is indeed for the mutual benefit and interest of both parties.

Of course the benefit of joint use might be offset by loss of revenue. But apparently it is not. It does not appear that any fewer or smaller trains are run over the joint section than would be run upon separate tracks. The defendant suffers no loss except in conceding purely local traffic. This would be partly lost if the trains of the two roads were run on separate tracks.

This loss, if any, was considered and discounted when the contract providing for joint use was made "for the mutual benefit and interest of both parties."

If the value of the privilege enjoyed is to be considered the joint section should be included as a basis of taxation.

The defendant admits that it in 1923 and 1924 was and now is using the track between Mattawamkeag and Vanceboro to transport passengers and freight for revenue by means of locomotives and cars running over rails. It also admits "that, limited only by the necessary conditions of joint operation and the equal rights of the party of the first part, these running rights (are) as full and free as if the line were its own property between the points named." But the defendant contends that the enjoyment of these privileges and the carrying on of such business is not "operating a railroad." The defendant's learned counsel quotes various definitions of the word "operate." One definition quoted is from Webster's New International Dictionary, namely, "To put into or continue in operation or activity." He also quotes definitions of the word "railroad" and from these draw the conclusion that "to operate a railroad then would seem plainly to be to manage or control one of the above three objects, the track, the whole system or the corporation owning the same."

Our problem is to determine what the Legislature meant by the phrase "number of miles operated within the State."

It did not use the term "railroad" as meaning the corporation because corporations cannot be measured by miles. It did not use

the term as meaning the entire system because the statute that we are considering expressly relates to a part of a railroad system. It could not have meant the track because the authoritative definition which the defendant's counsel has furnished us, namely, "To put into activity" forbids. The Legislature can hardly have contemplated that a railroad track independently of its rolling stock would be "put into activity." One cannot resist the apprehension that an active railroad track would be, to say the least, unsafe.

The Legislature in the use of the words "number of miles operated" undoubtedly referred to the transportation of passengers and freight by means of cars propelled by steam or other power and running upon rails. This idea has been expressed in different forms by several courts. "Cars and other appliances are required in order to make or operate a railroad." *Colonial City Traction Co.* v. *Kingston Railroad Co.*, 153 N. Y., 548. "A railroad is only operated within the meaning of the law by moving trains, cars, engines or machinery on the track." *Conners* v. *Railway Co.*, (Iowa), 82 N. W., 953. "The result to be accomplished by the operation of a railroad is the running of trains." *Railway Co.* v. *Wells*, (Texas), 275 S. W., 220. "Can there be any doubt of what is meant by operating a railway? Does the phrase not at once convey to every intelligent and impartial mind the idea of putting the railway in actual use in the business or employment for which it has been constructed?" *Lane* v. *Railway Co.*, (Iowa), 180 N. W., 899.

The cases cited in the briefs are not precisely in point, nor are they claimed so to be by counsel.

Ingersoll v. *Railway Co.*, 157 N. Y., 453, holds that a right vested by charter to contract with other roads to permit use of track by them cannot be impaired at the behest of abutting owners. *Heron* v. *Railway Co.*, (Minn.), 71 N. W., 706, decides that a licensor railroad is responsible for the negligent setting of fires by its licensee.

Both of the above cases are plainly irrelevant. *Slaughter* v. *C. P. Railway Co.*, 106 Minn., 263, (119 N. W., 398). "A joint traffic arrangement under which the Soo Line hauls the cars of the appellant (C. P. Railway Co.) within the State does not constitute the operation of a railroad" by the appellant. If the Maine Central Railroad Company hauled the defendant's cars over the joint section, so called, this case would be in point, but in such a situation the gross transportation receipts of the Maine Central subject to taxation would

be much enhanced. *Stone Company* v. *Oman*, 134 Fed., 450. In the opinion this language appears: "The complete control and management of the track . . . . is the very essence of operating a railroad." This language is the dictum of a single District Judge in a case not involving taxation and in which no railroad is a party.

Quincy Railway Co. v. *People*, (Ill.), 41 N. E., 162. This case cited by the State is much more nearly in point.

The appellant owning a station and other structures in Quincy was taxed by the local assessors and also by the State Board. It was liable to be taxed by one, not by both. Under the statute if it were "operating a railroad" in the State the tax imposed by the State Board was the legal tax. It owned no main track in Illinois. It brought its trains in over the rails of the C. B. & Q. Railway Co. under a "lease or agreement," not more definitely described. Held: That it operated a railroad in the State. "Every train run by the appellant carrying passengers and freight over the C. B. & Q. railroad was an act of operating a railroad in this State."

Paraphrasing this language, every train run by the Canadian Pacific Railway Company carrying passengers or freight over the Maine Central line between Mattawamkeag and Vanceboro was an act of operating a railroad in this State.

It is immaterial that another railroad is operated upon the same track "for the mutual benefit and interest of both." "Two different companies cannot operate the same railroad at the same time, though both may use the same track in part to operate their respective roads." *Traction Co.* v. *Railroad Co.*, 153 N. Y., 548.

By Act of 1921, Chapter 71, the entire tax is payable on the 15th day of June next after the levy is made. R. S., Chap. 9, Sec. 75 fixes the rate of interest on deferred payments at ten per cent.

Judgment is ordered for the State for $38,566.30 with interest at ten per cent. per annum from June 15th, 1923, and for $39,722.07 with interest at the same rate from June 15th, 1924. Interest to be computed to the date of judgment.

STATE *vs.* FRANK MCNAIR.

Aroostook. Opinion July 9, 1926.

The State is not confined in its proof to the date alleged in the indictment, but may offer proof of the commission of the alleged offense on any date within the period of limitation and prior to the indictment.

Proof of a different date from that alleged in the indictment, resulting in a surprise to the respondent, may be sufficient ground for a continuance, which must, of course, be raised at trial on motion.

The instant case is not one where two or more offenses of the same nature were committed at different times, and the state by offering proof of one may be held to have elected that offense as the one described in the indictment, and may not then offer proof of another and distinct offense. The evidence offered by the State in the instant case was all directed to the same offense. It matters not whether it was committed on the date named in the indictment. No motion for continuance on the ground of surprise was made.

On exceptions. The respondent was indicted for a sale of intoxicating liquor and October 28, 1925, was alleged as the date of the sale, tried by a jury and found guilty. Exceptions were taken by the respondent to the admission of certain testimony, and also to a refusal by the presiding Justice to give a requested instruction. Counsel for the respondent contended that the State must prove that the sale took place on the exact date alleged in the indictment and the requested instruction was to that effect. Exceptions overruled. Judgment for the State.

The case is sufficiently stated in the opinion.

Cyrus F. Small, County Attorney, for the State.

J. Frederic Burns and George E. Thompson, for the respondent.

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

WILSON, C. J. An indictment charged the respondent with the sale of intoxicating liquor on the twenty-eighth day of October, 1925. The purchaser, one Thompson, testifying for the State, fixed the time of the sale as the day alleged in the indictment, and also testified that

he first met the respondent at about six forty-five p. m. in a restaurant in the town of Houlton known as Campbell's Restaurant; that while in the restaurant he talked with a police officer named Lycette and that later in the same evening after the alleged sale, he had a conversation with the officer concerning the respondent, though he was not permitted to state what the converation was. There was also other testimony presented by the State corroborating the testimony of the witness Thompson as to the date of the sale.

The respondent denied making the sale at all, and presented evidence in support of an *alibi* as to the twenty-eighth day of October. The State in rebuttal offered the evidence of the police officer, Lycette, to the effect that at some time during the latter part of October, without being able to fix the exact day of the month, at about quarter of seven o'clock in the evening, he saw the respondent in Campbell's Restaurant. This evidence was objected to by the respondent on the ground that the day was not definitely fixed, and was admitted subject to exception. The officer, however, was also permitted to testify, subject to exception, that on the same evening in which he saw the respondent, he also talked with the witness, Thompson, in Campbell's Restaurant, and later in the same evening had another conversation with him in which the respondent was referred to.

The respondent also excepted to the refusal of the presiding Justice to instruct the jury that, in order to find the respondent guilty, the jury must find that the liquor was sold by McNair on the twenty-eighth of October. The case is before this court on respondent's exceptions.

It is urged that the evidence of the police officer as to seeing the respondent in Campbell's Restaurant sometime about the last week in October, without definitely fixing the day, should not have been received and the requested instruction should have been given. The objection appears to be based upon the assumption that the respondent's *alibi* was clearly proven, and therefore the evidence of the officer must relate to another date than October twenty-eighth or to another and distinct sale, in view of which counsel contends that the State, having alleged and offered evidence of a sale on October twenty-eighth, had "elected" that date as the day on which the offense was committed, and evidence that the offense was committed on another date could not afterward properly be received.

The authorities cited do not go so far. Counsel has apparently confused the cases where the respondent admits that the State is not confined to the date alleged in the indictment, but claims a surprise by proof of another date as a ground for a continuance, Bish. Crim. Pro. Vol. I., Sec. 400, and cases where more than one offense of the same nature has been committed within the period of limitation and the State having offered proof of either one is held to have elected that offense as the one charged in the indictment, and cannot then offer evidence of the other offense, *State* v. *Green*, 127 La., 831, under the familiar rule that the commission of one offense is not admissible to prove the commission of another, except in certain instances, which it is not necessary to note here. 10 R. C. L., 939, Sec. 107.

Neither of these classes of cases are controlling of the case at bar. No request for a continuance was made at the trial of the case on the ground of surprise; nor was the evidence presented by the State in rebuttal offered to prove, nor did it tend to prove, another offense than the one already testified to by the witness Thompson. On the contrary it corroborated the witness, Thompson, to the extent that on some evening during the latter part of October the respondent was in Campbell's Restaurant on the same evening that Thompson was there and that later in the same evening Thompson talked with the officer concerning the respondent. Thompson says it was on that evening the sale was made and fixed the date as the twenty-eighth. At this stage of the case, the testimony of the officer might be regarded as in rebuttal of the respondent's testimony and that of his witnesses that he was not in Houlton on the evening of the twenty-eighth.

It appeared, however, from testimony of the respondent and of his own brother in sur-rebuttal that on the twenty-seventh of October about seven o'clock the respondent was in the vicinity of and in Campbell's Restaurant and his car, sometime about seven-thirty o'clock, was in an alley nearby and the respondent apparently under the influence of liquor, as Thompson says he was on the evening he purchased the liquor of him.

It is not claimed there were two sales by the respondent. This is not a case, therefore, where the State was requested to elect, or could be held to have elected, between two offenses, to either of which the indictment might apply, by offering evidence of one and thereby excluding evidence of the other, as in the Louisiana case above cited; but a simple case of a single offense to which all the evidence clearly

related. It is immaterial whether it was committed on the twenty-seventh or the twenty-eighth. From the evidence the jury may well have been satisfied that the offense charged was committed; and upon the evidence offered by the respondent might have found it was committed on the twenty-seventh and that the State's witness was in error as to the day of the month on which the sale was made.

The requested instruction, therefore, was properly refused and the instruction given by the presiding Justice in harmony with the law applicable to the evidence in the case.

Exceptions overruled.
Judgment for the State.

JUAN'S CASE.

Waldo. Opinion July 28, 1926.

"Concurrent employment" as used in the Workmen's Compensation Act defined.

In the instant case the plain intendment of the statute governs. Although the computation cannot be made under sub-clause (a), yet the earnings, where an employee is employed regularly during the ordinary working hours concurrently by two or more employers, upon the question of compensation shall be used in determining amount of compensation as though earned in the employment of the employer for whom the workman was working at the time of the accident.

This workman was regularly employed as caretaker, janitor and fireman. He performed the full duties of his employment, every day, as caretaker and janitor, and though accident or chance called him into action as a fireman, his employment in the Fire Department cannot be found to be casual or accidental, the first requirement of a fireman being that he shall regularly respond to each alarm at his station.

In determining amount of weekly earnings, employment during the ordinary working hours is to be considered. Not that it is daylight service only, as in farming or cutting lumber; for a man's only employment may be in the night, or he may work at the same machine, one week by daylight, and the next on the night shift.

On appeal. Compensation of $16 per week was awarded to claimant as dependent widow of Walter H. Juan who lost his life by accident

while in the employ of Pejepscot Paper Company, one of several concurrent employers of the deceased, and from an affirming decree an appeal was taken seeking a modification of the decree. The question of "concurrent employment" was involved. Appeal dismissed. Decree below affirmed.

The case fully appears in the opinion.

Buzzell & Thornton, for claimant.

Clement F. Robinson and Forrest E. Richardson, for respondents.

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

BARNES, J. By a former decision in this case, 124 Maine, 123, it is decided that the earning capacity of the injured workman is to be computed under sub-clause (c), Paragraph IX., Section 1 of our Workmen's Compensation Act, into which is read, by necessary implication, the provison of increase of compensation arising from concurrent employment by two or more employers, expressed in sub-clause (a) of the same Paragraph, if concurrent employment is proved.

The case is one where the workman, at the time of the accident, is serving more than one employer, his several employments being concurrent, at least one having been continuous for not less than the year preceding the accident, and one employment having continued for the period of sixteen weeks immediately prior to the accident.

In such a case the Act places upon the Industrial Accident Commission the duty of finding the artificial average of weekly earnings under the conditions prevailing in the employment of the workman, before and up to the time of the accident, the standard established by the Act.

The case is of novel impression in this court, and industry of counsel has failed to suggest a decision by another court in a like case.

The Chairman of the Industrial Accident Commission has held additional hearings, in compliance with the mandate in the former case, and transcript of evidence introduced at those hearings is before us, together with his award of $16 weekly as compensation for the period prescribed in Section 12 of the Act; the same has been decreed by a single Justice, and appellant now pleads for a modification of the decree under Section 34.

As in *Scott's Case*, 121 Maine, 446, "the single issue before this court is whether the Chairman of the Industrial Accident Commission

erred as matter of law in determining the compensation to be paid. This problem necessarily comprises two elements: First, the proper method to be adopted for computation, which is a question of law, and, second, the amount awarded under such adopted method, which is a question of fact." And further, if any essential fact be found in favor of the claimant without proper evidence, the decree can be attacked upon appeal. *Thibeault's Case,* 119 Maine, 336.

It may be assumed as proven that the workman, then husband of the petitioner, had been regularly employed for the full year preceding the accident as caretaker for the appellant, Pejepscot Paper Company, at the wage of $10 a week, as janitor for the Consumer's Fuel Company, at $1.50 a week, and as an active member of the Belfast Fire Department, at $2.58 a week.

The accident and death occurred on November 7, 1923. On the 13th day of July preceding, the workman entered the employ of Forgione & Romano, contractors engaged in the erection and construction of a high school building, in Belfast, the city where the workman was employed in the several positions listed above. He worked for the latter firm as common laborer, general utility man, carpenter's helper and mason tender for a period of nearly seventeen weeks, losing some time on account of rains, and occasionally an hour or so when his duty to appellant required his attendance at its wharf, up to the day of the accident which occurred at about 6:30 P. M., an hour well past quitting time for the day on the Forgione & Romano job, and it is contended that the workman's earnings, $31.50 per week, at this employment, should not have been considered by the commissioner when computing the average weekly earnings, as they manifestly were, for if the earnings in the employment furnished by Forgione & Romano are to be considered in computing the average weekly earnings of the workman, the decree is not to be disturbed.

For our decision of this question there is no guide but the plain intendment of the statute first herein referred to. Although the computation cannot be made under sub-clause (a), yet the earnings, where an employee is employed regularly during the ordinary working hours concurrently by two or more employers, upon the question of compensation shall be used in determining amount of compensation as though earned in the employment of the employer for whom the workman was working at the time of the accident.

This workman was regularly employed as caretaker, janitor and fireman. He performed the full duties of his employment, every day, as caretaker and janitor, and though accident or chance called him into action as a fireman, his employment in the Fire Department cannot be found to be casual or accidental, the first requirement of a fireman being that he shall regularly respond to each alarm at his station. *Mitchell's Case*, 121 Maine, 455; *Charles* v. *Harriman*, 121 Maine, 484.

In determining amount of weekly earnings, employment during the ordinary working hours is to be considered. Not that it is daylight service only, as in farming or cutting lumber; for a man's only employment may be in the night, or he may work at the same machine, one week by daylight, and the next on the night shift.

Employment during the ordinary working hours is the employment considered, when earnings are a factor in determining compensation; because it is the normal wage that fixes earning capacity, rather than the combination of normal wage and bonus that makes up pay for extraordinary service, for over time and for Sunday work, not as argued by appellant that the accident must happen in the employ of the assured, at an hour when the workman should have been laboring for one of his other employers, for by definition in the statute concurrent employers are employers for one of whom the workman works at one time and for another at another time.

So much of sub-clause (a) carries over into (c), according to the provisions of which computation of amount of compensation is to be made.

It remains only to be considered whether the Chairman erred as a matter of law when he included employment by the Forgione & Romano Company with other concurrent employment, in determining the average weekly earnings.

One of the beneficent purposes of our Compensation Act is to secure to his dependents a portion of the return that his "earning capacity" would have procured for them from the industry in the service of which the workman lost his life.

It is true that the work of a mason's tender is only seasonal; in the latitude of Belfast, never, under ordinary circumstances, being continuous throughout the year, but the paragraph controlling the Commissioner when he made his finding as to the average weekly earnings prescribes as such earnings, "Such sum as, having regard to the

previous wages, earnings or salary of the injured employee and of other employees of the same or most similar class, working in the same or most similar employment in the same or a neighboring locality shall reasonably represent the weekly earning capacity of the injured employee at the time of the accident in the employment in which he was working at the time."

Led by the decision after the former hearing in this case, and with the additional light obtained from facts elicited in accordance with the previous mandate of this court, the Commissioner found that the employment as mason's tender, in which this workman had been regularly employed for more than three months before the accident, was employment concurrent with that by him rendered to the appellant. Then, in compliance with the provision of the statute last above quoted, the Commissioner apparently found that of his earnings as mason's tender so great a sum was to be considered "average weekly earnings" as would bring the earnings from all concurrent employments above the sum of $24 per week.

Hence he awarded compensation in the amount of $16 weekly, and we cannot say this finding is contrary to law.

The mandate must therefore be,

Appeal dismissed.
Decree below affirmed.

FRANK S. HENRY, Adm'r. *vs.* BOSTON & MAINE RAILROAD.

Cumberland. Opinion August 3, 1926.

Obstructions to view should admonish the traveler to exercise greater vigilance and caution in approaching a railway crossing, and emphasizes the importance of giving signals by bell and whistle, but they do not at country crossings require a railroad company to stop its trains, nor reduce their ordinary and reasonable speed.

In the instant case in running its train at forty miles an hour at the time and place of the accident, the defendant was doing no more than its duty to its passengers and no less than its duty to the plaintiff's intestate, a traveler upon the highway.

No official mandate being shown requiring the crossing to be guarded, the absence of flagman or automatic signal does not, under the circumstances of this case, prove negligence.

The presiding Justice properly excluded testimony as to the extent and limits of unobstructed vision from a point in the highway opposite the side of the track from which the truck approached it.

On exceptions. An action to recover damages suffered by plaintiff's intestate, Otis Henry, who was riding beside the driver of a truck of the Turner Centre Creamery going toward Portland, that is, westerly on the Pine Point Road in Scarboro and was struck by a west bound train of the defendant company. At the conclusion of the plaintiff's evidence, the court directed a nonsuit and exceptions were taken. Exceptions also were taken to the exclusion of certain testimony. Exceptions overruled.

The case fully appears in the opinion.

Oakes & Skillin, for plaintiff.

Cook, Hutchinson & Pierce, for defendant.

SITTING: WILSON, C. J., PHILBROOK, DEASY, STURGIS, BASSETT, JJ.

DEASY, J. On Sunday, August 9, 1925, at a crossing near Pine Point in Scarboro, a collision occurred between a motor truck and the defendant's west-bound express train. As a result the plaintiff's intestate, Otis Henry, a passenger on the truck, sustained fatal injuries.

The case comes to this court upon exceptions to an order of nonsuit and to the exclusion of certain testimony.

The plaintiff charges that the accident was due to the defendant's negligence in two particulars:

1. That it "ran its train in a reckless, careless and negligent manner."

2. That it "maintained no guards or warnings at said railroad crossing."

In support of the former allegation the plaintiff relies upon testimony that the train was moving at the rate of forty miles an hour, plus testimony offered to show that the day of the accident was foggy and that the crossing, by reason of obstructions to vision, was a peculiarly dangerous one.

It has been frequently and we think generally held that speed of railway trains is not, per se, evidence of negligence. *Moore* v. *M. C. R. R. Co.*, 106 Maine, 304; *Pittsburgh R. Co.* v. *Nichols*, (Ind.), 130 N. E., 546; *Phelps* v. *Erie R. Co.*, 119 N. Y. S., 141—22 R. C. L., 242, and cases cited.

"The railroad is chartered to carry passengers at a high rate of speed. Unless it did so carry them it probably would not carry them at all." *Newhard* v. *Penn. R. Co.*, (Penn.), 26 Atl., 105.

It almost goes without saying that there may be conditions under which a speed of forty miles an hour, or even much less, would be negligent. Counsel for the plaintiff vigorously contends that such conditions are shown in the instant case. In holding otherwise the presiding Justice was, we think, abundantly justified.

Leighton v. *Wheeler*, 106 Maine, 452, is cited by plaintiff's counsel. In this case the duty of the engineer to keep a lookout especially at grade crossings is emphasized. But in the pending case there is no direct evidence and no legitimate inference that the engineer neglected this duty.

The plaintiff quotes from and relies upon *Ham* v. *Maine Central R. R. Co.*, 121 Maine, 171, a crossing accident case wherein a verdict for the plaintiff was sustained. But that case differs widely from this. In the case above cited there was evidence justifying the jury in finding that the approaching train gave no warning by bell or whistle, while in the record before us the giving of such warning is not questioned. In the former case the crossing was over a village street, whereas in this the locus is in the country. In the Ham Case it is

said that "It (the railroad company) needlessly . . . allowed trees and bushes, materially obstructing the plaintiff's vision, to grow upon its own premises," while in the instant case there were no needless obstructions upon the railroad property.

In numerous cases, many of which are cited in the plaintiff's brief, it has been held that, under proved conditions, whether the speed of a railroad train is excessive and spells negligence is a jury question. But it will be found that in most of these cases the crossing was over a city or village street (See note 19 L. R. A., 563) or that the speed exceeded a maximum fixed by law or ordinance, or that there was failure to give proper signals, or that the company maintained or suffered unnecessary obstacles to vision in its own right of way, or that there was manifest danger preventable only by stopping or slowing the train. In the pending case the record discloses the existence of neither of these conditions.

The view of on-coming trains by travelers approaching the crossing was partially but far from wholly obstructed and there was a "light fog," so called by one of the plaintiff's witnesses, a fog apparently of no greater density than is common on the Maine coast. These conditions should admonish the traveler upon the highway to exercise greater vigilance and caution in approaching a railway crossing; they make more important the giving of signals by bell or whistle (not questioned in this case) but they do not require a railroad company to stop its trains nor to reduce their usual and reasonable speed.

In running its train at forty miles an hour at the time and place of the accident the defendant company was doing no more than its duty to its passengers and no less than its duty to the plaintiff's intestate, a traveler upon the highway.

In the other charge of negligence, to wit, that the defendant "maintained no guards or warnings at said railroad crossing" the plaintiff also fails.

The ordinary railroad crossing signs were in place. There was no flagman or automatic signal. In the absence of official mandate that the crossing be so guarded the absence of such flagman or signal does not, under the conditions shown to exist in this case, prove negligence.

Among the authorities supporting this opinion we refer to two only.

In a case similar to the one at bar the Pennsylvania Supreme Court says: "If the train has given the proper warning signal to the traveler, of its intention immediately, for a very short space of time,

to occupy the crossing, the further duty of slowing up or stopping until the traveler has safely passed is not by law imposed upon it. That duty is on the traveler." *Newhard* v. *Penn. R. Co.*, (Penn.), 26 Atl., 105.

A very recent case decided by the Supreme Court of Kansas closely resembles that under consideration, the grounds of alleged negligence being mainly the same. Quoting and affirming an earlier case the opinion says: "Cases may arise where the speed of a train may be considered by a jury in connection with the location and other surrounding circumstances upon a question of negligence. In densely populated districts such as towns and cities public safety requires the speed to be moderated. This crossing as we have seen however is in the country where there was no statutory or municipal regulation with respect to the speed of trains. In such cases there is no limit upon the speed at which trains may be run except that of a careful regard for the safety of trains and passengers."

In passing upon the other alleged ground of negligence (absence of flagman or automatic signal) the opinion relies upon and quotes at length from *Grand Trunk Railway Co.* v. *Ives*, 144 U. S., 408, (36 L. Ed., 485). The Kansas case disclosed the running of the defendant's train at the rate of forty-five to sixty miles an hour over a country crossing not guarded by flagman or automatic signal. A demurrer to the evidence was sustained. *Cross* v. *Railroad Co.*, (Kan.), 242 Pac., 469.

There being no evidence of want of due care on the part of the defendant it is unnecessary to consider the defense of contributory negligence.

The plaintiff sought to introduce and the court below excluded testimony as to the extent and limits of unobstructed vision from a point in the highway opposite the side of the track from which the truck approached it. This evidence was plainly irrelevant.

Exceptions overruled.

INHABITANTS OF ARGYLE *vs.* EASTERN TRUST & BANKING COMPANY.

Penobscot. Opinion August 7, 1926.

Except where otherwise directed by statute or constitutional limitations, when the purposes sought to be effected under an article in a town warrant are within its corporate powers, and are expressed with sufficient precision to be plain to the ordinary mind though not in set phrase, nor with technical formality, action on such article by a majority of the qualified participants in a town meeting is binding on the inhabitants.

In the case at bar it is not claimed that the total borrowed was excessive, nor that the proceeds were diverted from the channel authorized.

On exceptions by plaintiff. An action in assumpsit to recover $1,644.91, which plaintiff alleged was on deposit with defendant bank, to its credit, which defendant refused to pay to the plaintiff. Defendant filed in set-off two promissory notes payable to the defendant and executed in the name of plaintiff for a valuable consideration by "Isaac F. Bussell, Town Agent" which in amount nearly equaled the deposit. The case was tried by the presiding Justice without a jury, exceptions as to matters of law being reserved, who allowed the notes in set-off, and rendered judgment for the plaintiff for the balance of $72.59. The question as to the authority of the town agent to execute the notes was involved. Exceptions were taken by plaintiff to a refusal to give requested rulings, and also to certain rulings. Exceptions overruled.

The case sufficiently appears in the opinion.

Clinton C. Stevens and Artemus Weatherbee, for plaintiff.

Ryder & Simpson, for defendant.

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

BARNES, J. On the day of the purchase of the writ in the above-entitled action, defendant had, of the funds of the plaintiff, in their capacity as a municipal corporation of this state, hereinafter called the plaintiff, a deposit in due course of banking in the sum of $1,597.00.

At the same time defendant held, as it deemed, against plaintiff, two negotiable promissory notes, the one dated December 1, 1922, for $500.00, payable in six months after date, signed "Inhabitants of the Town of Argyle By Isaac F. Bussell, Town Agent," the other note, dated March 13, 1923, for $986.00, payable in four months after date, signed "Inhabitants of Town of Argyle By Isaac F. Bussell, Town Agent," and each bearing interest at six per cent.

On the tenth of the preceding October, defendant assumed to apply the total amount of the deposit of plaintiff to the two notes, which were then overdue, notifying plaintiff of its action and requesting settlement of the balance.

Plaintiff did not approve such application of its bank deposit; did not consider itself held to pay the notes; brought suit for the money on deposit, and the notes were pleaded in set-off duly filed at the term to which the writ was made returnable.

At the trial the notes were introduced and their execution proven. In each note the maker is styled "Argyle, Maine, by its town agent, he being duly authorized to, by vote at the regular town meeting of March 27th, 1922," and plaintiff contends that these notes are not obligations binding upon it, because it says that Isaac F. Bussell was not legally authorized to execute notes of the town, and claims to recover the amount of its deposit with the defendant, with interest from October 10, 1924, the date when defendant applied the entire deposit to what it considered payment, so far as it went, on the indebtedness according to the terms of the notes.

The suit is in assumpsit, on account annexed for the amount of the deposit and interest as aforesaid, with a second count for the deposit as money held by defendant to plaintiff's use.

It was tried at the November term, 1925, before the Superior Court of Penobscot County, without a jury, with "exceptions reserved to both parties in matters of law," and the court allowed the claim of the plaintiff, "with certain interest," and also the claim in set-off of the defendant as to the notes, "with certain interest," and found for the plaintiff in the sum of $72.59.

The plaintiff excepted to the decision of the court, and, all other matters having been settled or waived, the only point now in issue is whether or not this Isaac F. Bussell was, on the dates of the several notes, duly authorized and competent to bind the town by the notes as given.

In the first place, it is evident that a municipal corporation can issue its notes only by the hand of one or more duly authorized agents. The warrant for the annual meeting of plaintiff town for 1922 contained, as Article 8, "To choose a Town Agent with power to hire money if necessary for the ensuing year."

The records of the town show that its inhabitants did then choose "I. F. Bussell, (admitted to be the same Isaac F. Bussell who signed the notes within that municipal year) Town Agent with power to hire money."

Without going into a lengthy discussion upon the point we hold that under the article as printed in the warrant the inhabitants of Argyle, at the annual meeting for 1922, were in position lawfully to choose an agent to hire money for necessary municipal purposes, and, from the record, that I. F. Bussell was so chosen and empowered.

If Article 8, above quoted, is sufficiently specific and clear, Mr. Bussell's action in signing the notes as he did bound his town, and the finding of the Superior Court is correct in law.

It is urged that the article in the town warrant, "To choose a Town Agent with power to hire money if necessary for the ensuing year," is not sufficient, in that it does not specify the amount to be hired, the purposes for which it was to be hired, the terms, etc. "The rule running through all the decisions is that an article in a warrant for a town meeting, is sufficient if it gives notice with reasonable certainty of the subject-matter to be acted upon." *Railroad Co.* v. *Brooks*, 60 Maine, 568, 573.

Except where otherwise directed by statute or constitutional limitations, when the purposes sought to be effected under an article in a warrant are within its corporate powers, and are expressed with sufficient precision to be plain to the ordinary mind, though not in set phrase, nor with technical formality, action on that article by a majority of the qualified participants in a town meeting is binding on the inhabitants.

In proceeding under the authority given him by vote of his town the agent can bind the town by notes only for money borrowed to discharge a liability or to meet an obligation legally incurred.

The amount borrowed must also be within the limit prescribed for towns by the statutes. "The powers of the agent (of a town) are limited only by the capacities of the corporation and by the nature of his employment." *Augusta* v. *Leadbetter*, 16 Maine, 45.

In the case at bar it is not claimed that the total by this agency borrowed was excessive, nor that the proceeds were diverted from the channel authorized.

By preliminary steps prescribed by statute the inhabitants of a town, qualified to vote therein, are warned to assemble in the month of March annually, at a time and place named; and under an appropriate article a majority of the qualified voters who vote may bind the town to hire money for charges for carrying on the business of the town for the ensuing municipal year, the performance of the particular duties imposed upon them by law, and to meet their liabilities lawfully assumed.

The records of Argyle show that at the date of the annual meeting in 1922, its liabilities exceeded its immediately available resources by an amount in excess of the sum hired and secured by the two notes to the defendant, and in fact this condition is evidenced by all subsequent records so far as introduced. In the absence of proof that funds were provided from other sources to pay these liabilities it is settled law that a town is holden to pay money borrowed by its authorized agent to discharge such liabilities. In a suit against a town on notes given by its treasurer, after vote of the town, "to authorize the treasurer to obtain money by loan or otherwise to pay the debts of the town, etc.," this court has held: "If the town was in debt at each passage of the vote, and had not made sufficient provision otherwise, it had the power to empower an agent to borrow upon its credit enough to provide for the debt." *Lovejoy* v. *Foxcroft*, 91 Maine, 367, 377.

The action of its agent may be ratified by a town, and this case shows not only that the article in the warrant sufficiently apprized plaintiff of the business to be done, that the voters authorized Mr. Bussell's negotiations, but that, at annual meetings held subsequent to the dates of the notes, the report of the town officers showing the transactions in question was "discussed and accepted."

Here then was authorization emphasized by ratification.

The finding of the trial court was not incorrect in law, and the entry must be,

Exceptions overruled.

FRANK BARTLETT'S CASE.

Cumberland. Opinion August 9, 1926.

A workman is not entitled to receive compensation for accidental injury unless his employer has notice or knowledge of the accident within thirty days after its occurrence, except when failure to give notice is due to accident, mistake or unforeseen cause, and illness may be such unforeseen cause, but where it appears that after recovery the employee allowed months to pass without informing his employer of the accident the court will not remand the case to the Commission for a finding of fact upon this point.

Knowledge by an employer of the fact that an employee is suffering from a strangulated hernia is not equivalent to knowledge that the hernia was caused by an accident arising out of and in the course of his employment.

If a workman knows that his disablement is due to an industrial accident he should, except when prevented by illness or other cause, speedily inform his employer. If he does not do it, that is if he does not in his own mind connect the accident with the disability, he can hardly expect his employer to have greater knowledge.

On appeal by respondents. The petition alleges that petitioner while in the employ of Ford & Smiley, general contractors, in the construction of a state road in the town of Raymond in the Summer of 1925, received a hernia while lifting a tent into an automobile, which thirteen days later required surgical attention, but no notice was given to his employers of the rupture as having been caused while in their employ for more than three months after the rupture was received. Compensation was awarded by the Associate Legal Member of the Commission, and from an affirming decree respondents appealed. Appeal sustained. Decree reversed.

The case sufficiently appears in the opinion.

Petitioner appeared without counsel.

Merrill & Merrill, for respondents.

SITTING: WILSON, C. J., DEASY, STURGIS, BARNES, BASSETT, JJ.

DEASY, J. Workmen's Compensation Case. The statute cited in this opinion is Act of 1919, Chapter 238. The only question

presented is whether the employer had such "knowledge of the injury" (Section 20) as to render unnecessary the thirty-day notice prescribed by Section 17. All essentials, other than the notice or equivalent knowledge, are established and unquestioned.

The statutes involved, omitting irrelevant parts are as follows: Section 17. "No proceedings for compensation for an injury under this act shall be maintained unless a notice of the accident shall have been given to the employer within thirty days after the happening thereof."

Section 20. "Want of notice shall not be a bar to proceedings under this act if it be shown that the employer or his agent had knowledge of the injury, or that failure to give such notice was due to accident, mistake or unforeseen cause."

The Commissioner found knowledge sufficiently proved. The defendants appeal.

It is knowledge of "the injury" that Section 20 provides for. The word "injury" is used in the act in two distinct senses. *Hustus' Case*, 123 Maine, 432. As employed in Section 17 it clearly means disabling or compensable injury, *Hustus' Case*, supra Page 428 and cases cited. But as used in some other parts of the act including Section 20 it is synomymous with "accident." An accident sometimes occurs long before compensable injury, arising from it, is suffered. Notice of the accident must be given within thirty days after the happening thereof. Section 17. Knowledge in lieu of notice, is knowledge of the accident and must also be had within thirty days after its happening.

The law intends that the fact of the accident shall be brought home to the knowledge of the employer by notice received or actual knowledge obtained, at a reasonably early date so that he may make such investigation as he desires while memory of the occurrence is yet fresh. Thirty days is the time prescribed for notice or for knowledge which is a substitute for it.

The commissioner found that the employer had knowledge of the accident within thirty days thereafter. This is a finding of fact, conclusive, if the record discloses any evidence to sustain it. A careful reading of the case, however, convinces us that there is no evidence to support the finding.

The accident described in the petition occurred at South Windham on August 6th, 1925. The employer, Smiley had sent the petitioner

to that place for a tent. While lifting the tent into an automobile he suffered a rupture or hernia. He secured a truss and for some days did his work, which was that of timekeeper on a job at Raymond. On August 19th the hernia "dropped down" or to use the medical term became strangulated. He entered a hospital in Portland, underwent an operation and was discharged from the hospital seventeen days later. No written notice of the accident has ever been given.

The employer, Mr. Smiley, had immediate information of the "dropping down" of the hernia. He knew that the petitioner was in the hospital and visited him there. Moreover, on August 26th he reported the petitioner's injury to the Industrial Accident Commission. In the report he described the accident as "hernia dropped down." He stated the time of the accident to be August 19th and the place of its occurrence, Raymond. He says further that he was notified of the injury "at once."

The employer had abundant and seasonable knowledge of what occurred at Raymond on August 19th, but it is not shown that he had any knowledge of what occurred at South Windham on August 6th, and it was at South Windham on August 6th that the accident happened, on account of which this proceeding is brought.

The petitioner told his employer that he was sick, and later told him of the truss that he was wearing, but said nothing about the tent lifting. If he knew that his condition was due to the South Windham accident he should have informed Smiley. If he did not know it, that is, if he did not in his own mind, connect the two things he can hardly claim that Smiley had greater knowledge on the subject.

The word "knowledge" is in the statute employed in its ordinary sense. *Allen* v. *Millville,* (N. J.), 95 Atl., 130. *Troth* v. *Bottle Works,* (N. J.), 98 Atl., 435.

It does not necessarily mean first hand knowledge. It does not require proof that the employer witnessed the accident. In common usage the word knowledge comprehends specific information.

On the other hand to have knowledge means more than to be put upon inquiry. Knowledge that a man employed as timekeeper is suffering from strangulated hernia is not equivalent to knowledge that two weeks before he had suffered an accident arising out of and in the course of his employment.

The rupture at South Windham was an accident arising out of and in the course of the petitioner's employment. Of this there is some evidence and the commissioner has conclusively so found.

The "dropping down" may have been an accident, i. e., an aggravation of a traumatic condition arising out of and in the course of the employment. But of this there is neither proof, nor finding, nor claim.

One other point remains to be considered. When failure to give notice is "due to accident, mistake or unforeseen cause" want of such notice is not a bar. Section 20. Illness whether arising from the industrial accident or otherwise may constitute such unforeseen cause. *Wardwell's Case*, 121 Maine, 220. *Donahue* v. *Sherman's Sons Co.*, 31 R. I., 373, 98 Atl., 109. The petitioner was ill and in a hospital during the last seventeen days of the thirty within which notice was required to be given.

We should be inclined to remand the case for a finding of fact upon this point were it not that the petitioner after leaving the hospital allowed months to pass without informing his former employer of the accident at South Windham.

No notice of the accident having been given, and as the record fails to show that the employer had such knowledge as the law requires, in lieu of notice, this proceeding cannot be maintained.

Appeal sustained.
Decree reversed.

HOWARD M. COOK, TRUSTEE *vs.* THOMAS C. STEVENS ET ALS.

MARGARET STEVENS CLARK *vs.* GRACE B. STEVENS ET ALS.

Penobscot. Opinion August 10, 1926.

The word "Family" as used in a will construed as including a deceased son's deceased daughter's children, but excluding such daughter's living husband, nothing in the will showing a purpose to include relations of affinity.

It is from testator's death that his will speaks; but in determining testamentary intent from its language the will should be construed as an entirety, and every part be reconciled and given effect, if possible, as of the date of its execution, circumstance illumined by the surroundings that were then extrinsic.

A turning point, or controlling event in the disposition of property by a will, generally, where there is not express or implied intention to the contrary, will be construed to relate to time of the death of the testator.

Devise or bequest to children or grandchildren, though they are not personally named, gives a vested interest when the contrary intention is not shown by the will.

Grandchildren living at testator's death took in vested interest by heads and not by class where on termination of testamentary trust the will directs that the remainder "be equally divided among my grandchildren share and share alike."

On report. The issues of two bills in equity find decision in this single opinion. The trustee under the will of Joseph C. Stevens brought the first bill to be instructed as to whom he should pay certain income accrued and undistributed from the testamentary trust. On the determination of the trust, while the bill by the trustee was still pending, but before its deciding could be, because one of the defendants had died and his administrator was not yet a party, one of the testator's surviving grandchildren, of conceded concern in what the will styles "remainder," filed her bill against all other persons of possible interest, praying construction of the will in relation to the corpus. When both cases were in order, they were submitted on the bill, answer and stated facts in each, and then reserved for the Law Court. The propositions involved are stated in the opinion.

First Bill:

H. M. Cook, for complainant.

Henry W. Mayo, for respondents, Thomas C. Stevens and Margaret Stevens Clark, and

Matthew Laughlin, pro se, as guardian ad litem for three minors, Chauncey S., Stanton W., and Gretchen Todd, and for Stanton W. Todd, Admr., and Stanton W. Todd, and Dorothy M. Todd.

Second bill:

Henry W. Mayo, for complainant.

Howard M. Cook, pro se.

Frederick B. Dodd, for Grace B. Stevens.

Mathew Laughlin for same parties as in first bill.

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

DUNN, J. The will of Joseph C. Stevens, following the usual introductory clause, nominates an executor and trustee, makes minor legacies, and proceeds, in abbreviated form where of less intimate connection with meaning in these two suits, as follows:

"After the few bequests all the remainder of my estate, ... I give . . . . in trust," while any son or any annuitant of mine lives, for the annuities hereby created and for the bequest conditionally given, and to divide the income then remaining "among my living sons and the families of such of my sons as may have deceased, a share to each son, and an equal share to each family of a deceased son who may leave one or more children," until the appointed time arrives at which the trust is to terminate.

What comes next is:

"I give to the widow of any deceased son without one or more children by any one of my sons two thousand dollars. . . . ."

Then are these words:

"And after the termination of this trust I direct that all the remainder of my estate be equally divided among my grandchildren share and share alike. . . ."

There is inhibition against the transfer of claim or rights, not restricted to beneficiaries of the trust, but applied generally to beneficiaries throughout its period, on penalty of forfeiting.

It was a spendthrift trust (*Robert* v. *Stevens,* 84 Maine, 325), limited to the death of the last son, which occurred in this year, 1926. The trustee was authorized to lease the real estate in all or part.

"Unproductive estate," the will impliedly thus comprehending but realty, could have been sold under court license, and personal property might have been sold, and the proceeds from either source reinvested.

A will speaks from the death of the testator, but for the purpose of determining a testator's intention from the language used in a will, it should be construed as an entirety, and every part be reconciled and given effect if possible, as of the date of its execution, circumstance illumined by the surroundings that were then extrinsic.

In 1881, when this will was made, its maker was in widowerhood. His eldest son had died leaving wife and child surviving. There were only three living sons, of whom two, Frederick and Thomas, respectively of name, were married; the record is indefinite if ever the third had wife; certain is it that he left no descendant. Mae was the single child of Frederick. Thomas had two children, Grace and Charles, and no more.

And so the testator was relatived, less than two years afterward, when he died.

Of estate, the personalty amounted to about $8,000; the realty was certain Bangor stores. The net annual income from both real and personal was approximately $3,000; since then increased rentals have quadrupled that.

The annuities and the conditional bequest are aside. No son of the testator is living now, so the trust is ended.

Frederick's daughter Mae, who on marriage became Todd, lived longer than her father. She was outlived by her husband and four children. Grace Stevens, now surnamed Clark, the daughter of the last of the sons, still survives. Charles, her brother, died in 1888, aged twelve years. Under the statute then in force, propinquity in kin and heirship found only the boy's father, and when that father died without leaving a will, the law cast the inheritance exclusively from him to his daughter, Grace Stevens Clark.

Two cases are presented for consideration. The first concerns accrued and undistributed income; the other the corpus of the estate.

In the administration of the trust, the assumption seems to have been, when a son died not survived by offspring, that the income as to him should cease, on the ground that the will constituted one entire trust scheme, subject to change by future death, among living sons and the child-embracing families of dead ones. But when in

1925 Mrs. Todd died intestate, whether and who of her husband and children were entitled to share in the income from the trust fund became of question.

Will construction cases fill a good-sized volume, but no chart more definitely marks a channel that can be depended upon to follow, than testamentary words derive their particular significance from the context. One will may or not be so expressed as to furnish a guide toward the same conclusion in another. Different testators may speak in much the same verbiage from different viewpoints to different purposes; it being as true today as when the epigram was penned, "that no will has a brother."

The goal of interpretation is not the intention simply, but the legal consequences of the indicated intention of the individual testator. If it be uncertain, his expressed or implied meaning must be gathered as a fact, gathered from what he said in the whole instrument, read in the light which the position that was attending continues to shed. These principles of law, generally adopted by all courts, lead to the point which opposite arguments present by logic and analogy.

"Family," to speak in the singular of the word which the will pluralizes, was applied in the initial using even broader than synonymously with kindred or relations by consanguinity. Obviously, the testator was desirous of doing impartially among living sons and the families of dead sons, where the dead left, surviving, one child or more; each son and family to take in the same proportion. Transposal of the order of clauses disencumbers testamental design from the cloud of words with which it is covered. To every woman widowed by the death of any son of his, the testator gave absolutely and in the same quantity, not from the income let it be noted, but by charge on the body of the trust. The income, apart from that apportioned in other respects, was for the living sons and the family of a son dead leaving child or children. Where there is childless widow, there shall be bounty, definitely said the testator in his way of defining. The text plainly implies the inclusion of every widowed mother. For every widow having no child, bequest from the corpus. The income, with no accumulating feature and limited to lives in being, for each living son and the family of any son dead; family here embracing widow and at least one child, in differentiation of a widowed mother from a widow merely. Of course, were there no widow, then child or

children would be family, in the survivorship and stead of a dead son. For them all, as the case might be, the will contained provision.

Of Frederick, as has been seen, his wife and the child were the survivors. They two made up the family, which the widow's death narrowed. Before or after that widow's death, in these proceedings it is inconsequential which, but at some time Frederick's daughter married. She bore children. The daughter-mother died, leaving husband and children. That husband is not a member of his deceased wife's father's family.

By implication, when the term was used first, the sense of family in relationship to a dead son's family was a son's children, plus his widow by right of representation, for the testator did not prefer a childless widow before a widowed mother; his solicitude and bounty extended to both. When the widow of the son Frederick had died, her surviving child was yet of that son's family, though the widower was not, because of absence in the varying shade of thought of purpose to include relations by affinity. Death takes Frederick's child. What of the income? Shall it augment the shares of living sons? No; the portion for them stands allotted. Shall the income be allowed to accumulate? No; for the will says to pay. Pay to whom? And the will answers, Frederick's family. Family is a flexible term; the whole human race constitutes the human family. The testator, however, here speaks as of descent. Those who were the family, widow and child and then child alone, are gone, but the trust lives and moves to another generation; that is to say, to Mrs. Mae Todd's children, for Frederick's family.

In the proper import of the term, to come now to the other inquiry, no remainder exists. Property is remaining, and of this the will makes disposition, but there is no remainder properly so termed. There are, however, vested interests in the nature of remainders in that which is remaining, chiefly the original real estate, and where these were vested is what the present asking is.

The trustee took the estate which the purposes of the trust required. *Deering* v. *Adams*, 37 Maine, 264; *Palmer* v. *Est. of Palmer*, 106 Maine, 25; 2 Jarman on Wills, 1156. The exigencies, though mainly the trust was to preserve income, necessitated the title to the personal property and the fee simple of the real, in trust, for the paying of bequests to childless widows, not from the income, as has been observed, but from the corpus of the trust.

When the mortal lives to which the objects of the trust were limited had ended, on which event the duties of the trust became passive and the trust itself dry, the property remaining passed to the testator's grandchildren.

But to whom of them and when?

It is contended that if the interests were not vested in the grandchildren before the ending of the trust, the children of a grandchild who is then dead will take nothing, and as there is no showing that the testator so intended, therefore the vesting was before that time.

Since the will as a whole is the base on which its utility must stand or fall, the scanning again of that document with thoroughness may ease the way to understanding its true intent.

There are in the will no conventional words of gift to the grandchildren. The disposal is by direction to divide what remains among the grandchildren. Quite as important, other than that direction, there is no gift to anyone, and the testator never contemplated intestacy.

Said the testator in effect, when there is not longer need of my estate for revenue, which will be after my sons have been incomed till the last is dead, the residue of my estate is to be "equally divided among my grandchildren share and share alike."

Adverbs of time, as "after," in a connection such as this, are construed to relate to the time of the right of use, possession, and enjoyment, and not to that of vesting interest, unless from the will it appears that the testator meant variantly. A turning point, or controlling event in the disposition of property by a will, generally, where there is not express or implied intention to the contrary, will be construed to relate to the time of the death of the testator.

When this testator wrote, and when he died, there were only four grandchildren. None came afterward, but two died before the trust terminated. Their disinheritance "would not be presumed to be intended . . . . unless such intention is clearly manifested." *Teele* v. *Hathaway*, 129 Mass., 164, 166. "In ninety-nine cases out of a hundred the intention of the testator is that his bounty should be transmitted to the children or family of the beneficiary, otherwise indeed full effect is not given to it." *Chess's Appeal*, 87 Pa. St., 362, 365. A devise or bequest to children, though they are not personally named, gives a vested interest where the contrary intention is not shown by the will. *Gibbens* v. *Gibbens*, 140 Mass., 102. The rule

above stated applies, in general, to one's own grandchildren as beneficiaries. The collective name distinguishes them beyond the possibility of mistaking their identity. The calling of their names is not one by one, but all at once. When legatees are designated by name and the character of the estate is indicated by the words, "in equal parts share and share alike," there is a strong presumption of testamentary intent that the legatees shall take as individuals. *Strout* v. *Chesley*, 125 Maine, 171. And, in parity, "where the limitations are to the direct descendants of the testator, it is a circumstance that warrants the inference that vested, rather than contingent remainders were intended to be created." *Carver* v. *Wright*, 119 Maine, 185. Look into *Belding* v. *Coward*, 125 Maine, 305, 133 Atl., 689, also.

The time when the property, after the provisions for the first generation and their families and widows were fulfilled, should pass in title and possession to the second generation, was not inseparably connected with the testator's appointment of the time of vesting, but in probability was with him a matter of less moment. Both interests, the present and the future, vested, the one in right and title, the other in right, at the same instant of time. First, the trust: When this to an end should come, which is but a change in expression, without a change in meaning, from after the termination of the trust, and "dividing" could not have been before the trust had run, the defeasible estate which the trustee had had being then determined, the estate which was left was for the grandchildren. Grandchildren then living? The will replies, "My grandchildren." And they were those the testator knew and seemingly expected would outlive the trust. But, whether outliving the trust or not, the grandchildren whom he knew.

By using the word "grandchildren," this testator did not classify, but distinctioned the sons' children living at the epoch of his own death. In his speech he comprises them similarly to his sons, saying: "After the trust is over and gone, when none of my children longer lives, then give the property to these grandchildren of mine."

Conclusion is that the defeasible estate which the original trustee took in trust, and which passed to the trustee in succession, determined at the ending of the trust, and passed to the grandchildren of the testator who were alive when he died, to which grandchildren an immediate fixed and descendible and inheritable right to have what was remaining, and enjoy it in the broadest estate known to the law,

by heads and not as a class, was made by the testator. To them, or the legal representatives of those deceased, the personal estate should be delivered; the will passes the real estate to the living and to them having the estates of the dead.

While a system of interpreting one ambiguous will cannot be built up by means of the scaffolding from another, but must be constructed and erected on the plan of the will wherein uncertainty of meaning is, still on the former framework there may be guiding marks. See *Deering* v. *Adams*, supra; *Pearce* v. *Savage*, 45 Maine, 90; *Shattuck* v. *Stedman*, 2 Pick., 468; *Cummings* v. *Cummings*, 146 Mass., 501; *Minot* v. *Purrington*, 190 Mass., 336.

Decrees as this opinion indicates, the amount to the trustee for his fees and expenses, for allowance in his administration account, to be settled below.

So ordered.

JOSEPH W. LUCE *vs.* CORINNA SEED POTATO FARMS, INC.

Penobscot. Opinion August 11, 1926.

Finding of a jury on questions of fact when submitted with proper instructions must be binding upon the parties, unless such finding was clearly wrong because based upon bias, prejudice, or plain misunderstanding of the evidence and the law governing the case.

In this case a remittur as indicated in opinion will overrule the motion for new trial, otherwise new trial granted.

On motion for new trial by defendant. An action in assumpsit to recover for 660 5/11 barrels of potatoes. The general issue was pleaded and defendant contended that the action was founded on an express contract and not on an implied one, hence should not be maintained. A verdict of $1,803.60 was rendered for plaintiff and defendant filed a general motion for a new trial. If a remittur be filed motion overruled, otherwise a new trial granted.

The case fully appears in the opinion.

William Cole, for plaintiff.

John S. Williams and William B. Peirce, for defendant.

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

PHILBROOK, J. This is an action in assumpsit on an account annexed to recover payment for six hundred sixty and five elevenths (660 5/11) barrels of potatoes which plaintiff claims were sold and delivered to the defendant. The price per barrel, as charged by the plaintiff, is eight dollars, making a gross debit of five thousand two hundred eighty-three dollars and sixty-four cents, ($5,283.64). Credits given amount to one thousand four hundred ninety-six dollars and seventy cents, ($1,496.70), leaving a balance of three thousand seven hundred eighty-six dollars and ninety-four cents, ($3,786.94).

The jury returned a verdict in favor of the plaintiff in the sum of one thousand eight hundred three dollars and sixty cents, ($1,803.60). The case is before us upon defendant's motion for new trial based upon the four customary grounds, viz., that the verdict is against law, against evidence, against weight of evidence, and that the damages are excessive.

The defense is twofold. *First*, that the plaintiff, by setting forth three counts in his declaration, viz., (a) account annexed for goods sold and delivered, (b) quantum meruit, (c) omnibus count, is seeking to recover upon an implied contract, whereas in fact and in truth, as defendant claims, there was an express contract between the parties which was recognized, accepted, and operated under by both of them, and by which the plaintiff was bound; hence that there could be no implied contract, under the familiar legal principle that where an express contract exists there can be no implied contract. *Broom's Legal Maxims*, 7 Am. Ed., 651; *Holden Steam Mill Co.* v. *Westervelt*, 67 Maine, 446; *Prest* v. *Farmington*, 117 Maine, 348. *Second*, that the damages assessed by the jury were excessive.

Express Contract. The plaintiff is a farmer, owning and operating a farm at North Newport, Maine. The defendant is a corporation, having its main office at 990, Noble Avenue, Bridgeport, Connecticut. In the latter days of December, 1924, or the early days of January, 1925, Mr. J. E. Sullivan, farm superintendent for the defendant, prepared a written contract to be executed by the parties hereto, which the plaintiff signed. This contract was then sent to the Bridgeport office of the defendant where it was held until the spring months of 1925. Bearing the signature of the defendant, it was returned to the plaintiff in May, but the latter said he did not then like it, because of changes made in it and would not have anything to do with it. When signed by the plaintiff it provided, among other things, that the plaintiff was to plant twenty acres of potatoes on his farm, to do all the labor in preparing the land for planting, to haul the fertilizer, seed and spray materials, and to cultivate, spray, dig, harvest, and deliver the crop to the defendant. When thus delivered, one half of the same was to become the property of the defendant and the other half was to be the property of the plaintiff. Still referring to the contract as signed by the plaintiff, it was therein provided that the defendant was to furnish the plaintiff one hundred twenty barrels of seed potatoes, and that the plaintiff, out of the half crop belonging

to him, was to deliver to the defendant one half that amount, or sixty barrels, to replace the seed thus furnished by the defendant. When the contract was returned to the plaintiff the defendant had changed the figures so that one hundred forty barrels of seed was to be furnished by the defendant and the plaintiff was required to replace all that amount, namely one hundred forty barrels. It must be conceded that the changes made at the Bridgeport office, after Mr. Luce had signed the contract, were material and important. Notwithstanding that fact, did the minds of the parties meet, with reference to the terms of the written contract, after the changes were made? The defendant answers the question in the affirmative. The plaintiff answers in negative and further contends that, whatever took place between the parties thereafter, grew out of the earlier attempt to contract in writing and that having performed labor required of him, and having delivered the potatoes to the defendant, and the latter having accepted them, an action of assumpsit will lie to recover the fair market value of the same.

Whether a contract was entered into by the plaintiff and the defendant, and the terms thereof if made, were questions of fact for the jury, and when submitted with proper instructions as to the force and effect of the testimony, the acts and conduct of the parties, the degree of credit to be given to witnesses, and the explanations of their acts and conduct, the finding of the jury must be binding upon the parties, and the court should not substitute its judgment for that of the jury, unless such finding was clearly wrong because based upon bias, prejudice, or plain misunderstanding of the evidence and the law governing the case. *Darling* v. *Bradstreet*, 113 Maine, 136. No exceptions were taken to the charge of the presiding Justice and we must assume that his instructions were complete and correct. In order to arrive at the verdict which was rendered the jury must have found that the minds of the parties did not meet, with reference to the alleged written contract, and that an implied contract to pay for the potatoes did exist. We do not find competent reason to set aside the jury verdict and the first ground of defense cannot prevail.

Excessive damages. From such evidence as we find in the record we are of opinion that the fair market value of the potatoes at the various times of delivery did not exceed four dollars and fifty cents per barrel. At this price the proper debit would be $2,972.05. Deducting the admitted credits, $1,496.70, we have a balance of

$1,475.35, which, with interest thereon from date of writ to date of judgment, the plaintiff may recover. If, therefore, the plaintiff remits all his verdict in excess of the sum thus indicated, within thirty days after date of mandate, the motion for new trial is to be overruled, otherwise new trial granted.

So ordered.

SWETT'S CASE.

Franklin. Opinion August 19, 1926.

While causal connection between the accident and disability must be shown, the accident need not be proved to be the sole or even the primary cause of disablement. It is sufficient to sustain a finding for the injured employee if the accident caused an acceleration or aggravation of a pre-existing disease.

The decree of a Commissioner in an industrial accident case must be based on evidence. Otherwise it cannot be allowed to stand. But a Commissioner's finding that the diseased condition of a petitioner is due to or has been aggravated by an accident will not be set aside merely because not based on the opinion of an expert if it is reasonably supported by other testimony.

In the instant case there was some evidence upon which the Commissioner's decree was based, thus removing it from the realm of mere speculation, surmise or conjecture.

On appeal. The petitioner was injured, it is admitted, while in the employ of the Wilton Woolen Co., by an accident arising out of and in the course of his employment. While carrying on his shoulder one end of a timber, he slipped and fell backward into a hole five feet deep. At the time of the accident the petitioner had a chronic diseased condition of the heart and contended that the accident accelerated or aggravated such condition resulting in total disability, while the respondents claimed that his disability was not a result of the accident. Compensation for total disability was awarded and from an affirming decree an appeal was taken.

Appeal dismissed with costs. Decree affirmed.

The case is sufficiently stated in the opinion.

Cyrus N. Blanchard, for petitioner.

Merrill & Merrill, for respondents.

SITTING: WILSON, C. J., DEASY, STURGIS, BASSETT, PATTANGALL, JJ.

DEASY, J. It is conceded that the petitioner on October 7th, 1924 suffered an accident arising out of and in the course of his employment by the Wilton Woolen Co. It is shown and not denied that at the time of the accident he had a latent, chronic diseased condition of the heart and spine (the precise medical diagnosis being unimportant) but was apparently, and so far as he knew well and sound and was engaged in hard manual labor.

The petitioner contends that the accident aggravated or "lighted up" his diseased condition and thus produced his present disability, or at all events brought it on at a much earlier time than it otherwise would have resulted.

If this latter contention is supported by evidence, the Commissioner's decree in favor of the petitioner must be sustained and the defendants appeal dismissed.

While causal connection between the accident and disability must be shown (*Westman's Case*, 118 Maine, 134), the accident need not be proved to be the sole, or even the primary cause of disablement.

It is sufficient to sustain a finding for the injured employee if the accident "hastened a deep seated disorder," (*Lachance's Case*, 121 Maine, 506) or "so influenced the progress of an existing disease as to cause . . . disablement" (*Mailman's Case*, 118 Maine, 180), or caused an "acceleration or aggravation of a preexisting disease," *Hull's Case*, 125 Maine, 137.

Dr. Risley a medical witness called at the instance of the Commissioner concurred in the suggestion of his cross-examiner that whether an accident lights up and makes worse a pathological condition is a "mere guess."

Arguing from this the defendants' counsel contends that the Commissioner's decree was built upon the sand of "speculation, surmise or conjecture" and cannot stand. *Butt's Case*, 125 Maine, 245.

But the decree was founded upon some evidence as the following brief summary may show.

At the time of the accident the petitioner felt and apparently was, well and sound. He had lost, he said, only nine days time in forty years. On October 7, 1924 while carrying on his shoulder one end of a water soaked stick of timber fourteen feet long and six inches square, he slipped and fell backward into a hole five feet deep and the timber "squatted me (him) down into the hole."

Afterward, while suffering constant pain, obliged to stop and rest several times between his house and the mill, he continued in his employment, performing light tasks, until July 18th, 1925. Since that time he has done practically no work. The Commissioner found him totally disabled.

One physician testified that the accident was a "plausible cause" of the disability; another, that the accident might have brought about his condition; another, that the accident could have accelerated his disorder, and another (Dr. Risley) speaking generally, testified, "I do think . . . . injury lights it up and makes it worse."

It will be observed that no physician expresses a positive opinion that Swett's disability was caused or aggravated by the accident. All of the medical testimony was given in the potential rather than the indicative mood. Some authorities treat this as a fatal weakness in a petitioner's case. *Fink* v. *Sheldon Co.*, 270 Pa., 479, 113 Atl., 666; *Anderson* v. *Baxter*, (Pa.), 132 Atl., 359; *Carolan* v. *Hoe*, 212 N. Y. S., 75.

But while this court holds expert medical testimony to be of very great importance and value, it is not absolutely essential in the establishment of truth.

It need not be reiterated that a Commissioner's decree must be based upon evidence. It is only stating the same thing in another way to say that if such a decree is founded upon speculation, surmise or conjecture it cannot stand. This is true where evidence of primary facts is wanting. It is likewise true where, as in this case, the issue is the correctness of an inference, deduction or conclusion.

In such case an expert opinion fully supporting the Commissioner's finding is desirable. But as in a common law action, so in a compensation case, expert evidence is not always essential to the making of sound deductions.

The Commissioner's conclusion notwithstanding that its supporting evidence is not viseed by an expert must stand if rational and natural. *Kelley's Case*, 123 Maine, 263; *Adam's Case*, 124 Maine, 297; *Cacciagiano's Case*, 124 Maine, 422; *Mailman's Case*, supra.

The decree in the present case was based on the full history of the case, the sequence of events, (*Anderson* v. *Baxter*, supra), the sudden transition from health to pain and weakness, the progressive and increasing disability beginning at the time of the accident, and culmi-

nating in total incapacity, the unanimous testimony of physicians that the petitioner's diseased condition could have been aggravated by his fall, and the evidence of Dr. Risley that injury "lights it up and makes it worse."

We think that the Commissioner's conclusion was rational notwithstanding Dr. Risley's disclaimer of certainty.

Appeal dismissed with costs.
Decree affirmed.

ABRAHAM LIEBERMAN ET AL. *vs.* S. D. WARREN COMPANY.

Penobscot. Opinion September 9, 1926.

Where an affidavit is filed, requiring proof of signature or authorization, a possessor of a negotiable instrument is not prima facie a holder in due course within the meaning of the Negotiable Instrument Act. He must prove the signature or the authorization on which his status as a holder depends.

In the instant case the question of whether the disputed signature was genuine or authorized by the maker was a pure question of fact which the jury found against the plaintiffs. It is not so clearly wrong that this court can say that it was the result of some mistake or that the jury who saw and heard the witnesses were influenced by bias, or prejudice.

On general motion for a new trial. An action to recover the sum of $233.71, being the amount represented by two checks given by defendant to one Herbert Miki, who, plaintiffs contend, endorsed, transferred and sold for a valuable consideration, said two checks to plaintiffs, but defendant disputes the genuineness of the endorsement. Verdict for defendant and plaintiffs filed a general motion for a new trial. Motion overruled.

The case sufficiently appears in the opinion.

Simon J. Levi, for plaintiffs.

James D. Maxwell, for defendant.

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

WILSON, C. J. An action in assumpsit to recover on two checks drawn by the defendant company September 3, 1925 on the Merrill Trust Company of Bangor, Maine and payable to one Herbert Miki and bearing the endorsement in blank of Herbert Miki.

The defendant pleaded the general issue and filed an affidavit complying with Rule XIV. of the Superior Court of Penobscot County, denying the signature of the payee as endorser, and also any authorization on the part of any person to sign his name to the checks as endorser.

The facts testified to by one of the plaintiffs were that on Saturday, September 5th, 1925 about noon a man whom he had known as Herbert Mickie, or Mitchie, came into his store in Bangor and purchased some articles and tendered him the two checks sued on with the endorsements already on them, which he cashed. The plaintiff was somewhat vaguely corroborated by his clerk.

The defendant's paymaster, and assistant, testified that on September 3d at Dennysville in Washington County, the two checks were issued to the man known to them on their records as Herbert Mihic, but for some reason not explained in the testimony, . . . unless the inference is that he was known among his fellows as "Mickie," or "Miki," . . . drawn in the name of Herbert Miki, that later on the same day Mihic came back to the company's office in Dennysville and stated that he had lost the checks and requested others be issued to him. The assistant clerk called a branch of the Trust Company at Machias and, in accordance with instructions received, notified the bank by letter not to honor the checks issued on September 3d.

On the following day, September 4th, the paymaster, who was absent when the original checks were given, returned to Dennysville and after conference with Mihic also called the bank and sent another letter, instructing it not to honor the checks; and later, it does not definitely appear when, drew one check to the order of Hubert Mihic, which is the name signed to the company's receipt, for the sum due him. The check, however, bears the date of September 5th. If issued on the fifth, it would have been impossible for Mihic, or Miki, to arrive by rail in Bangor by noon of the same day.

Mihic was not produced by either party at the trial, though the evidence showed that the defendant had made efforts to locate him.

The late Charles F. Sweet, former clerk of this court, who frequently qualified and testified as a handwriting expert, was called by the defendant, and after examining the receipt signed by Mihic, when the checks were issued, and the checks sued on, and bearing his alleged endorsement, expressed the opinion that the signature of Miki as endorser on the checks was not written by the same person as the signature to the receipt; that the signature on the receipt was obviously written by a good penman and the signature on the check was written by a poor penman, which an examination of the original exhibits, in some measure corroborates.

Upon this evidence the case went to the jury, which found in favor of the defendant; and the case comes before this court on a motion for a new trial on the usual grounds.

Counsel for plaintiffs contends that the plaintiffs upon the evidence were prima facie holders in due course under Section 59 of the Uniform Negotiable Instrument Law of this state, which reads: "Every holder is deemed prima facie to be a holder in due course," and that under Sections 57 and 59 of the Act, as such holders they took the checks free from any defense available to prior parties, and that the burden was on the defendant to show that the title of some person negotiating the instrument was defective.

Where, however, an affidavit is filed requiring proof of a signature and authorization, a possessor is not necessarily a holder within the meaning of the Act. He must prove the signature or the authorization of those on which his status as a holder depends. *Capital Hill State Bank* v. *Rawlin Nat. Bank*, 24 Wyo., 423; 11 A. L. R., 937; *Mayers* v. *McRimmon*, 140 N. C., 640; *Vickery* v. *Burton*, 6 N. D., 245; *Boles* v. *Harding*, 201 Mass., 103; Anno. 11 A. L. R., 954.

The defendant also contends that the jury was warranted in finding from the evidence that the signature of Herbert Miki as endorser on the checks was a forgery and, therefore, the title of the plaintiffs was defective, and hence under Section 59 of the Act, they cannot recover.

The issue was one of identity, and was submitted to the jury who heard and saw the witnesses and had before them the original exhibits. While this court might have arrived at a contrary conclusion, it cannot say that the verdict, upon the evidence, is so clearly wrong that it must have been the result of mistake or bias or prejudice, or that it was contrary to law. Accordingly the mandate must be,

Motion overruled.

BORELLO'S CASE.

Cumberland. Opinion September 9, 1926.

The compensation provided for in Section 16 of the Compensation Act is not necessarily based on the presumption that the injured workman previously had a normal arm, leg, hand or eye. If he had an eye capable of performing the ordinary functions, even though its normal efficiency was impaired and as the result of an accident its vision was reduced below one tenth of the normal vision, he is entitled to compensation under Section 16.

On appeal. A compensation case. Under an agreed statement, before the injury complained of the petitioner had sixty-four per cent. visual efficiency in the right eye. After the injury, which resulted from getting a piece of rock in his right eye while working as a stone mason, the eye became impaired until he had no visual efficiency in the eye. The question involved was as to whether the petitioner having less than a normal eye before the injury was entitled to compensation as though he had a normal eye. Compensation of $18 per week for one hundred weeks was awarded and from an affirming decree an appeal was taken. Appeal dismissed. Decree below affirmed with costs.

The case appears in the opinion.

Bernard A. Bove, for petitioner.

Hinckley, Hinckley & Shesong, for respondents.

SITTING: WILSON, C. J., PHILBROOK, DEASY, BASSETT, PATTANGALL, JJ.

WILSON, C. J. The petitioner was injured July 30, 1925 by a rock striking him in the eye while in the employ of the respondent, who was an assenting employer under the Workman's Compensation Act. On September 9, 1925, the petitioner entered into an "open end" agreement with the insurance carrier to pay him compensation during the period of incapacity, and sometime prior to February, 1926 filed a petition to determine the extent of permanent impairment of the vision of the eye under the last paragraph of Section 16 of the Act.

At the hearing before the full Commission, it was agreed between all the parties that there was a permanent impairment to the extent of a loss of all efficient vision of the injured eye, but that prior to the accident, the vision of the injured eye was only sixty-four per cent. of normal. Upon this agreement as to the result of the injury, the Commission held that there was a permanent total impairment of the injured eye which entitled the petitioner to compensation as for the loss of an eye under Section 16 of the Act.

From the decree of the Justice below in accordance with the Commission's findings, the respondent appealed, on the ground that the petitioner, not having a normal eye when injured, was entitled only to compensation proportionate to the percentage of normal vision lost by the accident, or sixty-four per cent of the compensation specified in the Act "for the loss of an eye."

It is not necessary to decide the appropriate form of petition under the circumstances of this case. No question is raised as to procedure. However, a petition to determine the extent of permanent impairment of an eye is not improper, even though the Commission find there was a total permanent impairment. The extent of the impairment of vision and whether permanent may not be determinable, except upon hearing and expert testimony, and if upon hearing, the full Commission find the impairment permanent and total, there seems to be no good reason why it should not so declare.

The compensation provided for in Section 16 of the Act is not necessarily based on the presumption that the injured workman previously had a normal arm, leg, hand, or eye. If he had an arm, leg, hand, or eye capable of performing the ordinary functions of such members, even though its normal efficiency was impaired, and as a result of an injury the arm, leg, or hand is severed, or the sight of an eye is reduced to or below one tenth of the normal vision, he would be entitled to compensation for total incapacity for the specified period fixed in Section 16.

What percentage of normal vision above one tenth, it is necessary for an employee to have, so that if reduced by injury to or below one tenth, he can be said, within the meaning of Section 16, to have lost an eye, it is not now necessary to determine.

The Commission was clearly right in holding that a loss of all efficient vision of an eye, previously sixty-four per cent. normal,

entitled the petitioner to compensation as "for the loss of an eye." *Purchase* v. *G. R. R.*, 194 Mich., 103; *Hobestis* v. *Columbia Shirt Co.*, 186 N. Y., App. Div., 397.

Appeal dismissed.
Decree below affirmed with costs.

BERTHA M. CHRISTENSEN, Libl't *vs.* CHRISTEN M. CHRISTENSEN.

Cumberland. Opinion September 9, 1926.

Condonation implies not only forgiveness but a restoration to the marital rights.

In the instant case not only was the court warranted in finding that the offense charged was not condoned, but condonation is a fact to be found to which no exception would lie, unless it was found without evidence to support it.

On exceptions. Libel for divorce alleging adultery. At the conclusion of testimony by the libellant counsel for libellee moved for a dismissal of the libel on the ground of condonation, which was denied, and at the close of the hearing before the presiding Justice without a jury, a divorce was granted and libellee entered exceptions. Exceptions overruled.

The case fully appears in the opinion.

Albert E. Anderson, Max L. Pinansky and Abraham Breitbard, for libellant.

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

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

WILSON, C. J. In a libel for divorce, the Justice below granted a divorce on the ground of adultery, which was conclusively shown. The only defense was condonation. The case comes to this court on exceptions to alleged rulings of the court below, as set forth in the bill

of exceptions: "that the libellant was entitled to a divorce on the ground of adultery" and "that the adultery was, as a matter of law, not condoned."

The real issue is set forth in the alleged ruling "that the adultery was, as a matter of law, not condoned."

"Condonation means the blotting out of the offense imputed so as to restore the offending party to the same position he or she occupied before the offense was committed."

The nature and elements of condonation were first fully stated by the English Courts in *Keats* v. *Keats*, 1 Sw. & Tr., 334, which has been followed by most of the courts in this country.

To be effectual, condonation must include a restoration of the offending party to, or a continuance of, all marital rights, after the offense becomes known. While condonation imports forgiveness; the converse is not necessarily true. The offended party may forgive, in that they may not bear any ill will, yet withhold a complete reconciliation in the sense of reinstating the offender to conjugal cohabitation and full marital rights.

The preliminary steps toward reconciliation and ultimate condonation, such as receiving the offending spouse back into the home, as in the case at bar, does not alone constitute condonation, so long as full marital rights are intentionally withheld. 9 R. C. L., 381, Section 173; *Taber* v. *Taber*, 66 Atl., (N. J.), 1082; *Betz* v. *Betz*, 19 App. Rep. (N. Y.), 90; *Harnett* v. *Harnett*, 59 Iowa, 401; *Anderson* v. *Anderson*, 89 Neb., 570; *Talley* v. *Talley*, 215 Pa. St., 281; *Rudd* v. *Rudd*, 66 Vt., 91; *Hahn* v. *Hahn*, 58 N. J., Eq., 211.

Again, while evidence of condonation in this state may be introduced without a special plea, *Backus* v. *Backus*, 3 Maine, 136, the burden is on the party setting up the defense to prove it.

Not only was the court, in the case at bar, warranted in finding, upon the evidence, that the burden was not sustained by the libellee; but condonation is a fact to be proved and found, *Taber* v. *Taber*, supra, and, unless the evidence of condonation was conclusive, it cannot be said that there was any error in law on the part of the court below in finding as a fact that condonation was not shown.

Exceptions overruled.

ARTHUR GRAVEL, Admr. *vs.* GEORGE F. ROBERGE.

Androscoggin. Opinion September 16, 1926.

The sudden emergency doctrine is not an exception to the general rule.

In the instant case, the fact that the defendant with his car entered the left-hand side of Second Street does not prove negligence. The statutory rule, commanding a turning to the right, applies only where one vehicle is "approaching to meet" another. Act of 1921, Chap. 211, Sec. 2. But he, who at any time drives upon the left-hand side of a street should be increasingly watchful.

The test question is whether the defendant acted as an ordinarily prudent and careful man would have done under the same circumstances. The emergency is one of the circumstances contemplated by the rule. If the defendant's course was one that an ordinarily prudent and careful driver put in his place, might have taken, he is relieved from liability, otherwise not. His own judgment or impulse is not in any situation, emergent or otherwise, the Law's criterion. The driver is exonerated if the course which he takes in an emergency is one "which might fairly be chosen by an intelligent and prudent person."

On motion for new trial by defendant. An action to recover damages for the death of a daughter of plaintiff, nine years old, who was knocked down and killed in the streets of Auburn by an automobile driven by defendant. A verdict of $650 was rendered by the jury for the plaintiff and defendant filed a motion for a new trial. Motion overruled.

The case sufficiently appears in the opinion.

Frank A. Morey, for plaintiff.

Albert Beliveau, for defendant.

SITTING: WILSON, C. J., DEASY, STURGIS, BARNES, BASSETT, JJ.

DEASY, J. On October 1st, 1925 an automobile driven by the defendant, turned suddenly from Broad Street into Second Street in Auburn. Jeanne Gravel, the plaintiff's intestate, a girl nine years old walking on the crossing at the junction of said streets, with unquestioned care, was by the automobile knocked down and killed.

The fact that the defendant with his car entered the left-hand side of Second Street does not prove negligence. The statutory rule, commanding a turning to the right, applies only where one vehicle is "approaching to meet" another. Act of 1921, Chap. 211, Sec. 2. But he who at any time drives upon the left-hand side of a street should be increasingly watchful.

The defendant says that he did not see the little girl until he "got within five or six feet of her." Up to that time he was looking at another car. He then, attempting to drive over the crossing between the girl and a post, hit both.

As an explanation and excuse he invokes the "sudden emergency" principle. *Fernald* v. *Fernald,* 121 Maine, 10.

Mill Street joins Broad near the Second Street Junction and on the same side of Broad. He says that driving out of Mill Street into Broad he saw a car called by witnesses the Levasseur car standing in or near the latter street; that this car started suddenly without warning and that watching it "to be sure whether he was going to hit me" the defendant turned toward and into Second Street.

The sudden emergency doctrine is not an exception to the general rule.

The test question is whether the defendant acted as an ordinarily prudent and careful man would have done under the same circumstances. The emergency is one of the circumstances contemplated by the rule. If the defendant's course was one that an ordinarily prudent and careful driver put in his place, might have taken, he is relieved from liability, otherwise not. His own judgment or impulse is not in any situation, emergent or otherwise, the Law's criterion. The driver is exonerated if the course which he takes in an emergency is one "which might fairly be chosen by an intelligent and prudent person." *Skene* v. *Graham,* 114 Maine, 234.

The Massachusetts Court in *Massie* v. *Barker,* 224 Mass., 423 says:—"If some unforeseen emergency occurs which naturally would overcome the judgment of the ordinary careful driver of a motor vehicle so that momentarily or for a time he is not capable of intelligent action, and as a result injury is inflicted upon a third person, the driver is not negligent." And the Vermont Court in *Lee* v. *Donnelly,* 113 Atl., 542 states the principle thus: "If he (the driver of an automobile confronted with a sudden emergency) acted, in the light of all the surrounding circumstances, as a careful and prudent man would

reasonably act, under like circumstances, he did all the law required of him. Whether he did this was a question for the jury."

Among the cases holding the same are,—*Lapp* v. *Railway Co.*, (Ky.), 199 S. W., 798; *R. R. Co.* v. *Hunt*, (Ala.), 86 So., 100; *Barkshadt* v. *Gresham*, (S. C.), 112 S. E., 923; *Carnahan* v. *Transit Co.*, (Cal.), 224 Pac., 146.

The evidence in the pending case shows no insuperable difficulty that the defendant would have encountered in continuing his course on Broad Street. The jury may have thought that an ordinarily careful driver would have avoided a sudden taking of a city street crossing which foot passengers are almost constantly using; or as between the chance of bending a mud guard, and the possibility of homicide, that such a driver would have chosen the former.

The defendant contends that the emergency excuses him. All cars are equipped with emergency brakes. It does not definitely appear that the defendant made use of his. When asked if he applied his brakes he replied—"Yes I did some." The jury may have determined that an ordinarily careful driver notwithstanding the emergency and perhaps because of it, would have used his brakes more than "some."

The defendant is the only living witness of the accident. He told the tragic story frankly. He probably regrets the death of the little girl more keenly than he can say. But the fact appears to be that she lost her life because he "lost his head." An emergency may arise so sudden and overwhelming, as to produce in any man the same mental disaster. The jury may have thought that the starting of a car without signal which, though unwarranted, is a common occurrence, did not create such an emergency.

The verdict was not based on manifest error.

Motion overruled.

CECIL D. MASTERS *vs.* WILLIAM T. VAN WART.

Aroostook. Opinion September 20, 1926.

A decree in equity overruling or sustaining a demurrer and nothing more, is interlocutory and cannot be brought to the Law Court until after final decree. But a decree sustaining a demurrer and dismissing the bill is final.

Where a defendant has agreed to convey property upon payment of certain notes by the plaintiff, and such notes have not been paid, no fraud being shown, the mere fact that the defendant does not own the property agreed to be conveyed does not entitle the plaintiff to a rescission. A contract whereby one agrees to convey, in the future, property which at the time of making the contract he does not own is neither illegal, reprehensible nor unusual.

When, however, fraud and false representations inducing the making of the contract, are alleged in the bill and proved or admitted by demurrer, the plaintiff is entitled to have the contract rescinded and his notes returned. Courts of Law have no machinery to accomplish this result. There is therefore, no plain, adequate and complete remedy at law.

Moreover in fraud cases, subject to certain well established exceptions, equity has jurisdiction irrespective of whether the injured party has a remedy at law, or whether such remedy will be effective or whether the loss for want of such equitable remedy is irreparable. Generally speaking, when fraud is shown, legal and equitable remedies are concurrent.

In a bill in equity for rescission of a contract for fraud, previous restitution or tender on the part of the plaintiff, need not be shown. An offer contained in the bill is sufficient.

A bill in equity is not like an action at law, brought on the footing of a rescission previously accomplished. Its theory is that the recission is not complete and it asks the aid of the court to make it so.

On appeal. A bill in equity asking that a contract between plaintiff and defendant be set aside on the ground of fraud. Defendant filed a demurrer to plaintiff's bill and upon a hearing the demurrer was sustained and appeal taken. Appeal sustained. Decree reversed. Case remanded.

The case is stated in the opinion.

Ransford W. Shaw, for complainant.

Harry M. Briggs and Herbert T. Powers, for respondent.

SITTING: WILSON, C. J., PHILBROOK, DEASY, STURGIS, BASSETT, JJ.

DEASY, J. PROCEDURE. The court below by its decree, appealed from, sustained a demurrer to the plaintiff's bill in equity and dismissed the bill.

In this State, contrary to the rule prevailing in some jurisdictions, (Whitehouse, Vol. 1, Page 850) an appeal may be taken from an interlocutory decree in an equity cause. R. S., Chap. 82, Sec. 24. But such appeal does "not suspend any proceedings . . . in the cause and shall not be taken to the Law Court until after final decree." R. S., Chap. 82, Sec. 24.

A decree in equity overruling or sustaining a demurrer and doing nothing more, is interlocutory (*Worcester* v. *Tupper*, 210 Mass., 380) and cannot be brought to this court "until after final decree." But a decree, like that in the present case, sustaining a demurrer and also dismissing the bill, is final. "It puts the case out of court." *Forbes* v. *Tuckerman*, 115 Mass., 119; *Snell* v. *Dwight*, 121 Mass., 348; *DeArmas's Heirs* v. *United States*, 6 Howard, 616.

Thus the procedure in this case while unusual is proper. The case might indeed have been brought forward on exceptions. R. S., Chap. 82, Sec. 27.

An appeal however is authorized.

Upon the appeal this court must determine the correctness of the decree below.

SUMMARY OF BILL.

Omitting non-essential parts and also, for the moment, omitting paragraph 10, we summarize the allegations of the bill as follows: The plaintiff gave the defendant three notes for one thousand dollars each, with interest. One note only is paid.

The consideration for these notes was a contract or bond, whereby the defendant agreed to convey to the plaintiff by warranty deed, clear of incumbrances, two lots of land in Bridgewater. The conveyance is required to be made at the request of the plaintiff "after the payment of said three thousand dollars before or at the time the same shall become due." The contract further provides that the plaintiff is "to have possession of said premises until he shall have failed to perform the condition of this bond."

The plaintiff, as authorized by the contract, entered into possession, by consent of the defendant moved a building from one lot to the other, "expended large sums of money in moving, fitting up and repairing and furnishing the said building," and leased it to the United States Government to be used as a customs house.

At the time of making the contract the defendant did not own the lot upon which such building has been placed. One Mrs. McMullin has notified the plaintiff that she owns the property and has forbidden him to exercise any ownership over it.

All these facts are alleged in the bill and admitted by the demurrer.

The above epitomizes the essential parts of the bill except the tenth paragraph which we consider further on in this opinion.

No Case Shown by Summarized Facts.

This summary discloses no case requiring the application of either an equitable or legal remedy.

It describes a contract but sets forth no breach of it.

The defendant agreed to convey the property, upon payment of the notes, but they have not been paid. A contract whereby one agrees to convey, in the future, property which at the time of making the contract, he does not own is neither illegal, reprehensible nor unusual.

Even if there had been a breach, no equitable remedy is indicated by the facts above recited. An injunction is prayed for, but no imperious necessity is shown and no irreparable damage threatened. Avoidance of multiplicity of suits is suggested, but plainly this ground of equitable jurisdiction is not applicable.

Tenth Paragraph. Fraud.

The tenth paragraph of the bill, however, (not included in the above summary) alleges fraud which is the "most ancient foundation" of equitable jurisprudence. *Hartshorne* v. *Eames*, 31 Maine, 97; *Trask* v. *Chase*, 107 Maine, 144.

In this paragraph of the bill it is alleged that the "defendant illegally and with intent to defraud the plaintiff, falsely represented to him that he was the owner of the land." This allegation the demurrer for all purposes of this appeal, admits.

In considering the appeal we are bound to treat as admitted, the charge that the defendant falsely represented himself to be the owner of the land, and that he did it with intent to defraud the plaintiff.

Thus the defendant admits all the elements of fraud, in any case required to be proved, except rescission and restitution, and except that the plaintiff in entering into the contract relied upon the fraudulent representations to his detriment.

If fraud, with all its elements, is shown, the plaintiff is entitled to have the contract rescinded. This is peculiarly an equitable remedy. Under his prayer for general relief he is entitled to have his notes cancelled and returned to him. Courts of law have no machinery to accomplish this result. There is, therefore, no plain, adequate and complete legal remedy.

"One of the prominent heads of equity jurisdiction, founded upon the peculiar remedy, is where the rescission, cancellation and delivery up of agreements, securities or deeds is sought on the ground of fraud." *Clark* v. *Robinson*, 58 Maine, 138.

Moreover, even if there be a plain, adequate and complete legal remedy, equity gives relief in case of fraud. In such cases, legal and equitable remedies are concurrent, subject to certain exceptions.

In fraud cases "equity has jurisdiction irrespective of whether the injured parties have a remedy at law or whether such a remedy will be effective or whether the loss for want of such an equitable remedy is irreparable." *Trask* v. *Chase*, 107 Maine, 144.

It is Chapter 175 of the Laws of 1874 that amends the then existing statute so as to give an equitable remedy in all "other cases" where there is not a plain, adequate and complete remedy at law. But inasmuch as relief in case of fraud is by the unamended statute provided for, without qualification or limitation, it is not one of the "other" cases referred to in the amendment.

"This is but an addition to the previous specifications. . . . . The limiting clause applies only to the additional jurisdiction . . . and in no respect affects that given before. Thus this Court has, by force of the statute, full equity jurisdiction in cases of fraud, limited only by the usage and practice of chancery courts . . . . concurrent with courts of law or exclusive of them" with some exceptions, to wit: "cases of warranties, misrepresentations and frauds in the sale of personal property and other like cases in which there is no prayer for rescinding the contract." *Taylor* v. *Taylor*, 74 Maine, 589.

The opinion next above cited then uses this language equally applicable to the instant case, —"It is very evident that this case does not come within any of the exceptions mentioned which can take it out of equity jurisdiction."

Granting that equity gives relief when fraud is proved or admitted, it may be urged that the bill in this case is demurrable for the reason that it contains no express allegation that the plaintiff relied upon the defendant's representations and none that the plaintiff before filing the bill put the defendant in statu quo or offered to do so.

RELIANCE UPON REPRESENTATIONS NOT ALLEGED.

There is in paragraph 10 no explicit averment that the plaintiff relied upon, believed or was influenced by the defendant's fraudulent misrepresentations. But such reliance may, we think, fairly be inferred from other parts of the bill, especially paragraph 7.

The demurrer sets forth want of equity merely. It is therefore a general demurrer.

If the demurrer had been special and had specified this omission as a ground, an amendment might have been asked and granted.

"Such a general demurrer does not specify any particular defect other than want of equity in the bill, (and) should only be employed when want of equity is plainly manifest." *Bidder* v. *McLean*, 20 Ch. D., 572; *Essex Paper Co.* v. *Greacen*, 45 N. J. Eq., 504; 1 Whitehouse, 407.

"The Courts make every reasonable presumption in favor of the bill when assailed by demurrer, the policy of the courts being to give every complainant an opportunity to be heard on the merits of his case, when any equity whatever appears in his bill although defectively stated." *State* v. *Oil Co.*, (Tenn.), 110 S. W., 570.

We think that equity appears in the bill, or at all events, that want of equity is not "plainly manifest."

RESTORATION OF STATU QUO.

The defendant by his demurrer admits that he did not own the land which he agreed to convey. But he gave the plaintiff possession of it.

The plaintiff has not been ousted. He still has possession. In order to rescind the contract he must restore the possession. The parties must be put in statu quo. *Herrin* v. *Libbey,* 36 Maine, 357; *Getchell* v. *Kirby,* 113 Maine, 94.

There is in the bill no allegation of restoration or tender or antecedent offer. But in the prayer of the bill the plaintiff asks that he "may be allowed to return all the property." This is an offer of restoration and in an equity proceeding is sufficient.

One who has been betrayed by fraud into the making of a contract for the purchase or sale of real estate and has received value has certain legal remedies, not involving or requiring rescission, and which need not be here discussed.

Instead of invoking these remedies he may,—

(1) Rescind the contract, make or tender full restitution and sue at law. A court of law cannot decree rescission or cancellation but, rescission and restitution being accomplished, it may enable the plaintiff to recover his property or money which is unlawfully withheld, or

(2) He may as in this case bring a bill in equity for rescission and therein offer to make full restitution.

In the former case rescission and tender of restitution are conditions precedent to the maintenance of the action.

In the latter case neither restitution nor rescission is a condition precedent. These things may be and should be provided for in the decree.

"Such an action (in equity) is not founded *upon* a rescission but brought *for* a rescission, and it is sufficient therefore for the plaintiff to offer in his complaint to return what he has received and to make tender of it at the trial." *Vail* v. *Reynolds,* 118 N. Y., 297, 23 N. E., 301.

"There was no necessity for an offer to return the consideration before the bill was brought. A bill in equity is not, like an action at law, brought on the footing of a rescission previously completed. The foundation of the bill is that the rescission is not complete and it asks the aid of this court to make it so." *Thomas* v. *Beals,* 154 Mass., 54.

Among the many cases holding the same are *Hall* v. *Bank,* (Wis.), 127 N. W., 969; *Haydon* v. *R. R. Co.,* (Mo.), 93 S. W., 833; *Alexander* v. *Walker,* (Tex.), 239 S. W., 313; *Bank* v. *Blocker,* (Minn.), 185 N. W., 292; *Strickland* v. *Strickland,* (Ala.), 90 So., 345; *Gamblin*

v. *Dickson*, (Idaho), 112 Pac., 213; *Clark* v. *O'Toole*, (Okl.), 94 Pac., 547; *Thayer* v. *Knote*, (Kan.), 52 Pac., 433.

RESUME.

False representations and fraud are alleged and for purposes of this appeal admitted. As against a general demurrer the plaintiff's reliance upon the fraudulent representations and action by reason of such reliance are sufficiently alleged. Some damage appears. In a bill in equity for rescission and cancellation of instruments voidable for fraud, offer of restitution is not a necessary condition precedent though, as some cases indicate, it may affect costs.

If the plaintiff can prove his allegations, including not merely want of title but actual fraud he is entitled to a remedy in equity.

Appeal sustained.
Decree reversed.
Case remanded.

SARAH BELLE CLARK'S CASE.

Lincoln. Opinion September 20, 1926.

Compensation paid to an injured employee to the date of his death limits the time during which compensation may be recovered by his dependents but is not a bar to recovery.

The power of an Industrial Accident Commissioner to grant additional time to file answer is discretionary. Denial is not subject to review, at all events unless abuse of discretion is shown.

Unless want of answer is waived material facts properly alleged in a petition and not disputed by answer are treated as admitted.

When, without objection, a case goes to trial before a Commissioner upon the issue of causal connection between the accident and death, the want of answer specifying such defense is treated as waived.

In the instant case the finding of such causal connection is supported by the testimony of two physicians. The decree in favor of the petitioner is based upon some evidence and must be affirmed.

On appeal. A petition for compensation by the dependent widow of R. T. Clark, who, while in the employ of the Waldoboro Garage Company on the twelfth day of February, 1924, received a personal injury by being kicked, knocked down and trampled upon by a horse, and it is alleged that his death which occurred on the twenty-fifth day of October, 1925, resulted from the injury. Compensation had been paid to the deceased from date of injury to date of his death, and a further compensation was decreed to petitioner according to the provisions of Section 12 of the Workmen's Compensation Act, and respondents appealed. Appeal dismissed with costs. Decree affirmed.

The case appears in the opinion.

Percival T. Clark, for petitioner.

Adelbert L. Miles, for respondents.

SITTING: PHILBROOK, DEASY, STURGIS, BASSETT, JJ. MORRILL, A. R. J.

DEASY, J. On February 12, 1924 the petitioner's husband, R. T. Clark, then an employee of the Waldoboro Garage Co. suffered an industrial accident. An agreement for compensation was approved March 1, 1924 and such compensation paid until the death of Mr. Clark on October 25, 1925.

From a decree in favor of the petitioner the defendants appeal.

The answer filed in this case sets up one defense only to wit: that compensation having been under an approved agreement, paid to the injured employee to the time of his death, "this employer's liability is now ended." A reading of Section 12 of the Compensation Act shows that this defense is ill-founded. Compensation for dependents under the precise circumstances of this case is provided for "but shall not continue more than three hundred weeks from the date of injury." Mr. Clark died before a third of this time had elapsed. Thus the only defense set up in the filed answer fails.

The defendant offered to file a further answer setting up another defense. This was objected to on the ground that the time prescribed by the statute for filing answer, had elapsed. The Commissioner refused to extend the time. The power of a Commissioner to grant additional time to file answers (Section 32) is discretionary Denial is not subject to review by this court, at all events, unless

abuse of discretion is shown. No such abuse appears in this case. Waiver by the petitioner was not proved, but on the other hand was negatived.

In the absence of an answer disputing material facts when properly alleged in or "disclosed by" (Section 32) the petition, such facts are treated as admitted. *McCollor's Case*, 122 Maine, 136. *Ross' Case*, 124 Maine, 108, *Brodin's Case*, 124 Maine, 162.

The point raised by the further answer which was offered too late to be filed is not before us. It is unnecessary to prolong this opinion by discussing it.

After an altercation concerning the proposed further answer the case went to trial before the Commissioner upon an issue not specified or mentioned in the answer filed, or in that rejected, to wit: Was Mr. Clark's disease aggravated or its progress accelerated or its fatal termination hastened by the accident? Failure of the answer to raise this point was thus impliedly, and was perhaps expressly waived.

The Commissioner's decree was on this issue in favor of the petitioner. The finding was supported by the opinion of two physicians. The decree was based upon some evidence.

Appeal dismissed with costs.
Decree affirmed.

HARRY A. THURSTON *vs.* MARY A. NUTTER.

Penobscot. Opinion September 24, 1926.

A contract partly in writing and partly oral is a parol contract, and a parol contract to support one during life is not within the statute of frauds.

He, who contracts to support another during life and then commits a breach of the contract that is wilful, purposeful or in bad faith, cannot recover in an action on a quantum meruit, for services rendered or benefits conferred.

If such a contract is not completed by a meeting of the minds of the parties, an action will lie to recover reasonable compensation for beneficial services rendered not gratuitously if the other party knows it and permits it and accepts the benefit, as there is a presumption that the services were requested with an intention to pay for them and the law implies a promise to pay.

In the instant case whether or not a contract was made between the parties and, if so, its terms were questions of fact for the jury, and the jury by their verdict must have found that an agreement was made as claimed by the defendant and that the plaintiff wilfully abandoned and broke it.

Upon a careful examination of the facts we are of the opinion that the conclusions of the jury were not authorized by the proof and that the only authorized conclusion is that the minds of the parties did not meet and the contract was not completed.

On motion for a new trial by plaintiff. An action of assumpsit for services rendered to and expenditures made for defendant. Plaintiff claimed the defendant orally agreed that if he would move upon her farm and care for and support her during life, she would give him a deed of the farm and take from him a bond for support secured by a mortgage on the farm; that he moved to the farm and carried it on for a year and repaired the buildings, and that defendant refused to give the deed and he left the farm. Defendant admitted that there was an agreement to support her but no agreement for giving a deed and mortgage and that plaintiff wilfully abandoned the contract. Verdict for defendant and general motion for new trial filed. Motion sustained. New trial granted.

The case fully appears in the opinion.

L. B. Waldron, for plaintiff.

W. B. Peirce, for defendant.

SITTING: WILSON, C. J., PHILBROOK, DEASY, BARNES, BASSETT, JJ. MORRILL, A. R. J.

BASSETT, J. Action of assumpsit to recover for services rendered to and expenditures made for the defendant. Writ dated September 19, 1923. Declaration contained three counts.

The first was a special count setting out an oral agreement that, if the plaintiff would move upon the farm of the defendant and care for and support her during life, she would give him a deed of the farm and take from him a bond for support secured by a mortgage on the farm; that the plaintiff moved to the farm and for a year, until July 1923, performed on his part, during that time working himself, hiring labor, furnishing supplies for the house and the farm stock and materials for repairing the buildings, all to the amount of $968; and that the defendant refused to perform.

The second count was upon account annexed of the items making up the above total. The third count was for money had and received.

Plea, general issue. Verdict for defendant. Case comes up on general motion.

The defendant, a widow seventy-five years of age, whose husband had died the year before, owned a small farm near the village of Dexter with a small amount of stock. She became acquainted with the plaintiff, who was in charge of a store in the village, and his wife and early in the Summer of 1922 suggested that they come to the farm and take care of her while she lived, as the plaintiff testified, "for what there was." The plaintiff and his wife had subsequent conversations with her, went to the farm to see her and in October moved on to the farm, taking farm stock, consisting of some cows, a horse, hogs and poultry. Before going the plaintiff cut and housed the hay. He continued at the store until the following February but during the Fall and Winter worked, as he could, on the farm and buildings. He also hired his brother to work on the farm during this period. The house was cleaned, a new kitchen built, papering and painting done, house and yard for poultry built and considerable carpenter work done and materials used in repairing and improving the house and barn. The following Spring the plaintiff put in the usual farm crops. According to the account the labor of plaintiff and his wife amounted to $117, he had paid for labor to the amount of $202, furnished wood, coal, hay and grain to the amount of $125,

and paid for the materials $341. The defendant was charged with board for the time plaintiff was on the farm $164. What the plaintiff did he did of his own volition neither asking the defendant nor being requested by her. He testified it was done for his convenience as well as hers. He and his wife treated the defendant kindly, gave her good board and care and the relations were harmonious until the last of the following June.

Prior to the plaintiff's coming to the farm the defendant wrote down on a piece of brown paper some terms for agreement, as she testified "as it come to me." She read this to the plaintiff's wife the first time she came to the farm and talked it over with her. Later she read it to the plaintiff and his wife before they moved. The plaintiff testified "she had a contract drawed up" and "that contract was that we was to come there, take care of her, have her real estate and personal property, have what wood was to be used on the place but none to sell and we was to give her a good burial but not an expensive one— We was to have the real estate and personal property for taking care of her." The plaintiff's wife and defendant testified to the same effect. This memorandum was not signed but these terms were agreed to by both parties.

The plaintiff and his wife both testified there was a further part of the agreement. His testimony was as follows:

Q. "There was nothing said about her giving you a deed of it at that time?

A. "She was to draw up papers to show that we had something to show for it.

Q. "That was what she was going to give you was a writing?

A. "Yes, sir.

Q. "That you was to have the place after she was dead?

A. "Yes, sir."

The testimony of the wife was:

Q. "What was the agreement in regard to the writing?

A. "And she was to give us a writing after we got settled there, she was to draw up a paper or draw up writings so that any one that came up—anything that came up afterwards, that they could not take it from us afterwards.

Q. "She was to give you security?

A. "Yes, sir, she was to give us security so that we would have the place after she had gone.

Q. "Later on after you got there what conversation, if any, did you have with her in regard to giving the security?

A. "I asked her two or three times, we got to speaking about it, and I said we would have to have some writings done before long because something might come up that we might not have any at all—she might be taken sick and die and we would have nothing to show that we was to have the place, after we had done the work we had done there.

Q. "Did she make any reply to that?

A. "She did not say anything at all."

The plaintiff testified that he did not speak of the agreement to the defendant or ask her "for a writing" until the last of the following June and the defendant testified she did not speak to him.

The defendant testified,

Q. "Was there anything more said about the agreement?

A. "After they got there Mrs. Thurston stated to me that Harry wanted to wait a year, try it a year. I was satisfied with that; furthermore there was nothing said about the agreement."

In reply to another question about this incident her answer was:

"It was after they moved there, soon after they moved she made that statement to me, that Harry wanted to try it for a year and I was agreeable for I thought it would give us both a chance to try it, so there was nothing more said and I thought no more about signing the paper until the year was up.

Q. "You did not have any conversation with Mr. Thurston about that?

A. "No.

Q. "In no way at no time?

A. "There was no more said about the paper at all until he demanded what I considered a deed the 29th day of June."

Mrs. Thurston denied that she made the suggestion and said that it came from the plaintiff.

As to the paper she had written, the defendant testified "I considered the paper they were to sign was an agreement of recompense to them; that it bound me and them both." And "I was going to write the copies in ink for each of us to have when they got ready to sign it." In reply to the question "did you expect him to come there without some security and take care of you during your life?" she said, "I expected him when he was satisfied with the paper to sign the paper and then we would be all right."

In the following June the defendant, it would appear of her own volition, spoke to a Mrs. Morrill, who was working for Mrs. Thurston, about the paper. Although Mrs. Morrill in her direct testimony stated that the defendant said she would not sign any paper, on cross-examination she made it clear that the defendant said she would not sign any deed, that she thought the Thurstons expected it but would be disappointed as she did not believe in people signing away their property.

This conversation was overheard by Mrs. Thurston, who reported it to her husband and on the same evening they had a talk with the defendant and the plaintiff asked as she testified, "for papers that I considered a deed and therefore I refused because I had this other paper for him to sign that would bind us both, me to care for him and him to care for me and he to have my property when I was through with it, what I left."

The plaintiff and his wife at first testified that she refused to sign any paper but from their whole testimony it is clear that she refused to give any deed.

The plaintiff and his wife refused to stay longer, and shortly after left the farm.

The theory of the defendant was that the agreement which the plaintiff and defendant made was that contained in the memorandum; that this was read to him and assented to by him and he entered upon its performance and then requested a deed which was not mentioned in the memorandum and because it was not given refused to perform and abandoned the contract.

Such a contract although a parol contract, because in part in writing and in part verbal, *Farwell* v. *Tillson*, 76 Maine, 237, *Miller* v. *Sharp*, 100 N. E., 108 (Ind.), would not be within the statute of frauds. A parol contract to support one during life is not within the statute, *Hutchinson* v. *Hutchinson*, 46 Maine, 154.

The decisions upon the specific question of the right of one who breaks a contract to support another for life to recover on a quantum meruit are not many and there is a conflict.

In *Ptacek* v. *Pisa*, 83 N. E., 221 (Ill.), and *Lathrop* v. *Moyer*, 86 Mo. App., 355, it is held that an action on a quantum meruit will not lie where there is a repudiation or wilful failure to perform.

But in *Pitts* v. *Pitts*, 21 Ind., 309, and *Vancleave* v. *Clark*, 20 N. E., 527 (Ind.), and *Sullivan* v. *Sullivan*, 92 S. W., 966, (Ky.), it is held

that such an action may be maintained for the fair and reasonable value of the services rendered and benefits conferred.

Before this court there has been one case where a son agreed with his father to carry on the homestead farm, divide the proceeds and receive the farm after the father's death. The son faithfully performed up to an illness, that incapacitated him from work, and, but for the illness, would have continued to perform. It was held that an action on a quantum meruit was maintainable, although the case went off on a nonsuit. "Recovery may be had for the value of the service actually rendered where the performance of an entire contract is prevented by sickness or death. A circumstance that has had a decisive influence is the fact that in such case the other party has received and retains the benefit of the services." *Preble* v. *Preble*, 115 Maine, 26.

There is a similar conflict of authority in the analogous cases of contracts for work and labor and personal services. *Lynn* v. *Seby*, 151 N. W., 31, (No. Dak., 1915) where there was a refusal to complete a contract for services partly performed, summarizes in a valuable way the conflicting decisions.

"The rule at common law was against the plaintiff's recovery until the case of *Britton* v. *Turner*, 6 N. H., 481; 26 Am. Dec. 713, was decided in 1834 in disregard of precedent. But the reasoning of that case is so cogent that it seems to have divided, if not changed, the current of authority. It first recognized the fact of the benefits of the part performance to the party who would keep such benefits, incapable of being returned, and still avoid paying anything for the benefits accrued, where the contract is not fully performed . . . . An equitable rule has gradually developed permitting a recovery for the value of the services rendered, irrespective of the breach, giving to the other party to the contract a corresponding right of action in damages separately or in mitigation of the plaintiff's recovery so that the rights of both may be equitably adjusted at law notwithstanding the breach and non-performance of the contract. (Cases cited). This is true only where that which has been received by the employer under the partial performance has been beneficial to him. . . . . While there is a division of authority and the weight of authority from the number of holdings alone would deny a right of recovery, yet we prefer to follow the other line of authority. Either rule must,

under certain circumstances work injustice. Otherwise there would be no division in authorities. We elect to follow that which we believe to be the trend of authority."

And the case held a promise would be implied, from the work and labor beneficial to the other party to pay its reasonable value.

There has been much discussion whether an obligation arises from the retention of benefits rendered, under a doctrine of "unjust enrichment" so called, and an ensuing obligation quasi ex contractu, and this distinction has been suggested for cases of wilful breach. "In cases of this kind the courts have not noticed any distinction between contracts where the broken condition is express and where it is simply implied; and yet it would seem that such a distinction might well be made. Where an express condition is introduced into a contract of this kind, it is put in for the express purpose of guarding against a wilful breach, such must be the intention of the parties in nearly all cases; therefore to allow a recovery in quasi contract would be, under such conditions quite useless; in short there are no equitable grounds on which plaintiff can claim relief. In the case of an implied condition, however, there is a difference. An implied condition is, strictly, nothing more than an equitable excuse for not having performed; the whole question therefore is equitable and is reduced to determining whether, even in the case of wilful breach, it is just that plaintiff should not be allowed to recover for benefits conferred on the defendants, and it is submitted that it is not just and that in such cases recovery should be allowed." 8 Harvard Law Review, 364; 10 Ibid, 381; 12 Ibid, 284.

The "cogent reasoning" of *Britton* v. *Turner* was not followed by this court. In *Miller* v. *Goddard*, 34 Maine, 102 (1852) the New Hampshire doctrine was argued by counsel, considered by the court and not adopted. "When the laborer has adequate cause to justify an omission to fulfil the contract he cannot be regarded as in any fault. But it does not very well accord with the good faith which the rules of law uniformly require, to allow him to stop at any stage of his labor in open violation of his agreement, and still compel his employer to pay him what his services are worth. If it were permitted to the laborer to determine the contract at his pleasure, no well founded reliance could be placed at any time upon a due observance of it." It was accordingly held that if the laborer voluntarily quits the service before the expiration of the time without justifiable cause he can recover nothing for his previous labor.

There is too a consideration of public policy for if "irrespective of the breach," *Lynn* v. *Seby*, supra, recovery were allowed on a quantum meruit there would be an increasing tendency to break existing contracts.

This court has always while considering the matter of retention of benefits considered the nature of the breach. It has recognized well defined classes of cases where there has been an endeavor in good faith to perform, substantial performance and, although some variance, with the work and material of value and benefit to the other party. *Hattin* v. *Chase*, 88 Maine, 237; *Skowhegan Water Company* v. *Skowhegan Village Corporation*, 102 Maine, 323.

But where the breach is wilful, purposeful or in bad faith no recovery on a quantum meruit is permitted. *Miller* v. *Goddard*, supra; *Veazie* v. *Bangor*, 51 Maine, 509; *Holden Steam Mill* v. *Westervelt*, 67 Maine, 446; *Dixon* v. *Fridette*, 81 Maine, 122.

Therefore the plaintiff's leaving the farm under the defendant's theory of the case would have been a breach, which would have prevented the maintenance of an action on a quantum meruit, if the defendant's theory of the case were correct.

The theory of the plaintiff, on the other hand, was that the agreement also included an agreement for making out papers which would secure him in his performance, and that a part of such papers included a deed. If that were the agreement and the defendant refused to give the deed, the plaintiff would have the legal right to elect to rescind and sue on a quantum meruit, *Dixon* v. *Fridette*, supra.

But if the agreement, instead of being as contended by the plaintiff or by the defendant, was not completed because there was not a clear accession on both sides to one and the same set of terms, *Wiswell* v. *Bresnahan*, 84 Maine, 398, or a complete mutuality of engagement so that each had the right at once to hold the other to a positive agreement, *Preble* v. *Hunt*, 85 Maine, 267, then the plaintiff could maintain an action on a quantum meruit because where one party renders services beneficial to another under circumstances that negative the idea that the services were gratuitous and the party, to whom the services are rendered, knows it and permits it and accepts the benefit, he is bound to pay a reasonable compensation therefor. That is because such facts and circumstances justify a presumption that the party to whom the services are rendered must have requested them and must have intended to pay for them and therefore the law

implies a promise on his part to pay for them. *Wadleigh* v. *Pulp and Paper Company*, 116 Maine, 113. We think the circumstances here satisfy the rule, if the minds of the parties did not meet. The amount of benefit to the defendant would be a question of fact for the determination of the jury.

In the absence of any exceptions to the charge of the presiding justice or requests for instructions it is to be assumed that full and adequate instructions were given to the jury upon the principles of law applicable to the case and to enable them to understand the issues and to appreciate the kind and degree of proof to establish them.

Whether or not a contract was made between the parties and, if so, what were its terms were questions of fact for the jury. The jury by their verdict for defendant must have found that the agreement which was made was as claimed by the defendant and that the plaintiff wilfully abandoned and broke it.

This is a motion for a new trial on the ground that the verdict is against the evidence and the weight of evidence. The evidence was in some respects contradictory though the most substantial facts seem to have been perfectly established. "A court of law is not in the habit of setting aside verdicts on such ground except in those cases where it is plain that the jury have drawn conclusions unauthorized by the proof. Whether they have done so in any particular case is often a question of difficulty and one which should be examined with care and decided with caution." *Palmer* v. *Barker*, 11 Maine, 338.

Upon a careful examination of the facts we are of the opinion that the conclusions of the jury were not authorized by the proof and that the only authorized conclusion is that the minds of the parties did not meet and no completed contract was made. This conclusion harmonizes the facts in the case. While the parties were agreed upon the terms contained in the memorandum, the memorandum was not the complete contract. The parties further agreed it should be put into a written form to insure its performance but what that form was to be was not agreed. The conduct and testimony of the defendant clearly establishes this. Whether the suggestion as to waiting a year was made by her or Mrs. Thurston she testified that she stated to Mrs. Thurston she was satisfied "to wait a year, try it a year." Her conversation with Mrs. Morrill shows that she had some reason to believe that the plaintiff wanted a deed which she did not propose

to give. She was awaiting when he would be satisfied with a signed copy of the memorandum which she believed to be binding on both. "I expected him *when he was satisfied* with that paper to sign the paper and *then* we would be all right." Her conduct and admissions clearly show that on this part of the agreement no positive agreement to which "each had the right at once to hold the other" had been reached by the parties.

We therefore conclude that the verdict is so clearly wrong that it must be set aside.

Motion sustained.
New trial granted.

ADDIE F. BRYANT *vs.* SANFORD L. FOGG, Adm'r.

Somerset. Opinion September 24, 1926.

For a relative or member of the household to recover payment for services there must be a contract, either express or implied as a matter not of law but of fact, and such contract must be proved in accordance with the ordinary rule of burden of proof.

It is not enough to show that the valuable service was rendered. It must appear that the one who rendered service expected at the time the services were performed compensation and the one who received so understood or under the circumstances ought so to have understood and by his words or conduct or both justified the expectation.

There is not in any given case a legal presumption of any kind that the services were rendered gratuitously or for compensation.

When the parties bear the relationship to each other as in this case the determination whether upon the circumstances existing in each case the services were rendered on the basis of contract or not is declared by our court to be "peculiarly the province of the jury."

The jury concluded there was a mutual understanding for compensation and the court cannot say that as a matter of law there was no evidence from which such understanding could not be inferred or that the jury's verdict was due to bias or prejudice or was manifestly wrong.

On general motion for new trial. An action by a daughter against the estate of her father for housekeeping and care. A verdict of

$978 was rendered for plaintiff and defendant filed a general motion for a new trial. Motion overruled.

The case is sufficiently stated in the opinion.

H. R. Coolidge, for plaintiff.

McLean, Fogg & Southard, for defendant.

WILSON, C. J., PHILBROOK, STURGIS, BASSETT, JJ.
MORRILL, A. R. J.

BASSETT, J. Suit brought by Addie F. Bryant against the administrator c. t. a. of the estate of her father, Cyrus W. Foster. One part of the claim filed in the Probate Court and set forth in the writ, which was dated August 26, 1924, was for housekeeping and care of the father from April 1, 1915, to May 22, 1922, three hundred and seventy-one weeks at $6 per week, $2226; the other part was for groceries and provisions furnished the father from April 1, 1915, to May 8, 1921, three hundred and seventeen weeks at $5 per week $1585. The only question submitted to the jury was the recovery for housekeeping and care for six years prior to the date of the writ, viz.: from August 27, 1918, when the statute of limitations began to operate, to May 22, 1922, one hundred and ninety-four weeks. The verdict was for the plaintiff $978. The case comes up on general motion.

Cyrus W. Foster, a civil war veteran eighty years old was in April, 1915, living on his farm in Palmyra. His wife was very ill. They had two children, a son Frank P. Foster who also lived in Palmyra at some distance from his father and a daughter, the plaintiff, who lived in her home in Pittsfield village. The son at his father's request went for and brought back his sister to the farm. She came April 1. The mother died on April 17. The plaintiff remained continuously at her father's home until he was taken to the National Home at Togus on May 22, 1922, by the son, who had been appointed his guardian. He remained there until his death February 25, 1923. The plaintiff while in her father's home did all the house work being the only woman there. The father was occasionally attended by a physician until October, 1921 when from the infirmities of age and a complication of physical ailments he required frequent and regular medical treatment. In August, 1918 a man was employed to run the farm and did so, constituting one of the family, until the father left. On October 8, 1921, a male trained nurse was employed to take

care of Mr. Foster and remained until March 4, 1922. It was not controverted that the plaintiff did all the household duties and that, when Mr. Foster had sick spells, washings had to be done almost each day. The son, when asked what his father said in reference to the employment of his sister at the time she came, replied: "He never said anything to me in particular." Mr. Eldridge, who ran the farm, testified:

Q. "If she (the plaintiff) went away for a day did Mr. Foster make any remark?

A. "He did.

Q. "What did he say?

A. "He would like to have her at home.

Q. "When she would go away for a day, be absent for a day, during this time what would he tell you?

A. "He said he would like to have her at home.

Q. "Did he make any statements as to whether he needed her services?

A. "He did.

Q. "What did he say about that?

A. "He said he needed her."

This is all the evidence of any conversation of the father about the services.

The brother testified that shortly after the father went to and was living at the Home, the plaintiff spoke to him, he being then guardian, about filing an account; that he did not pay her anything because, as he explained, he and his sister were, so far as they knew, the only heirs, he had paid out considerable money on the father's account, he and the plaintiff were going to see the father through and did not know how much would have to be paid out and he and the plaintiff could settle with each other any differences or accounts.

The only evidence offered by the defense and admitted without objection was a letter from the brother to the defendant dated July 9, 1923, a part of which was "I have taken up the matter of the monument with Mrs. Bryant and she feels that on account of the lack of courtesy, and even decency shown her by one Charles F. Tibbitt of Augusta it will be her duty to place in your hands a bill from her at a nominal price covering her seven years of service and her estimated expenses . . . . This bill will be forwarded to you in a few days."

The law of this State with reference to payment for services by a relative or member of the household has been clearly and definitely stated. To recover there must be a contract. It may be express or implied. It is implied as a matter not of law but of fact. It must be proved in accordance with the ordinary rule of burden of proof. It is not enough to show that valuable service was rendered. It must appear that the one who rendered expected compensation and the one who received so understood or under the circumstances ought so to have understood and by his words or conduct or both justified the expectation. There is not in any given case a legal presumption of any kind that the services were rendered gratuitously or for compensation. *Saunders* v. *Saunders*, 90 Maine, 284; *Leighton* v. *Nash*, 111 Maine, 528; *Hatch* v. *Dutch*, 113 Maine, 405; *Cheney* v. *Cheney*, 122 Maine, 556.

"It is then incumbent on the plaintiff to satisfy the jury that the services were rendered under circumstances consistent with contract relations between the parties and that the defendant either expressly agreed to pay for the services or to give certain property therefor or that they were rendered by the plaintiff either in pursuance of a mutual understanding between the parties or in the expectation and belief that he was to receive payment and that the circumstances of the case and the conduct of the defendant justified such expectation and belief."

"If it can properly be said that there is any presumption in a given case that the services rendered to a father by a son after he becomes of age, are gratuitous, it is clearly a presumption of fact and not of law. It is not a uniform and constant rule attached to fixed conditions and applicable only generically. It is a conclusion from a process of reasoning which the mind of any intelligent person would apply under like circumstances, and it is applicable only specifically. It rests on probability and is the effect of evidence, the result of inferences to be drawn from the facts in the case at the discretion of the jury,—the force of it varying according to circumstances." *Saunders* v. *Saunders*, 90 Maine, 290.

"It must be shown that the plaintiff expected to receive compensation and the defendant's intestate so understood, by reason of a mutual understanding or otherwise or that under the circumstances he ought so to have understood. . . . Whether the plaintiff expected compensation and whether the defendant's intestate so

understood or ought so to have understood are questions of fact, and must be determined in a case like this where there is no testimony from either of the parties, by a consideration of the circumstances, of their relations to each other, of their conduct respectively, and of the probabilities." *Leighton* v. *Nash*, 111 Maine, 528.

Since the law of this State has been so definitely settled and stated and the questions in any given case reduced to questions of fact, the numerous and varying decisions (see extended note 11 L. R. A., N. S., 873) of other States, in many instances seeming to be in conflict with each other and with our decisions, are often inapplicable. While there are varying theories as to presumptions and counter presumptions and what evidence rebuts presumptions, and as to implications to be drawn from certain kinds of evidence and their effect, and as to whether agreements of this kind must be express and, if so, the admissible proof of them, or may be implied, upon careful examination of the cases it would appear that the seeming differences are often abstract and so minute as not to be of practical consideration and that the differences in the opinions are really, in the final analysis, based upon the views of the court as to the sufficiency or insufficiency of certain kinds of evidence to establish such a claim and as to whether in this class of cases a higher degree of certainty and definiteness in the evidence to establish is required than in the ordinary civil case. In our State there is no such requirement and no distinction is made between cases of this class—although the claim is usually brought against the estate of an alleged deceased promisor—and any other civil case.

And when the parties bear the relationship to each other as in this case, the determination whether, upon the circumstances existing in each case, the services were rendered on the basis of contract or not has been declared by our court to be "peculiarly the province of the jury." *Cheney* v. *Cheney*, 122 Maine, 557.

Of the four cases which this court have decided, *Saunders* v. *Saunders*, *Leighton* v. *Nash*, *Hatch* v. *Dutch*, *Cheney* v. *Cheney*, the first three were against estates and all of them came up on motion, overruled in three and sustained in one. The first also came up on exceptions to instructions and refusal to give instructions, which were overruled. So far as the motions were concerned, the decisions turned on the specific facts of each case.

There is no conflicting evidence in the case before us. The facts are clear. There was no express request by the plaintiff to be paid. No express promise of the defendant to pay. The contract, if it existed, is to be implied. To establish it two facts must be proved. The failure to establish either is fatal. Did the plaintiff "then" *Lafontain* v. *Hayhurst*, 89 Maine, 391, i. e., when the services were rendered, expect to be paid and believe she would be paid and did her father so understand or ought under all the circumstances so to have understood and by his conduct justified her expectation and belief.

The plaintiff was an adult, a married woman, lived in her own home in another town. Her father was old, infirm and increasingly so. He sent for her seventeen days before his wife died. The daughter remained thereafter for seven years, the only woman there, doing all the ordinary household duties, which at times on account of sick spells of the father were more than ordinary. All the farm work was done by a man hired for that purpose and one of the household. For five months during the last year a male nurse was there. At times when she left the house for a day the father said he needed her and would like to have her at home.

What inferences of fact are to be drawn from "a consideration of the circumstances of their relations to each other, of their conduct respectively and of the probabilities"? The jury concluded there was a mutual understanding for compensation. We cannot say that as a matter of law there was no evidence from which such an understanding could not be inferred or that the jury's verdict was due to bias or prejudice or was manifestly wrong.

But the defendant contends that the plaintiff did not expect to be paid because the statements made by her brother in his letter to the defendant after the father's death plainly show that she did not consider her father to be her debtor until after the alleged discourtesy and that her claim was not a prior thought but an afterthought. There was no objection to the admission of this letter. It went to the jury, was considered by them. It is a part of the evidence, which we must consider.

The plaintiff on the other hand introduced evidence that she considered with her brother, while he was guardian and shortly after her father left the farm, the presentation of a bill but did not formally do so because of the explanation given.

Evidence of one's state of mind at a given time may be probative of one's state of mind at the necessary time. The state of mind of the plaintiff when the services were rendered is the necessary time here.

What are the inferences to be drawn from the letter? Those claimed by the defendant? What in the light of all the evidence? Could the jury believe that the plaintiff had expectation of compensation when the services were rendered and when she talked with her brother, decided not to present a bill for the reasons given and then changed her mind for other reasons and decided to present. Were these reasonable probabilities? We cannot say as a matter of law they were not. The answers to these questions were conclusions of fact for the jury's determination and "peculiarly the province of the jury."

Our final conclusion therefore is that the verdict is not manifestly wrong and the entry must be:

Motion overruled.

MELCHER'S CASE.

Cumberland. Opinion September 28, 1926.

Section 28 of the Workmen's Compensation Act construed to mean that where by agreement approved by the Commission a lump sum is paid in settlement of a claim for compensation, the employer shall not be called upon for further or other payments, even for medical or surgical expenses.

Appeal from dismissal of petition for compensation after a lump sum settlement had been regularly effected under the Workmen's Compensation Act. Appeal dismissed.

The case is fully stated in the opinion.

W. A. Connellan, for complainant.

Hinckley, Hinckley & Shesong, for respondent.

SITTING: WILSON, C. J., PHILBROOK, DEASY, BARNES, BASSETT, JJ.

BARNES, J. This case involves the interpretation of the statute known as the Maine Workmen's Compensation Act, upon the following state of facts, taken from the record.

Petitioner was injured in the course of her employment by Wyman's Cafe, claimed compensation and was awarded a weekly stipend.

After compensation had been paid for more than six months, but before petitioner had paid the physician who ministered to her during convalescence, she filed a request for commutation of future payments to a lump sum. Notice was given, hearing had and the lump sum was ascertained and paid.

Within sixty days of receipt of the lump sum settlement, petitioner filed a petition for determination of a sum to be paid by her employer to defray the expense of medical and surgical aid incurred immediately after the accident.

Her employer, through its insurance carrier, disputed her right to further consideration as an injured employee, on the ground that a lump sum settlement is a full and final adjustment, and that payment thereof discharges the employer from any liability to the employee after date of such payment.

At an informal hearing, petitioner and respondents each being represented by counsel, it was agreed that without presentation of evidence decision should be rendered upon the petition and answer, and the commission thereupon found petitioner not entitled to any further award; and upon her appeal to the Supreme Court the Justice upheld the decision of the commission and dismissed the petition. The contention of the parties is purely legal and its solution is found by construing Section 28 of our compensation act, it being Chapter 238 of the Public Laws of 1919, and reading as follows:

"In case payments have continued for not less than six months either party may, upon due notice to the other party petition the commission for an order commuting the future payments to a lump sum. Such petition shall be considered by the commission and may be summarily granted where it is shown to the satisfaction of the commission that the payment of a lump sum in lieu of future weekly payments will be for the best interest of the person or persons receiving or dependent upon such compensation, or that the continuance or (of) weekly payments will, as compared with lump sum payments,

entail undue expense or undue hardship upon the employer liable therefor, or that the person entitled to compensation has removed or is about to remove from the United States. Where the commutation is ordered, the commission shall fix the lump sum to be paid at an amount which will equal the total sum of the probable future payments capitalized at their present value upon the basis of interest calculated at five per centum per annum with annual rests. Upon payment of such amount the employer shall be discharged from all further liability on account of the injury or death, and be entitled to a duly executed release, upon filing which, or other due proof of payment the liability of such employer under any agreement, award, findings, or decree shall be discharged of record, and the employee accepting the lump sum settlement as aforesaid shall receive no future compensation under the provisions of this act."

Construction is further limited to the phrase, "discharged from all further liability on account of the injury," and the word "compensation," in said sentence.

Respondents contend that by payment of the lump sum, to which all future payments were commuted strictly in compliance with the law, their liability to petitioner was ended; while petitioner argues that medical aid and assistance is not "compensation," as the word is used in the section of statute above quoted, and that the expense incurred for such aid and assistance is still recoverable upon petition.

The wording of the phrase under inspection is entirely unambiguous, and its meaning must be held to be that after paying the amount of the settlement ordered by the commission the employer shall not be called upon for further or other payments.

In interpreting a statute essentially similar to ours, in a case where, after a lump sum settlement an employee sought further compensation for loss of vision discovered subsequent to date of the settlement, the Supreme Court of Massachusetts say: "Weekly payments must have continued for six months and the agreement of settlement must be found to be for the best interest of the employee or his dependents. When these findings are once made the payment is in full settlement for all compensation, general and specific, under the act. Both parties are bound by it."

Patrick McCarthy's Case, 226 Mass., 444.

And in a somewhat similar case in Pennsylvania the court said:

"There is nothing in the act to indicate that the relations between the employer and employe are not definitely settled upon payment of the commuted award. Any contingencies involved before then disappear."

Jones v. *Laughlin Steel Co.*, 79 Pa., Sup. Ct., 303.

As to the contention of petitioner, we cannot agree that the services of a physician or surgeon and medical and surgical aids are not "compensation" as intended by the Legislature.

And our conclusion is reached by study of other sections of the Workmen's Compensation Act, upon the familiar principle that in expounding one part of a statute resort should be had to every other part.

Section 10 of the act provides that the employer shall promptly furnish reasonable medical, surgical and hospital services, nursing and medicines and mechanical surgical aids when they are needed, during the first thirty days after an accident, and for a longer period, in the discretion of the commission.

Are such services and aids "compensation"? Was it the intention of the Legislature to differentiate between the weekly payments that are to be made an injured employee for a stated period and the aid furnished the employee through physicians, nurses and material appliances to relieve pain and restore his body as nearly as may be to the normal condition?

Is the latter not "compensation?"

The only portion of the act that appears to classify them seems clearly to class them as one, for in Section 9 the expression, "No compensation except medical, surgical and hospital services, nursing and medicines and mechanical surgical aids, etc.," can be construed to convey no other meaning than that medical, surgical and hospital services, etc., are a part of the "compensation" provided by the act. The section as written has the same meaning as if it were expressed, "No compensation other than the compensation of medical, surgical and hospital services,"—and so on to the end.

We hold that the services, restoratives and aids required by statute to be supplied are "compensation," within the meaning of the act, and our conclusion therefore is that after payment to him under a lump sum settlement order, regularly arrived at, the injured workman can on longer, as of right, demand of the employer any contribution of any sort.

Decree affirmed.
Appeal dismissed.

ELBRIDGE L. FICKETT, Applt. from Decree of Judge of Probate.

Androscoggin. Opinion September 29, 1926.

The question as to whether a person should be placed under guardianship, and the selection of a person as such guardian, are within the sound judgment and discretion of the Justice hearing the case, and his judgment of the facts, and necessity and propriety of his conclusions, are not subject to exception.

On exceptions. Helen E. Fickett petitioned for guardianship of her father, Elbridge L. Fickett, alleging unsound mind, infirmity and mental incapacity. A hearing was had in the Probate Court and the petitioner and another were appointed guardians, and the matter went to the Supreme Court of Probate on appeal where the appointment of the two guardians was reversed and Ralph W. Crockett appointed guardian, and exceptions were taken. Exceptions dismissed. Decree below affirmed.

The case is fully stated in the opinion.

Frank A. Morey, for petitioner.

Ralph W. Crockett, for appellant.

SITTING: WILSON, C. J., PHILBROOK, DEASY, STURGIS, BASSETT, JJ.

PHILBROOK, J. This is an appeal from a decree of a Judge of Probate adjudging the appellant to be a person of unsound mind who, by reason of infirmity and mental incapacity, is incompetent to manage his own estate or to protect his rights, and appointing Helen E. Fickett of Rockland, Massachusetts, his daughter and sole heir, and Frank A. Morey of Lewiston, Maine, guardians of said appellant. By agreement of the parties the cause was heard in vacation under R. S., Chap. 87, Sec. 37.

The Supreme Court of Probate ordered, adjudged and decreed that so much of the decree of the Judge of Probate whereby it was adjudged that the appellant is a person of unsound mind who, by reason of infirmity, is incompetent to manage his own estate or to protect his rights, be affirmed, and that as to other matters included in said decree, the same be reversed, and further adjudged and decreed

that Ralph W. Crockett of Lewiston, Maine, be appointed guardian of the appellant, and that the cause be remanded to the Probate Court for further proceedings in accordance with law.

To so much of the decree of the Supreme Court of Probate as adjudged the appellant to be a person of unsound mind who, by reason of infirmity, is incompetent to manage his own estate or to protect his rights, the daughter, Helen E. Fickett consents and agrees; but to so much of that decree as appoints Ralph W. Crockett as guardian of her father "the said Helen E. Fickett does except to and prays that her exceptions may be allowed."

The case is before us upon the exceptions brought up by Helen E. Fickett.

The determination of a question of guardianship, in the first instance, is submitted to the Probate Court and ultimately, if an appeal be taken, to the determination of a Justice of this court sitting as Judge of the Supreme Court of Probate. The statute imposes upon such Justice the duty of hearing and deciding the fact, whether the welfare of the person, for whom guardianship is sought, requires such guardianship. Such decision is to be arrived at by the exercise of the sound judgment and discretion of the Justice hearing the case. His decision is not a ruling of law, but his judgment of the facts and necessity and propriety of his conclusions. It is not subject to exception. The same rule obtains in the selection of a person to be that guardian, *Dunlap Appellant*, 100 Maine, 397.

The record discloses what the Justice below denominates as "unfortunate domestic affairs." After a careful examination of the testimony we not only agree with that language but unqualifiedly concur with his decree.

As in the *Dunlap Case*, supra, the entry must be,

Exceptions dismissed.
Decree below affirmed.

VIOLETTE, Petitioner *vs.* MACOMBER, Sheriff.

Hancock. Opinion September 29, 1926.

The statute providing for the release of poor convicts, R. S., Chap, 137, Sec. 50, when the convict shall have tendered his promissory note for the amount due for fines or costs, accompanied by a written schedule of all his property, does not grant him release of right, but the release is a matter of discretion.

The further provision in said statute, "except when otherwise provided," is applicable to the case at bar, and in view of the evident intention of the Legislature when it enacted Public Laws, 1923, Chapter 167, the release of the petitioner must be denied.

On report on agreed statement. Petitioner was convicted of illegal transportation of intoxicating liquor, and sentenced three hundred dollars and costs and five months in jail, and six months additional in default of payment of fine and costs. After serving the sentence of five months in jail and thirty days on the additional sentence, he tendered to the sheriff his note payable to the county treasurer for the amount of the fine and costs, together with a written schedule of his property, and requested his release from jail under R. S., Chap. 137, Sec. 50, which the sheriff refused, and he instituted habeas corpus proceedings. Cause reported on an agreed statement. Release of petitioner denied.

The case fully appears in the opinion.

Fred L. Mason, for petitioner.

W. B. Blaisdell, for defendant.

SITTING: WILSON, C. J., PHILBROOK, DEASY, STURGIS, BASSETT, PATTANGALL, JJ.

PHILBROOK, J. This is a process wherein the petitioner seeks release from the custody of the sheriff, claiming that he is now unlawfully imprisoned in the county jail and is unlawfully restrained of his liberty by the defendant. The case is reported to the Law Court for final determination upon an agreed statement of facts.

At the October term, 1925, the petitioner was found guilty of illegal transportation of intoxicating liquor and was sentenced to pay a fine of $300 and costs, and to serve five months in the county jail, and in default of payment of fine and costs to serve six months additional. The petitioner was thereupon committed to jail on October 29, 1925, wherein he remained for a period of five months, and for thirty days in addition to said five months, and being unable to pay his fine and costs, on the thirtieth day of April, 1926, he tendered to the defendant, sheriff of the county, a note for the amount due under said fine and costs payable to the treasurer of the county of Hancock, accompanied by a written schedule of all his property of every kind, signed and sworn to before a justice of the peace, and requested the sheriff to release him, which release was refused.

The petitioner then made application for a writ of habeas corpus, addressed to a justice of this court holding the April, 1926, term in said county of Hancock. The writ was granted and by virtue thereof the petitioner was brought before said Justice, when and where it was made to appear that the defendant sheriff was holding the petitioner by virtue of the sentence above quoted. The sitting Justice did not grant release under the writ but in view of the important questions of law involved reported the case to the Law Court as above stated.

The petitioner was sentenced under the provisions of Public Laws, 1923, Chapter 167, where the penalty provided reads as follows:

"Whoever violates the provisions of this section shall be fined not less than three hundred nor more than six hundred dollars and costs, and in addition thereto shall be imprisoned for not less than three months nor more than six months, and in default of payment of fine and costs shall be imprisoned for six months additional."

The petitioner claims release from further imprisonment under said sentence because of the provisions of R. S., Chap. 137, Sec. 50, which reads as follows:

"Except when otherwise expressly provided, any convict, sentenced to pay a fine or costs, and committed for default thereof and for no other cause, who is unable to pay the same, may be liberated by the sheriff, after thirty days from his commitment, by giving his note for the amount due, to the treasurer of the same county, accompanied by a written schedule of all his property of every kind, signed and sworn to before the sheriff, jailer or any justice of the peace or

trial justice, and the sheriff shall deliver same to said treasurer, for the use of the county, within thirty days; and all convicts so committed may be placed at labor in the same manner as persons sentenced to imprisonment and labor."

The issue, therefore, is whether or not the petitioner is entitled to release from further imprisonment by reason of the statutory provisions for the release of poor convicts last above quoted. His contention is that having served the five months' imprisonment imposed upon him, then at the expiration of said term he stands committed for default of payment of the fine and costs, and for no other cause, and that being unable to pay the same, after thirty days from his commitment, to wit, after thirty days from the expiration of the five months' sentence, he is entitled to release upon complying with the terms of the act relating to the release of poor convicts.

This contention calls for an examination and interpretation of the last named act and the act under which he was sentenced and committed.

In the interpretation and construction of statutes the primary rule is to ascertain and give effect to the intention of the Legislature. This rule is so universal that citation of decided cases becomes unnecessary. And it has been frequently stated, in effect, that the intention of the Legislature constitutes the law. The object in construing penal, as well as other statutes, is to ascertain the legislative intent. That is the law. The proper course in all cases is to adopt that sense of the words which best harmonizes with the context and promotes, in the fullest manner, the policy and objects of the Legislature. *United States* v. *Hartwell*, 6 Wall., 385, 18 U. S., (L. ed.), 830. In *State* v. *Bass*, 104 Maine, 288, our own court, while not unmindful of the rule that penal statutes are to be construed strictly, said "But though penal laws are to be construed strictly, yet the intention of the legislature must govern in the construction of penal as well as other statutes, and they are not to be construed so strictly as to defeat the will of the legislature." See also *Keller* v. *State*, 11 Md., 525, 69 Am. Dec. 226, and note; *Parkinson* v. *State*, 14 Md., 184, 74 Am. Dec., 522 and note. The rule of strict construction of a penal law is subordinate to the rule of reasonable, sensible construction, having in view effectuation of the legislative purpose, and is not to be so unreasonably applied as to defeat the true intent and meaning of the enactment. See 25 R. C. L., 1084, and long list of authorities there cited.

A provision for the liberation of poor convicts is to be found in the laws of Massachusetts before Maine became a separate state, and first appears in the Laws of Maine passed by our Legislature and published according to a resolve of 1821, as part of Chap. LXXXIII, Section 2. This provision applied when "said convict has lain in prison for the term of three months, for fine and costs only, and that he stands committed for no other cause; and that he has not estate sufficient to pay said fine and costs." The provision for giving a note for the fine and costs, accompanied by a sworn statement as to his property, also occurred therein, but the power to release was vested in the Justices of the Supreme Judicial Court and the Justices of the Circuit Court of the Common Pleas. The authority to release was not made dependent upon the amount of the fine and costs, whether large or small, but a rather quaint, and perhaps significant portion of the oath was that the convict had "not sufficient wherewith to support him or herself in prison or to pay prison charges." By an act of Legislature approved February 2, 1822, the authority to liberate poor convicts, which had theretofore been given to the courts, was "transferred to the several sheriffs, who are hereby authorized and required to liberate poor convicts confined in the goals of their respective counties, ... when they shall have lain in prison for the term of thirty days, and detained for no other cause," upon the same terms and conditions, as had been provided for in case of liberation by the courts. The time of imprisonment was also reduced from three months to thirty days. At this point it should also be noted that the original direction to the sheriffs was in the mandatory words "authorized and required" to release, but in the general revision of the Statutes in 1840 these mandatory words disappeared and it was then provided that the sheriff "may" liberate the convict. This statute remained in substantially the same form until the general revision of 1883, when there were inserted, in the first line of Chap. 135, Sec. 17, these most significant words, "Except when otherwise expressly provided." From eighteen hundred eighty-three the phraseology of the statutes has remained unchanged and now appears in Chap. 137, Sec. 50.

Exclusive of penalties provided for the violation of that portion of R. S., Chap. 127, which relates to the manufacture and sale of intoxicating liquor, our legislature, from time to time, has defined and fixed penalties for the violation of more than two hundred crimes. Those

penalties are imprisonment without fine, imprisonment or fine, imprisonment and fine, as well as fine without imprisonment.

Under the common law rule it is the practice, when punishment inflicted is by sentence to pay a fine, to include in the judgment an order that the prisoner be committed to jail until the fine is paid. This has been the practice in England from the earliest times until a comparatively recent date, and this rule has been followed very generally in this country, either from the adoption of the common law doctrine or by statutory provision in the several states. Note in *Ex parte Bryant*, 12 Am. St. Rep., 202. Detention of a condemned person in jail for failure to pay a fine is only a means provided for the enforcement of the pecuniary penalty imposed by the sentence. Actual payment of the fine itself is the punishment. Imprisonment for default of payment is a mere incident of the fine. *LeClair* v. *White*, 117 Maine, 335. When humanity and justice demanded the prisoner's release if he had "not sufficient wherewith to support him or herself in prison or to pay prison charges," was doubtless the originating reason for this statute providing for the release of poor convicts. The statute, in modern form, still exists but its mandatory words, in our state have given way to discretionary ones, and there has also been added the restrictive clause "Except when otherwise expressly provided."

Returning to the petitioner's demand for release wherein he claims literally the right of freedom because of R. S., Chap. 137, Sec. 50, let us see what the result might be as affecting this and other cases.

As above stated, exclusive of penalties for infraction of so-called liquor laws, there are upon our statute book more than two hundred crimes defined, and penalties provided for violation thereof. Of this number more than fifty per cent. of the penalties are imprisonment or fine. The length of time for incarceration, and the amount of fine, vary greatly in their terms.

Let us take, as an example, the punishment for manslaughter which may be imprisonment for not more than twenty years, or by a fine not exceeding one thousand dollars. Suppose a person convicted of that crime is fined five hundred dollars and committed until the fine and costs are paid. If the petitioner's contention as to release of poor convicts is sound then, at the end of thirty days' imprisonment, the convict would be entitled to release and a possible term of twenty years be reduced to the paltry term of one month. Under the per-

missive "may" could it be reasonably said that such was the intention of a legislature which passed the statute relied upon by the petitioner? Would such a construction be a "reasonable, sensible construction, having in view effectuation of the legislative purpose?" Would not such a construction "defeat the true intent and meaning" of the statute?

But we must go further and give full effect to the restrictive words "Except when otherwise expressly provided."

As we have already said, our Legislature has defined, and provided penalties for infraction, of more than two hundred crimes, exclusive of the so-called prohibitory law. In the latter law the punishment provided differs materially in its terms from other penalties. We take judicial notice of the fact that our Legislature, through increasing severity of punishment, has endeavored to stamp out the evils resulting from the manufacture and sale of intoxicating liquor. In 1917, Chapter 291, of the Public Laws, there was passed an act "To amend chapter one hundred and twenty-seven of the Revised Statutes, to make plain the penalties imposed under certain sections thereof." Again by Public Laws, 1923, 167, the act under which this petitioner was sentenced, the Legislature amended the law. In these amendments appear the feature not common to penalties for infraction of other criminal statutes, namely imprisonment and fine, together with an express provision that if fine and costs are not paid then the person convicted shall be further imprisoned for a definite period. This is materially different from a mere commitment to enforce payment of fine and costs, to which we have referred. "This term of imprisonment was apparently regarded by the law makers as the proper alternative in case of the non-payment of the fine," to borrow an expression from *Rollins* v. *Lashus*, 74 Maine, 218.

We are of opinion that this additional imprisonment, in default of payment of fine and costs, brings the situation well within the meaning of the words "Except when otherwise expressly provided." For this, and other reasons herein found, we are further of opinion that this construction of the statute conforms to the rules of construction already referred to, will best serve to effectuate the legislative purpose, and will not defeat the true intent and meaning of the enactment.

The mandate, therefore, will be,

Release of petitioner denied.

MARION HARDING, Complainant *vs.* EZRA B. SKOLFIELD.

Penobscot. Opinion October 7, 1926.

A release by a minor complainant, standing alone, is not a bar to an action under Chap. 102, R. S., to compel the father of the illegitimate child to contribute to its support and maintenance unless it appears that the minor complainant was represented by a next friend, and that such settlement was approved by the court, or affirmed by an entry or judgment.

In the instant case by statute in force when the accusation of July 27, 1912 was made the Trustees of Juvenile Institutions had, and now have, all the powers of a guardian as to the person, property, earnings and education of a girl committed to their charge, during the term of her commitment, and all the powers which parents have over their children. As guardian they may appear for and represent the minor in all legal proceedings unless another is appointed for that purpose as guardian or next friend, and may compound and give discharges of the minor's dues on such terms as the Judge of Probate authorizes; having the authority of a parent, the board can act as next friend.

The present record is insufficient to enable the court to pass upon the rights of the parties advisedly. It contains no statement of the proceedings in court upon the accusation of July 27, 1912, nor of the disposition of that case. These are material facts which the court cannot supply.

The statute contemplates that the Justice presiding at nisi prius, not the Law Court, shall render or refuse judgment of filiation; and if entered, fix the amount of payments by defendant, and the amounts of the bonds given to plaintiff and to the town liable for the maintenance of the child, and approve the sureties thereon.

On report. On July 27, 1912, the complainant in this action, then Marion C. Snell and a minor, made an accusation against the defendant under R. S., Chap. 102, and two hundred dollars was paid by defendant to complainant and a release given by complainant to defendant from all claims under said accusation, and a release was also given to defendant by the trustees of the State School for Girls, where the complainant at that time was an inmate. On June 6, 1924 the complainant again accused the respondent of the same act

for which the money had been paid and releases given twelve years before. Report discharged, case remanded to Superior Court of Penobscot County.

The case is fully stated in the opinion.

Gillin & Gillin, for complainant.

Fellows & Fellows, for defendant.

SITTING: WILSON, C. J., PHILBROOK, DEASY, STURGIS, BASSETT, JJ. MORRILL, A. R. J.

MORRILL, A. R. J. These proceedings under R. S., Chap. 102, instituted by a non-resident, who is described as "formerly Marion Snell, of Bangor, in said County (of Penobscot), now of Boston, Massachusetts," are reported to this court from the Superior Court Penobscot County, for determination upon an agreed statement of facts. The complaint in the instant case is dated June 6, 1924, and alleges that the child, a boy now thirteen years of age, was begotten on or about April 13, 1912, and was born January 17, 1913.

The defendant, not denying that he is the father of the child, relies upon an alleged settlement of a former accusation dated July 27, 1912, containing the same charges, and presents as evidence of such settlement the following receipts which bear date prior to the birth of the child:

"Old Town, Maine, November 5, 1912.

"Received of E. B. Skolfield of Lisbon Falls in the County of Androscoggin and State of Maine, by hand of W. H. Newell, the sum of Two Hundred Dollars, being in full payment of all claims of Marion Snell now pending against said E. B. Skolfield. It is agreed that a formal release of said Marion Snell shall be obtained and furnished to said Skolfield.

(sd.) W. H. WATERHOUSE.
Committee upon the above claim duly authorized to act for the Board of Trustees of Juvenile Institutions of Maine."

"For a valuable consideration to me paid, the receipt whereof is hereby acknowledged, I, Marion C. Snell, do hereby release Ezra B. Skolfield from all claims, actions and demands whatsoever, and particularly from all claims under a certain accusation signed by me and bearing the date of July 27, 1912.

"Bangor, Maine, November 26, 1912.

(Sd.) MARION C. SNELL.

"In the presence of
W. H. WATERHOUSE."

It is admitted that at the date of said alleged settlement and at the time she signed the above writing purporting to release the defendant, "the complainant was a minor of the age of seventeen years; that at the time of settlement of said accusation and at the time said releases were given in settlement thereof, the said complainant was living as an inmate of the State School for Girls, that W. H. Waterhouse was a member of the Board of Trustees, and that said Waterhouse in taking part in the settlement of said accusation thereunto was duly authorized by the Board of Trustees acting as such a board, and the acts of said W. H. Waterhouse as a representative of said Board were approved and confirmed by said Board of Trustees acting as a board as aforesaid."

It appears in the case that the alleged settlement was made by Mr. Waterhouse with the attorney then acting for the defendant; that he received the money paid in settlement, and obtained from the plaintiff the writing bearing her signature. It does not appear that, except as may be inferred from the writing, the plaintiff received any part of the two hundred dollars.

The release by plaintiff, standing alone, constitutes no bar to this action. The view of the statute recognized and adopted by this court in *Roy* v. *Poulin*, 105 Maine, 411 is, "that the statute converts an existing moral obligation of the father into a legal obligation, enforceable like any other legal obligation upon the obligor if within the jurisdiction." It is settled beyond question that infants may avoid any contract or agreement to surrender or release their rights, for which they are entitled to an equivalent; because it is a presump-

tion of law, that infants have not sufficient discretion to put a just value on their property or rights. *Baker* v. *Lovett*, 6 Mass., 78, 14 R. C. L., 228, Title Infants, Sec. 13. Note to *Craig* v. *Van Bibber*, 100 Mo., 584, in 18 Amer. St. Rep., 618. Note to *Indiana Union Traction Co.* v. *Maher*, 176 Ind., 289, in Ann. Cas., 1914 A., 997. And the statute of limitations is no bar to the prosecution. *Keniston* v. *Rowe*, 16 Maine, 38. *Wheelwright* v. *Greer*, 10 Allen, 389.

The statute, indeed, authorizes the mother, although a minor, to make the complaint, and in *Low* v. *Mitchell*, 18 Maine, 372, this court said: "It is competent for the legislature to authorize minors to prosecute, and to enable them to do all acts necessary for that purpose;" but no statute has been called to our attention authorizing a minor to adjust such a proceeding and release the putative father by an agreement made out of court. That proceedings under Chapter 102 are civil actions is too well settled to be now questioned, *Easton* v. *Eaton*, 112 Maine, 106, and upon the authority of that case, citing apparently with approval *Hinman* v. *Taylor*, 2 Conn., 357, it may be that, although the proceeding may be instituted by a minor, upon entry of the complaint in court the plaintiff, if a minor, should be represented by a guardian or next friend, as a respondent, if a minor, must be represented by guardian. We have no occasion, however, upon the present record to decide that precise question. But we perceive no reason why the same care and supervision which the law exercises over a settlement of other civil actions in which minors are plaintiffs, should not be exercised in bastardy proceedings. We, therefore, hold that before such settlement can be regarded as valid it must appear that the minor complainant was represented by a next friend, and that such settlement was approved by the court, or affirmed by an entry or judgment, as provided in R. S., Chap. 72, Sec. 31. The incapacity of an unfortunate minor to put a just value on her right to receive from the putative father of her child suitable aid in its support is quite as apparent, as her incapacity to properly appraise her damages in cases of personal injury.

By the statute then in force the Trustees of Juvenile Institutions had, and now have, all the powers of a guardian as to the person, property, earnings and education of a girl committed to their charge, during the term of her commitment, and all the powers which parents have over their children. R. S., Chap. 144, Sec. 21. As guardian they may appear for and represent the minor in all legal proceedings

unless another is appointed for that purpose as guardian or next friend, and may compound and give discharges of the minor's dues "on such terms as the judge authorizes," (R. S., Chap. 72, Sec. 17) meaning the Judge of Probate. Having the authority of a parent, the board can act as next friend.

It is apparent that the present record is insufficient to enable the court to pass upon the rights of the parties advisedly. It contains no statement of the proceedings in court upon the accusation of July 27, 1912; process issued thereon was returnable to the next term of the Supreme Judicial or Superior Court for the county in which the mother resided, and would stand continued until after the birth of the child. R. S., 1903, Chap. 99, Secs. 3, 4. We have no information as to the disposition of the former case. Plainly the record is silent as to material facts which the court cannot supply. For want of such facts supporting the alleged settlement, we might be warranted by the terms of the report in ordering a judgment of filiation; but the case must be remanded in any event if such judgment is ordered. The statute contemplates that the Justice presiding at nisi prius, not the Law Court, shall render or refuse such judgment, and, if entered, fix the amount of payments by defendant, and the amounts of the bonds given to plaintiff and to the town liable for the maintenance of the child, and approve the sureties thereon. Then upon exceptions, the case will be in order for final disposal in the Law Court.

We, therefore, think it best to discharge the report and remand the case for trial in the court below.

Report discharged.
Case remanded to the Superior Court of Penobscot County.

WILLIAM JOHNSON, Petitioner *vs.* STATE HIGHWAY COMMISSION.

Waldo. Opinion October 7, 1926.

Under the Workmen's Compensation Act, upon the petitioner seeking compensation rests the burden of proving that the accident by which he received his injury arose in the course of and out of his employment.

In the instant case at the time the petitioner was injured, the relation of employer and the employee was suspended.

The accident by which he received his injury neither arose in the course of nor out of his employment.

Hence the finding by the Commission at the trial of facts not being based upon some competent evidence was erroneous.

On appeal. In the Summer of 1924 the petitioner was in the employ, with his own team, of the State Highway Commission hauling rocks to a crusher operated at Northport, feeding and stabling his horses at his own expense at his home, and besides his wages he received no allowance for board of himself or horses. At the close of a day's work while unhitching his horses in his dooryard, they started and he was thrown down and run over by the cart. Compensation was awarded and from an affirming decree an appeal was taken. Appeal sustained. Decree below reversed.

The case appears in the opinion.

Petitioner was without counsel.

Franklin Fisher, for appellant.

SITTING: WILSON, C. J., DEASY, STURGIS, BASSETT, JJ. MORRILL, A. R. J.

STURGIS, J. Appeal from decree affirming an award under the Workmen's Compensation Act.

At the trial of facts the Chairman of the Industrial Accident Commission found that the petitioner, while in the employ of the State Highway Commission as a teamster, "did receive a personal injury

by accident arising out of and in the course of his employment," and awarded compensation. The single issue raised by the respondent upon this appeal is whether the accident arose "out of and in the course of" the petitioner's employment.

The record of evidence presented to the Chairman discloses as undisputed facts that William Johnson was employed by the State Highway Commission during the Summer of 1924, at Northport, Me., to haul rocks to a stone crusher. He furnished his own team, feeding and stabling his horses at home about a quarter of a mile distant from the crusher. His daily wage was $6.50 for himself and team, with no allowance for board of himself or horses. July 15, 1924, having dumped his last load of rock for the day, he left the crusher and drove home. As he was unhitching his horses in his yard, they started and he was thrown down and run over by the cart. It is for injuries thus received he was awarded compensation.

By repeated decisions this court has construed the provisions of Sec. 11, Chap. 50, R. S., and it is settled law that the burden is upon the petitioner to prove that the injury for which he seeks compensation was by accident not only arising "out of" but also occurring "in the course of" his employment. *Gray's Case*, 123 Maine, 86. *Dulac's Case*, 120 Maine, 31. *White's Case*, 120 Maine, 62. *Mailman's Case*, 118 Maine, 172. *Westman's Case*, 118 Maine, 133. It is equally well settled that the finding at the trial of facts of these essential elements must be based upon some competent evidence, otherwise the finding is an error of law. *Adam's Case*, 124 Maine, 295. *Orff's Case*, 122 Maine, 114. *Mailman's Case*, supra.

The petitioner Johnson was hired with his team by the day, and when he left the crusher his day's work was ended. He drove home a free agent, his method and course of travel in no way controlled by his employer. When injured he was on no errand for the Highway Commission, and neither bound to render it further service nor subject to its further directions until he returned to his work the next day. The relation of employer and employee was suspended. *Rourke's Case*, 237 Mass., 360, 363. *Morey* v. *Battle Creek*, 229 Mich., 650. There was at the time of the accident no "employment" as the term is used in the Statute.

In *State Ex. Rel. Jacobson* v. *District Ct.*, 144 Minnesota, 259, the employee drove a sprinkling wagon for the city of Minneapolis, furnishing his services and the use of his team for a daily compensa-

tion. His horses were fed and stabled in his own barn at his own expense. On the day of his injury he drove home at the end of the day's work, stabled and fed his horses, and after supper, while doctoring one of his horses, was killed. That court says, "The accident did not arise out of his employment any more than would an accident which came while he was repairing his wagon or while doing other work in preparation of his next day's work for the city."

In the instant case we think the petitioner's accident did not arise in the course of or out of his employment any more than would an accidental injury received after he returned from his day's work, and while he was removing his working clothes in his own home, preparing himself for his evening meal and night's rest.

Dobson's Case, 124 Maine, 305, is not in conflict with this conclusion. Dobson received as part of his compensation stabling for his horses in his employer's barn, and was injured on his employer's premises while unhitching the horses at the end of the day's work. The conclusion that Dobson's accident arose out of and in the course of his employment was based on the fact "that stable room was furnished the petitioner during his employment as part consideration for his services. "And the obvious distinction to be drawn, where a teamster feeds and stables his horses at his own expense and in his own stable, is there thus noted, "Had the petitioner, at the close of his day's work, driven a mile or more towards 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."

For the reasons stated we are of opinion that the award of compensation to this petitioner is based on an error of law. The respondent's appeal must be sustained.

Appeal sustained.
Decree below reversed.

INHABITANTS OF NORTH BERWICK

vs.

NORTH BERWICK WATER COMPANY.

York. Opinion October 8, 1926.

In the case of a renewal of a contract fixing rates for the public service of a water company, where the parties fail to agree upon terms of renewal which meet the approval of the Public Utilities Commission, the authority of the Commission must supersede the provision for arbitration. Upon such failure either party may make application to that tribunal.

In the instant case the contract of June 13, 1896 was a valid contract. It was reasonable and fair, and for a reasonable length of time. It contained a reasonable working agreement for the protection of the village of North Berwick after the expiration of the term, pending a new agreement or arbitration.

The Act of 1913 establishing the Public Utilities Commission did not affect the validity of that contract, or any rates fixed therein; they remained valid and binding until the Commission should find them to be unjust, unreasonable or insufficient.

The rates for public service were fixed by that contract and were published as required by the Act. No change has been made in the rates and charges for the public service so published. They were, therfore, the lawful rates and charges in force during the municipal year of 1923, and continue to be the lawful rates and charges until changed.

By the Act of 1913 any agreement of the parties for an extension of the contract for public service became subject to the approval of the Commission.

In making a determination of reasonable rates for service, taxes to which the defendant is subject are to be considered as a part of its operating expenses, and are not to be regarded in part as a measure of such rates.

On report. An action of debt to recover the sum of $420 as taxes assessed by plaintiff against defendant for the year of 1923 on its plant, pipe line and tank. The general issue was pleaded and under a brief statement defendant claimed that the tax was offset and paid by hydrant service and water furnished plaintiffs by the defendant in accordance with the terms of a contract between them dated June

13, 1896. Under an agreed statement the cause was reported to the Law Court. Judgment for the defendant.

The case fully appears in the opinion.

E. P. Spinney, for the plaintiffs.

Sherman I. Gould, for defendant.

SITTING: WILSON, C. J., PHILBROOK, DEASY, STURGIS, BASSETT, JJ. MORRILL, A. R. J.

MORRILL, A. R. J. The plaintiff seeks to recover the sum of $420 assessed as taxes for the year 1923 upon the "plant and pipe lines and tanks" of the defendant, with interest from and after October 1, 1923. The defendant does not question the regularity of the proceedings in the assessment of the tax, but pleads by brief statement under the general issue that said sum has been fully offset and paid by hydrant service and water furnished therefor, and for schoolhouses and public drinking fountains in accordance with the terms of a contract between the parties dated June 13, 1896. The case is presented upon an agreed statement of facts, from which we abstract the following:

The North Berwick Water Company was incorporated by Chapter 186 of the Private and Special Laws of 1895 for the purpose of supplying the inhabitants of North Berwick with pure water for industrial, manufacturing, domestic, sanitary and municipal purposes, including the extinguishment of fires; it was authorized to make contracts for supplying water as contemplated by the act, and the plaintiff was authorized to contract by its selectmen with said company for a supply of water for any and all purposes mentioned in the act, and for such exemption from public burden as might be agreed upon; which contract, when made, was declared to be legal and binding upon the parties thereto.

The defendant constructed its water system during the season of 1896, and entered into the contract relied upon in defense, dated June 13, 1896, wherein the defendant agreed to furnish, set and maintain twenty hydrants, and such additional hydrants as the town from time to time might desire and authorize, and to furnish water for the same; the defendant also agreed to furnish water at the mains for the use of all schoolhouses along the line of pipe, or that might

thereafter be built along the line of pipe or any extension thereof, and to furnish two drinking fountains for man and beast to be located by the committee of the town, and to furnish water for the same and to keep said fountains in repair. The term of the contract was twenty years from the completion of the water system, and expired sometime in 1916. The plaintiff agreed to pay the sum of $1,000 a year during said twenty years for the use of said twenty hydrants, and $45 a year for each additional hydrant, and for water for the same and for the schoolhouses and drinking fountains, "and such further sum each year as shall equal the amount of taxes, if any, assessed against said company (the defendant) its successors and assigns by said town of North Berwick."

The contract also provided that at any time after the expiration of twenty years from the date of the contract the town had the privilege of purchasing the water system, and all corporate rights and privileges connected therewith, at such price as might be agreed upon, and in case of disagreement, at a price to be determined by appraisers to be appointed by the Chief Justice of this court. It was further agreed that if upon the termination of the contract no purchase and sale of the Water Works as provided had been made, "all the covenants, stipulations and agreements as hereinbefore enumerated and written shall continue binding and obligatory upon the parties hereto or their assigns, until a complete and final adjustment be reached either by mutual agreement or by reference to a board of arbitration" to be appointed by the Chief Justice of this court on the application of either party.

The plaintiff contends that the last paragraph above quoted was abrogated by the laws governing public utilities and the powers vested in the Public Utilities Commission created since the contract was made. This contention, stated thus broadly, is untenable in view of the conclusions of this court in a number of well considered cases. *Belfast* v. *Belfast Water Company*, 115 Maine, 234, 245. In re *Searsport Water Company*, and In re *Lincoln Water Company*, 118 Maine, 382, 392, where it is said:

"We do not think that either the Act itself, or Sec. 16 of Chap. 55 prohibiting unjust and unreasonable rates, affects the validity of any existing contract. All such contracts remain valid, binding obligations unaffected in their terms until the Utilities Commission has

found that the rates contained therein are 'unjust, unreasonable or insufficient,' when just and reasonable rates may then be substituted therefor."

The plaintiff further contends that the paragraph has no reference to the covenant on the part of the town to pay for the public service rendered, in addition to the yearly cash payment, such further sum each year as shall equal the amount of taxes, if any, assessed against the defendant by the town of North Berwick, which provision it contends was limited to twenty years.

We think it clear that said paragraph was intended to extend beyond the term of twenty years from the completion of the water system all the covenants of the contract, in case a sale had not been made, until new terms could be reached—the covenants to render the service, and the covenant to pay therefor, the former for the benefit of the town, the latter for the benefit of the company.

The contract was reasonable and fair, and for a reasonable length of time. It contained a reasonable provision for its renewal, in case a sale to the town was not made, and a reasonable working agreement for the protection of the inhabitants of the village of North Berwick, pending a new agreement or arbitration. It would have been most unfortunate that the public service for protection against fire, for schoolhouses, and drinking fountains for man and beast, should be in danger of discontinuance at the expiration of the term, upon failure of the parties to agree upon a sale or upon terms of a renewal. The contract was therefore valid. *Maine Water Co.* v. *Waterville,* 93 Maine, 586, 595.

The case shows that from the completion of the water system in 1896 to the present time the defendant has maintained the hydrants, and has furnished water therefor and for the schoolhouses and drinking fountains, and maintained the latter, and that the town has met the cash payments, fixed in the contract, to the present time. Those rates have not been changed since the contract was made, and no tax was assessed on the property of the Water Company by the town of North Berwick prior to 1923; such tax has since been assessed each year. The town and the water company did therefore for six years mutually construe the paragraph in question in accord with the construction which we now place upon it.

By the Act of 1913 establishing the Public Utilities Commission (Chapter 129), any agreement of the parties for an extension of the

contract for public service became subject to the approval of the commission. R. S., 1916, Chap. 55, Sec. 34. By that act exclusive jurisdiction, subject to a limited review, was conferred upon the commission over all service rendered, and the rates charged therefor, by public utilities. We hold that in case of a failure of the parties to agree upon terms of renewal the authority of the Utilities Commission must supersede the provision for arbitration. The tribunal created by law takes the place of the tribunal which the parties have agreed may be created upon their application, but which is not in existence.

It is conceded that the defendant filed with the commission schedules, showing all rates, tolls and charges in force when the Act went into effect, and a copy of the contract of June 13, 1896, in accordance with Public Laws of 1913, Chapter 129, Sections 19 and 20, (R. S., 1916, Chap. 55, Sec. 25). The rates, tolls and charges for private service were not fixed by the contract; the rates for the public service alone were so fixed, and the furnishing of the public service at the rates and upon the terms and conditions provided in the contract "is not to be construed" as constituting discrimination, or undue or unreasonable preference or advantage. Public Laws, 1913, Chap. 129, Sec. 32, (R. S., 1916, Chap. 55, Sec. 34). No change has been made in the rates and charges for the public service so published. They were therefore the lawful rates and charges in force during the municipal year 1923, and continue to be the lawful rates and charges until changed. R. S., Chap. 55, Sec. 30. In re *Searsport Water Co.*, supra. If the parties fail to come to an agreement which meets the approval of the Utilities Commission, either may make application to that tribunal as indicated in the case last cited.

It is to be noted that the covenant of the town to pay for the hydrant service, the water for schoolhouses and two drinking fountains, and for the maintenance of the latter, is an entirety, and is not susceptible of severance into two covenants, one, to pay a cash compensation for the hydrant service, and another, to pay a sum equal to taxes assessed, for the schoolhouse and drinking fountain service.

It is clear that the town ought not to receive the entire service contemplated by the contract, and refuse to pay the full compensation agreed upon. In any proceeding before the commission to determine rates for the public service, the entire public service, and it may be the income from the service to private consumers as well, must be considered. In making such determination taxes to which the

defendant is subject are to be considered as part of its operating expenses in determining reasonable rates, and are not to be regarded in part as a measure of such rates. In re *Caribou Water, Light and Power Company*, 121 Maine, 426, 431. This procedure was not observed in the proceeding before the commission in 1925 upon complaint of the defendant, made part of the case.

Judgment for the defendant.

STATE OF MAINE *vs.* ROSARIO RENDA AND JOSEPH MONTALTO.

Cumberland. Opinion October 12, 1926.

Consent or agreement "to fight or use blows or force towards each other" is not an essential element of the offense of an affray. The statute provides "if two persons voluntarily or by agreement fight," etc., they are guilty of affray. Persons who of their own free will fight or exchange blows act voluntarily, and if the other elements of the offense are established, they are as guilty of affray as if the combat grew out of an agreement.

On exceptions. Respondents were indicted for an affray by fighting each other and tried at the September Term, 1925, of the Superior Court for Cumberland County. At the close of the evidence by the State counsel for the respondents moved for a directed verdict for the respondents, not presenting any evidence, on the ground that the State must prove that the respondents consented or agreed to enter into the affray, which motions were denied, and respondents excepted. Exceptions also were taken to the charge to the jury. A verdict of guilty was returned in each case. Exceptions overruled. Judgment for the State.

The case appears in the opinion.

Ralph M. Ingalls, County Attorney and F. U. Burkett, for the State.

H. C. Sullivan and F. P. Preti, for the respondents.

SITTING: WILSON, C. J., PHILBROOK, DEASY, STURGIS, BASSETT, JJ.

STURGIS, J. The respondents were tried together on a charge of affray. At the close of the State's case they filed motions for directed

verdict which the presiding Justice denied. They offered no evidence in their defense, and the verdict was guilty. The case is before this court on exceptions to the denial of the motions.

Affray is defined by Sec. 1, Chap. 125, of the R. S., "If two persons voluntarily or by agreement, fight or use blows or force towards each other, in an angry or quarrelsome manner, in a public place to the terror or disturbance of others, they are guilty of an affray."

The fact is uncontroverted that sometime in the evening of July 19, 1925, the respondents were engaged in a street fight at the corner of Deer and Fore Streets in the city of Portland. The officer who made the arrest testifies that he was attracted by a woman's scream to the scene of the alleged affray, and as he approached saw the respondents exchanging blows. He says they were separated by bystanders, but again ran towards each other and were a second time striking at each other. While the officer's statement is not entirely clear as to subsequent events, it may fairly be inferred from his testimony that the combatants were again separated, and without opportunity to renew hostilities were arrested. The respondent Renda had a cut in his back. Montalto had a ragged wound in the back of his head. Both were bleeding freely, but neither was seriously injured.

We think all the elements of an affray as defined by the Statute are present in these facts, and the refusal of the presiding Justice to direct a verdict was not error.

The sole ground of error pressed by the respondents, that it was necessary for the State to prove by direct or positive evidence that they both consented to enter into this affray, is without merit. At common law it was not an essential element of an affray that the fighting should be by consent of the parties concerned. Sup. *Council O. C. F.* v. *Garrigus*, 104 Ind., 133. *Cash* v. *State*, 2 Overt. (Tenn.), 198. *Saddler* v. *Republic*, Dall. (Tex.), 610. *Pollock* v. *State*, 32, Tex. Cr. L., 29. In Indiana by R. S., 1881, Sec. 1980, the consent or agreement of the parties to engage in the fighting is made an element of affray, and its existence is necessary to complete the offense. *Klum* v. *State*, 1 Blackf. (Ind.), 377, the single case cited by the respondents in support of their exception, is based upon this statute.

The language of our statute (R. S., Chap. 125, Sec. 2), however, does not limit affray to fighting by consent or agreement. The language is, "If two persons voluntarily or by agreement fight," etc.

A person who enters into a fight or exchange of blows of his own free will acts voluntarily, and if the other elements of the offense are established he is as guilty of affray as if the combat grew out of an agreement. We do not think the sense of the statute requires that the disjunctive "or" be converted into "and."

In the instant case the evidence is plenary that both respondents voluntarily fought and exchanged blows while the officer was approaching. The existence of the other elements of the offense as defined by statute are not questioned and were fully proved.

The entry is,

Exceptions overruled.
Judgment for the State.

STATE OF MAINE *vs.* FOREST CLAYTON POND.

Penobscot. Opinion October 12, 1926.

When the death of another is caused unintentionally by some unlawful act not amounting to a felony nor likely to endanger life, or while doing some lawful act in an unlawful manner, it is involuntary manslaughter.

Every act of gross carelessness, even in the performance of what is lawful, and a fortiori of what is not lawful, whereby death ensues, is indictable either as murder or manslaughter.

There is little distinction except in degree between a will to do wrong and an indifference whether wrong is done or not.

In the instant case whether the respondent's act be viewed as assault and battery or as gross and culpable negligence, or both, the essential elements of the crime of manslaughter are present.

On appeal and general motion. Respondent was indicted for manslaughter and tried by a jury at the September Term, 1925, of the Superior Court for Penobscot County, and found guilty. Counsel for respondent filed a motion for a new trial addressed to the presiding Justice which was refused and respondent appealed. A general

motion for a new trial was also filed by respondent. Appeal denied. Motion for new trial overruled. Judgment for the State.

The case appears in the opinion.

Artemus Weatherbee, County Attorney, for the State.

Donald F. Snow, for the respondent.

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

STURGIS, J. The respondent was convicted of manslaughter. He thereupon filed a motion for a new trial which was denied by the presiding Justice, and the case comes before this court on appeal from that decision under R. S., Chap. 136, Sec. 28. No exceptions have been reserved, and the single question now before us is whether, in view of all the testimony in the case, the jury were warranted in believing beyond a reasonable doubt, and therefore in finding, that the respondent was guilty of the crime charged against him. *State* v. *Mulkerrin,* 112 Maine, 544. *State* v. *Albanes,* 109 Maine, 199. *State* v. *Lambert,* 97 Maine, 51.

On the afternoon of July 29, 1925, the respondent, a young man twenty-three years old, picked up the deceased, Irving Upton, a ten-year old boy, and tossed him from the float in front of the yacht club below Bangor into the deep water of the river which flowed by. The boy struck partially on his back, and being unable to swim, with only a slight movement of one hand, sank and was drowned. The sole eye witness, Charles H. Jenkins, a boy eleven years old, gives in his testimony this graphic description of the respondent's act: "Well, Pond came up and took Irving and he was going to throw him in, and Irving said 'I cannot swim,' and I said 'No, he cannot,' and Pond took him and threw him in."

The respondent in his defense testifies that the deceased boy consented to all that was done. He declares that he asked the boy, "Can you swim?" and received the reply, "Yes, I can," and, "let her go." He says he then dropped the lad from the slip believing that he could swim.

That the respondent dove and made an earnest endeavor to rescue the boy after he was in the water, is unquestioned. His efforts unfortunately, however, were unavailing. After sinking once the boy never rose, and his body was recovered some hours later when the river was dragged with grappling irons.

The respondent's claim of consent and statement that he could swim, by the deceased, is attacked by the State, which offered the testimony of Officer Golden who assisted in the search for the boy's body. The officer testifies that the respondent at that time did not assert consent by the deceased or a statement of his ability to swim, but told the officer that "I was fooling with the fellow and tossed him overboard; I thought he could swim."

The State offered the testimony of playmates and members of the family of the deceased from which the jury, we think, could have well found that the deceased was unable to swim, and unless they believed the respondent's story, which evidently they did not, were justified in drawing the inference that he had no ground for belief that the victim of his horse-play could support or propel himself in the water into which he threw him.

Manslaughter is the unlawful killing of another without malice aforethought either express or implied, and may be either voluntary, as when the act is committed with a real desire and purpose to kill but in the heat of passion occasioned by sudden provocation; or involuntary, as when the death of another is caused unintentionally by some unlawful act not amounting to a felony nor likely to endanger life, or while doing some lawful act in an unlawful manner. *State* v. *Conley,* 39 Maine, 78. *Commonwealth* v. *Webster,* 5 Cush., (Mass.), 295. *Commonwealth* v. *Pierce,* 138 Mass., 165. 13 R. C. L., 784. R. S., Chap. 120, Sec. 2.

It is accordingly held that it is manslaughter when one kills another as the result of a practical joke which was a surprise to the deceased, and where death is imputable to physical agencies put in motion by the perpetrator. Wharton on Homicide, 346. Within this rule falls death resulting from building a fire around a drunken man *Errington's Case,* 2 Lewin C. C., 217; upsetting a cart as a joke, *Rex* v. *Sullivan,* 7 Car. & P., 641; administering as a joke excessive quantities of intoxicating liquor, *Rex* v. *Martin,* 3 Car. & P., 211; throwing a thief into a pond without apparent intention to drown him, *Rex* v. *Fray,* East., P. C., 236; and in close analogy to the facts of the instant case, seizing and carrying a boy eleven years old into the deep waters of the Smoky Hill River where he was drowned, *State* v. *Radford,* 59 Kansas, 591.

That the drowning of the deceased was unintentional on the part of this respondent we have no doubt. But from the facts appearing

in the record we are convinced that his act in throwing this boy into the Penobscot River, where as the evidence shows the water was twenty feet deep, was manslaughter. If his seizure and toss of the boy into the river be viewed either as a minor assault and battery, or, as in *State* v. *Radford*, supra, gross and culpable negligence, or both, the essential elements of the crime of manslaughter are present. To quote Bishop on Criminal Law, 6th Ed., Vol. 1, Sections 313, 314; "There is little distinction, except in degree, between a positive will to do wrong and an indifference whether wrong is done or not. . . . Every act of gross carelessness, even in the performance of what is lawful, and, a fortiori, of what is not lawful, and every negligent omission of a legal duty, whereby death ensues, is indictable either as murder or manslaughter."

A careful study of the occurrences of this tragedy which were either uncontroverted or which from the evidence the jury were warranted in believing took place, not only justified but demanded the verdict rendered.

Appeal denied.
Motion for a new trial overruled.
Judgment for the State.

STATE OF MAINE *vs.* CASPART COHEN.

Oxford. Opinion October 15, 1926.

A bill of exceptions should succintly state the issue and the ruling of Court excepted and contain, by reference or otherwise, sufficient to show wherein the excepting party was aggrieved.

A plea of former jeopardy should be met by the State by a demurrer or replication, in the first instance raising a question of law, and in the latter an issue of fact which must be submitted to a jury.

The instant case does not show the nature of the reply by the State to the respondent's plea or whether an issue of fact or law was presented, nor whether upon the overruling of the motion any or what judgment was entered. Exceptions will be sustained only when it appears from the exceptions themselves that the court mistook the law.

A plea of former jeopardy being in the nature of a dilatory plea, the case should have gone to final judgment before being brought to the Law Court on exceptions. The respondent, however, having brought his exceptions to the Law Court without pleading over, must be deemed to have waived his right to answer further, and the judgment here is final.

On exceptions by respondent. Respondent was indicted for keeping a common nuisance and pleaded a previous conviction supported by a certified copy of the record. The plea was overruled and exceptions entered. Exceptions overruled. Judgment for the State.

The case fully appears in the opinion.

Hugh W. Hastings, County Attorney, for the State.

Aretas E. Stearns and George A. Hutchins, for the respondent.

SITTING: WILSON, C. J., PHILBROOK, STURGIS, BASSETT, PATTANGALL, JJ.

WILSON, C. J. The respondent was indicted at the February Term, 1926, of the Supreme Judicial Court in Oxford County, under Sec. 1 of Chap. 23, R. S., for keeping and maintaining a common

nuisance, to wit: a store situated in the town of Rumford resorted to for purposes of gambling, and covering a period from January 1, 1924 to the date of the indictment.

To the indictment, the printed case shows that the respondent pleaded *autrefois convict*, alleging a previous conviction for the same offense in the Rumford Falls Municipal Court upon a complaint for keeping a store in said Rumford which was resorted to for the purposes of gambling, and covering a period from May 1, 1925 to November 19, 1925; that he pleaded guilty to the charge, which was brought under Sec. 1, of Chap. 127, R. S., and the Judge of the Municipal Court, which is expressly given jurisdiction over the offense defined in the last-named section, fined him the sum of fifty dollars and costs, which he paid.

The case, based on the indictment, is now before this court on a bill of exceptions, which must be overruled.

This court has frequently had occasion to call attention of counsel to essential requirements of a bill of exceptions under Sec. 55 of Chap. 82, R. S. *State* v. *Reed*, 62 Maine, 135; *Webber* v. *Dunn*, 71 Maine, 331; *McKown* v. *Powers*, 86 Maine, 291; *Neal* v. *Rendall*, 100 Maine, 575; *Jones* v. *Jones*, 101 Maine, 447; *Feltis* v. *Lincoln Power Co.*, 120 Maine, 101.

The printed case, which contained nothing on the title page to indicate that it is a bill of exceptions, first sets forth under the caption, "Foreword" certain alleged facts, and refers to the indictment, plea and record of an alleged former conviction, and states they "are printed within." The Foreword is followed by what purports to be a copy of an indictment for maintaining a gambling nuisance and a record of the Rumford Falls Municipal Court, showing a complaint against one Casper Cohen for keeping a place resorted to for gambling, a conviction and payment of a fine.

Then follows, under the caption "Exceptions," the following:

"After hearing on the plea of former conviction filed by the respondent, the Court overruled the respondent's plea; whereupon the respondent has alleged exceptions, and prays that his exception may be allowed."

Whether the "Foreword," the indictment, plea, or record are thus made a part of the bill of exceptions may be questioned, and this court has repeatedly ruled that it cannot "travel outside the bill of exceptions" and consider documents or evidence not made a part

thereof, though contained in the printed case. The bill of exceptions must be able to stand alone. *Jones* v. *Jones*, supra; *Feltis* v. *Lincoln Power Co.*, supra.

But overlooking the irregularity, if any, in this respect and assuming that it was the intent of counsel to make the "Foreword" and copies of the indictment, plea, and record a part of the bill of exceptions, the proceedings, so far as they are set forth in the printed case, appear either to have been irregular, or the printed case does not set forth sufficient to show whether and how the respondent was aggrieved. The printed case does not state how the issue was joined and what it was, or what the final judgment was. It sets forth only that the plea of former jeopardy was overruled, and to this ruling the respondent excepted.

The bill of exceptions, whether confined to the part under that title, or the entire printed case, falls within the language of this court in *State* v. *Houlehan*, 109 Maine, 281, 284: "The bill of exceptions does not show the character of the reply of the state to the plea . . . . whether an issue of law or of fact was presented, nor whether upon the overruling of the motion any or what judgment was entered. Exceptions will be sustained only when it appears from the exceptions themselves that the court mistook the law. *Hix* v. *Giles*, 103 Maine, 439. The exception is overruled."

At common law, which in this state has never been modified by statute, a plea of former jeopardy should be met by the state by a demurrer or a replication; in the first case raising a question of law for the court, and in the latter raising issue of fact which should be submitted to a jury. Archibald on Crim. Pl. & Pr., Vol. 1, Page 348; Ency. P. & Pr., Vol. 9, Page 636, IV., Page 639 VI. Bish. Crim. Pro., Sec. 810, 816; *Kinkle* v. *People*, 27 Colo., 459; *Conklin* v. *State*, 25 Neb., 784; *Com.* v. *Merrill*, 8 Allen, 545.

Instances may be cited where the replication raised no issue of fact, and thus amounted in effect to a demurrer, and the court upon the pleadings and facts admitted overruled or sustained the plea; otherwise the regular proceedings should be followed.

Pleas of former jeopardy being of the nature of a dilatory plea, *State* v. *Inness*, 53 Maine, 536; *State* v. *Jellison*, 104 Maine, 281, 284, the case should have gone to final judgment before being brought to this court on exceptions. Sec. 58, Chap. 82, R. S. Whether it did

or not, the bill of exceptions does not disclose. But so far as the printed case shows, the respondent having brought his exceptions to this court without pleading over to the merits, he must, therefore, be deemed to have waived his rights to answer further, and the judgment here will be final. *State* v. *Inness*, supra; *State* v. *Jellison*, supra.

Exception overruled.
Judgment for the State.

WILLIAM H. MILNER *vs.* DENNIS HARE.

Knox. Opinion October 16, 1926.

In an action for malicious prosecution, it is necessary to prove both malice and lack of probable cause. The mere fact that a plaintiff fails in an action will not alone furnish a ground for action. If the plaintiff acts upon the advice of an attorney, it may be sufficient to satisfy a jury that probable cause existed, but if he fails to state to his attorney fully and truthfully all the facts, a jury might well find that probable cause was lacking.

In the instant case, it was purely a question of veracity between witnesses. If the jury believed the plaintiff and his witnesses, the defendant, in the original suit, did not fully and truthfully state the facts to his attorney who brought the action, and the jury may have properly found under instructions, to which no exceptions were taken, that probable cause was lacking, and at least legal malice, if not actual malice, was present.

On general motion. An action for malicious prosecution. The defendant in this action was plaintiff in a former action against the plaintiff in this action, of trover for the value of fifty logs, and also another action for board and hay was brought by same plaintiff against same defendant, in which two actions defendant, the plaintiff in this case, prevailed in the first action, and the plaintiff prevailed in the second action. The plaintiff in this case, having prevailed as defendant in the first case then brought this action. Verdict for

plaintiff and defendant took the case to the Law Court on a general motion. Motion overruled.

The case fully appears in the opinion.

E. W. Pike and F. H. Ingraham, for plaintiff.

R. I. Thompson and F. A. Tirrell, Jr., for defendant.

SITTING: WILSON, C. J., PHILBROOK, STURGIS, BASSETT, JJ. MORRILL, A. R. J.

WILSON, C. J. An action for malicious prosecution. The jury found for the plaintiff, and assessed damages in the sum of one hundred dollars. The case is here on motion for new trial.

The original action on which the present action is predicated was an action of trover for the conversion of certain logs. In March, 1922, the defendant sold the plaintiff a farm with two woodlots. On the woodlots were certain logs cut and lying on the ground. The testimony is that the plaintiff offered fifteen hundred dollars, and the defendant asked seventeen hundred and fifty. The plaintiff, corroborated by the agent of the defendant, who conducted the negotiations and heard the conversation, testified that the final terms agreed upon were, that the plaintiff was to pay sixteen hundred and twenty-five dollars and have the logs. The defendant, uncorroborated by other witnesses, testified that he agreed to sell for the last-named sum upon the condition that he reserve the logs.

In the Winter of 1922-1923, the plaintiff disposed of the logs on one of the woodlots, the logs on the other lot in the meantime having been conveyed by bill of sale to the defendant by the plaintiff, either in accordance with the agreement of purchase, or in connection with another transaction.

In August, the following year, two actions were brought by the defendant against the plaintiff, one of which was the trover action for the recovery of the value of the logs disposed of by the plaintiff. The cases were referred to a referee, who decided against Hare in the trover action. As a result, the plaintiff brought this action of malicious prosecution, alleging that the action of trover was brought without probable cause and with malice, for the purpose of harassing and injuring the plaintiff.

The defendant's contention is that the jury clearly erred in finding lack of probable cause and malice, inasmuch as the evidence did not show

either ill will, nor malice in law, *Hopkins* v. *McGillicudy,* 69 Maine, 276-7, and the defendant before bringing the action of trover consulted an experienced and reputable attorney and acted upon his advice.

It is true that, even if malice existed, but there was probable cause, no action for malicious prosecution could be maintained, *Payson* v. *Caswell,* 22 Maine, 212; *Soule* v. *Winslow,* 64 Maine, 520; and if a party states to an experienced and reputable attorney fully and truthfully all the facts, and acts upon the advice received, it may be sufficient to satisfy a jury that he acted without malice, or, at least, had probable cause.

It is for the jury to find the facts, if in dispute, and determine the inferences to be drawn therefrom. *Watt* v. *Corey,* 76 Maine, 87; *Hopkins* v. *McGillicudy,* supra; Page 276; *White* v. *Carr,* 71 Maine, 555; *Morin* v. *Moreau,* 112 Maine, 471; *Stevens* v. *Fassett,* 27 Maine, 266. The mere fact that a plaintiff failed in his action, of course, would not alone furnish a ground for an action for malicious prosecution.

The instant case was properly submitted to the jury, and we must assume under proper instruction as to the essential elements of such an action and what constitutes malice and probable cause in law. It was simply a question of whether the trade was as claimed by the defendant, or there was a misunderstanding between the parties as to the terms and the defendant acted in good faith in seeking to recover the value of the logs; or whether the trade was as stated by the plaintiff and the defendant untruthfully and deliberately misstated the terms of the sale to his counsel, and the action of trover was brought out of spite, or malice, by reason of some differences which had arisen between them since the sale of the farm. The plaintiff urged the latter reason, because of the delay in bringing the trover suit, and it following a dispute as to some hay and board.

The jury heard the witnesses, and evidently believed the plaintiff and his witness as to the agreement for the sale of the farm. If so, the defendant, from his own testimony, did not truthfully state the facts to his attorney, and the jury, therefore, under the instructions of the court, may have been warranted in finding from such a deliberate misrepresentation, that probable cause was lacking, *Cooper* v. *Waldron,* 50 Maine, 80, and that legal malice, *Page* v. *Cushing,* 38 Maine, 526, actuated the defendant in bringing a groundless suit, as it would be if the plaintiff and the agent's testimony was believed.

From the reported case, to reverse the verdict would be to substitute the judgment of this court upon the printed testimony for that of the jury, who heard the witnesses, upon a question of veracity. The parties have had their day in court before the tribunal established to determine the facts. It decided in favor of the plaintiff. The verdict is not excessive or large. We do not find sufficient grounds for disturbing it.

Motion overruled.

STATE OF MAINE *vs.* HARRY SIDDALL.

Oxford. Opinion October 21, 1926.

Exceptions in order to be sustained must show within themselves that the excepting party was aggrieved.

Intoxication does not make innocent an otherwise criminal act.

Appeal lies only in cases of felony, from a denial of a motion for a new trial by the presiding Justice.

Where in a prosecution for knowingly transporting intoxicating liquor the only exceptions are to the following extract from the Judge's charge, to wit: "The law will not permit a man to hide behind the statement 'I was drunk' " and "if he bought the liquor and put it in his pocket the fact that he may have been intoxicated will not excuse the act," the respondent is not in any legal sense aggrieved.

In a prosecution for crime in which knowledge or specific intent are necessary elements, if no sober premeditation be shown inability to possess knowledge or harbor intent is a defense, even though such condition of mental oblivion is produced by intoxication. But in the instant case nothing in the rulings excepted to is at variance with this principle.

On appeal and exceptions. Respondent was indicted for knowingly transporting intoxicating liquor without Federal permit and found guilty by a jury. At the conclusion of the Judge's charge respondent excepted to a part of it, and also filed a motion for a new trial

which was denied and an appeal taken. Appeal dismissed. Exceptions overruled. Judgment for the State.

The case is fully stated in the opinion.

Hugh W. Hastings, County Attorney, for the State.

Peter M. MacDonald and George A. Hutchings, for respondent.

SITTING: WILSON, C. J., PHILBROOK, DEASY, BASSETT, PATTANGALL, JJ.

DEASY, J. The indictment, based upon Chapter 116 of the Laws of 1925 charges that the respondent, without Federal permit, knowingly transported intoxicating liquor from place to place within the State. The case comes to this court on exceptions to the charge of the presiding Justice.

"To sustain exceptions they must contain within themselves sufficient to show that the excepting party was aggrieved." *Lenfest* v. *Robbins,* 101 Maine, 178, *Borders* v. *Railroad,* 115 Maine, 208, *State* v. *Chorosky,* 122 Maine, 287.

The respondent excepts to parts of the charge set forth in the bill as follows: "The law will not permit a man to hide behind the statement 'I was drunk' " and "if he bought the liquor and put it in his pocket the fact that he may have been intoxicated will not excuse the act" i. e. the act of transporting intoxicating liquor in his pocket.

The respondent is not in any legal sense aggrieved by these rulings.

Intoxication does not make innocent an otherwise criminal act. The rulings say no more than this.

It is true that in a prosecution for crime in which knowledge or specific intent are necessary elements, if no sober premeditation be shown (*State* v. *Bacon,* (Del.), 112 Atl., 682), inability to possess knowledge or harbor intent is a defense, even though such condition of mental oblivion is produced by intoxication. 16 C. J., 107, 8 R. C. L., 131 and cases cited.

But nothing in the rulings excepted to is at variance with this principle.

The converse of the rules given by the presiding Justice could not be defended as correct to wit: "The law *will permit* a man to hide behind the statement 'I was drunk' " or "the fact that he was intoxicated *will excuse* the act." The parts of the charge brought forward for our consideration merely negative such manifestly erroneous propositions.

The respondent also presents an appeal from the ruling of the presiding Justice refusing to set the verdict aside and grant a new trial. The appeal must be dismissed. The ruling of the court below is final. It is not subject to exception. *State* v. *Simpson*, 113 Maine, 27. An appeal lies only in cases of felony. R. S., Chap. 136, Sec. 28.

Appeal dismissed.
Exceptions overruled.
Judgment for the State.

PITTSFIELD NATIONAL BANK

vs.

VERA M. DYER AND ROYAL INSURANCE COMPANY, L'T'd, Trustee.

SAME

vs.

VERA M. DYER AND ATLAS ASSURANCE COMPANY, L'T'd, Trustee.

SAME

vs.

VERA M. DYER AND NIAGARA FIRE INSURANCE COMPANY, Trustee.

Somerset. Opinion October 21, 1926.

In order to establish a lien upon an insurance policy or its proceeds under R. S., Chap. 53, Sec. 69, a mortgagee must show conformity to the statute which creates the lien.

A mortgagee whose lien has not taken effect for want of sufficient notice cannot successfully invoke R. S., Chap. 53, Sec. 72 as against another who has established his lien in the manner provided by law.

Letters which do not, except inferentially, name the mortgagor; do not give the date of the mortgages nor state when, where or whether they are recorded, nor give any information as to the location of the mortgaged premises, nor correctly state the amount remaining unpaid, do not conform to the statute which requires such notice to "describe the mortgage, the estate conveyed thereby and the sum remaining unpaid thereon."

When a mortgagee's lien upon the proceeds of an insurance policy is established and has taken effect, if the sum due and payable upon the mortgage debt at the beginning of the suit exceeds the lien, judgment should be rendered for such sum.

When, however, no part of the debt had matured at the date of the writ, judgment must be limited to "what is found due from said (insurance) company," not exceeding of course the total amount of the principal defendant's obligation.

To advance by enactment subsequent to its date the time of payment fixed by a contract would impair its obligation. Not so, however, where the statutory enactment precedes the making of the contract. The statute reads itself into the contract and becomes a part of it.

A trustee is chargeable with interest whenever he receives interest, or when he has expressly promised to pay interest, but not when it is recoverable simply as damages.

On report on an agreed statement. Three actions brought by plaintiff on certain notes secured by a mortgage on real estate to establish a lien on three policies of insurance or the proceeds thereof which had been placed on the buildings on said real estate by the three insurance companies, trustees in these actions, the buildings having been destroyed by fire on February 14, 1925. The principal defendant, Vera M. Dyer, prior to the date of the mortgage given to plaintiff had given two mortgages on the same real estate to the Dominion Fertilizer Company, L't'd, intervenor in the actions, contending that it had prior liens on the policies. The question involved was as to whether the intervenor had established its liens on the policies or their proceeds, under R. S., Chap. 53, Sec. 69. Plaintiff recovered judgment in each action.

The case fully appears in the opinion.

Harry R. Coolidge, for plaintiff.

William H. Gulliver and Gower & Shumway, for Trustees.

Gower & Shumway and Wilfred I. Butterfield, for Dominion Fertilizer Company, L't'd.

SITTING: WILSON, C. J., PHILBROOK, DEASY, STURGIS, BASSETT, JJ., MORRILL, A. R. J.

DEASY, J. These are three actions at law brought by the same plaintiff against the same principal defendant to recover upon the same promissory notes. Three insurance companies are summoned

as trustees, one in each case. Except as otherwise indicated the facts in all the cases are the same and the principles of law identical. For brevity we are treating the first case as if it were the only one. The others abide the result.

By virtue of R. S., Chap. 53, Sec. 69, a mortgagee has a lien upon insurance policies covering the mortgaged property. The lien is made to "take effect" when a statutory written notice is filed with the insurance company. If the mortgagor does not consent that the sum secured by the policy be paid to the mortgagee the lien may be enforced by trustee process brought within sixty days after a loss. Section 70.

It is not disputed that the plaintiff bank held a mortgage covering buildings situated in Palmyra, Maine, owned by Vera M. Dyer the principal defendant, that the buildings were insured by the company joined herein as trustee, that such buildings were destroyed by fire, that proof of loss was duly made and filed, that the plaintiff gave the notice required by statute to make its lien effectual and that within sixty days after the loss it began this trustee process to enforce it.

This is all that the law requires to establish and enforce a lien.

But the Dominion Fertilizer Company, Ltd., intervenes claiming and showing that it holds two mortgages upon the same buildings, both mortgages ante-dating that of the plaintiff, and that it also in writing notified the insurance company of its claims and mortgages. The Fertilizer Company did not bring a trustee process but somewhat more than sixty days after the loss filed with the insurance company the mortgagor's written consent that the sum secured by the policy be paid to it, the Fertilizer Company. There is no contention as between the plaintiff and the principal defendant or trustee. The controversy is wholly between the plaintiff and the intervenor.

The Fertilizer Company contends that it has a lien upon the sum due from the insurance company, which lien is paramount to that of the plaintiff. The plaintiff, on the other hand, says that the claim of the intervenor has not taken effect as a lien because the notice given by it to the insurer was not such a notice as the statute requires.

The notice which the statute prescribes is "a written notice briefly describing his mortgage, the estate conveyed thereby and the sum remaining unpaid thereon." R. S., Chap. 53, Sec. 69.

To show conformity to this requirement the Fertilizer Company presents two letters, as follows:

"March 16, 1925.

"Harold A. Fortington,
Secretary, Royal Insurance Co.,
85 Williams Street,
New York City.

"Dear Sir:

You are hereby notified that the Dominion Fertilizer Company of Houlton, holds first mortgage on the premises of Earl and Vera Dyer which were insured by your company and which premises were destroyed by fire. The premises secured by the mortgage were the same that were burned and the amount due under two mortgages owned by the Dominion Fertilizer Company is approximately $5500. I will notify you of the exact amount as soon as I receive it from the Company.

"Kindly advise me when you expect to make payments on this and whether it will be necessary for me to take further steps.

Very truly yours,

WILFRED I. BUTTERFIELD."

B-O

"March 21, 1925.

"Harold A. Fortington, Secretary,
Royal Insurance Company,
85 Williams Street, New York.

"Dear Sir:

I wrote you on March 16th concerning certain mortgages which the Dominion Fertilizer Company hold against Vera M. Dyer and Earl H. Dyer. I understand that this premises were burned and that your company had insurance on same and I notified you on the sixteenth of March that we were the mortgagees and should expect payment as far your insurance would go to cover said mortgage. I have figured up the mortgages and unless there is some error there is due to date $4297.37.

Very truly yours,

WILFRED I. BUTTERFIELD."

It is conceded that the signer of these letters was duly authorized and that they were sent to and received by the proper officer or agent of the Insurance Company at about the dates specified.

The sufficiency of the notice is not questioned by the insurance company. It is, however, not the insurer but the statutory requirement that must be satisfied. In order to establish a lien the intervenor must show conformity to the statute which creates the lien. *Knowlton* v. *Black*, 102 Maine, 504.

The letters relied upon state that the Dominion Fertilizer Company holds and owns two mortgages upon the buildings insured, but the letters do not, except inferentially, name the mortgagor. They do not give the date of the mortgages nor state when, where or whether they are recorded, nor give any information as to the location of the mortgaged premises. The first letter approximates and the second (inadvertently no doubt) over-states the amount remaining unpaid.

The letters may have given to the insurance company all the information required for its purposes but it would be loose construction indeed to hold that they "describe the mortgage, the estate conveyed thereby and the sum remaining unpaid thereon."

The intervenor having established no effectual lien, it is not necessary to consider the alleged unseasonableness of the mortgagor's consent. The plaintiff's established lien can hardly be defeated by the mortgagor's consent that the funds held by the lien be paid to the intervenor who has no effective lien.

A mortgagee whose lien has not taken effect cannot successfully invoke R. S., Chap. 53, Sec. 72 as against another who has established his lien in the manner provided by law.

Another point remains to be considered. The suit is brought upon certain promissory notes neither of which had by its terms matured at the date of the writ.

The statute, however, provides that "judgment may be rendered for what is found due from said company upon the policy, notwithstanding the time of payment of the whole sum secured by the mortgage has not arrived." R. S., Chap. 53, Sec. 70. If the sum due and payable upon the debt at the beginning of the suit exceeded the lien, judgment would be rendered for such sum. In this case, however, no part had matured at the date of the writ. Judgment must therefore be limited to "what is found due from said company," not exceeding of course the amount of the principal defendant's

obligation. There is no controversy about this amount. The principal defendant's total obligation exceeds the sum for which all the trustees are chargeable. The balance of the mortgage debt must remain to be enforced if necessary by proper process at maturity.

To advance by enactment subsequent to its date the time of payment fixed by a contract would impair its obligation. *Randolph* v. *Middleton*, 26 N. J. Eq., 546, 12 C. J. 1059.

Not so, however, where, as in this case, the statutory enactment precedes the making of the notes. The statute reads itself into the contract and becomes part of it. *Corbin* v. *Houlehan*, 100 Maine, 259; *Phinney* v. *Phinney*, 81 Maine, 450.

The trustee is chargeable for the amount disclosed, without interest. "A trustee is chargeable with interest whenever he receives interest or when he has expressly promised to pay interest, but not when it is recoverable simply as damages." *Abbott* v. *Stinchfield*, 71 Maine, 214, and cases cited.

In this case the trustee is not shown to have promised to pay or to have actually received interest.

In No. 1227, *Pittsfield National Bank* v. *Vera M. Dyer and Royal Insurance Company, Ltd., Trustee.* Trustee charged for $2000.

Judgment for plaintiff for $2000.

In No. 1228, *Pittsfield National Bank* v. *Vera M. Dyer and Atlas Assurance Company, Ltd., Trustee.* Trustee charged for $1100.

Judgment for plaintiff for $1100.

In No. 1229, *Pittsfield National Bank* v. *Vera M. Dyer and Niagara Fire Insurance Company, Trustee.* Trustee charged for $1100.

Judgment for plaintiff for $1100.

ISAAC BERLIAWSKY *vs.* CHARLES E. BURCH ET AL.

Knox. Opinion November 3, 1926.

The question of the financial standing of accommodation makers is one of fact for the jury.

The rule governing the admission of shop books is not to be disregarded merely for the purpose of corroboration of a party to the suit.

An excepting party, in order to sustain his exceptions, must show that the matters excepted to were prejudicial to his interest.

In the instant case the checks could not be found but the plaintiff admitted that the defendants paid interest on the note, by check, and the defendants admit that the stubs showed payments of interest on the note, the exclusion of these stubs, even if admissible under some circumstances which we do not find applicable to the case at bar, was not prejudicial to the defendants.

The case involves primarily these issues of fact; first, whether or not the note in suit was an accommodation note; second, whether or not it had been paid by giving a renewal note. The note in suit was not produced at the trial and the evidence is practically conclusive that it was lost. Upon these issues, and others, some of which are collateral, the jury found for the plaintiff, and it does not appear that the jury was clearly wrong in its conclusions.

On exceptions and general motion. An action in assumpsit on a promissory note. The general issue was pleaded with a brief statement alleging that the note was an accommodation note and also that it had been paid by giving a renewal note. Verdict for the plaintiff. Exceptions were taken to the admission of certain evidence and a general motion for a new trial was also filed. Motion and exceptions overruled.

The case appears in the opinion

R. I. Thompson and F. A. Tirrell, Jr., for plaintiff.

Frank H. Ingraham, for defendants.

SITTING: WILSON, C. J., PHILBROOK, DEASY, STURGIS, JJ., MORRILL, A. R. J.

PHILBROOK, J. This is an action in assumpsit to recover on a promissory note which the plaintiff alleges was given him by the

defendants, bearing date of July 10, 1922, the amount being six hundred dollars, with interest at seven per cent. until paid, payment of note and interest to be made within six months from its date.

In addition to the plea of general issue the defendants, by way of brief statement, declare that the note was given without value received, and for the purpose of lending their names to the plaintiff, and that the plaintiff agreed to take care of the note when due; also that one of the defendants, Charles E. Burch, previously had the use of a certain automobile, the purchase price of which the plaintiff had paid, and it was arranged that the defendants should pay the plaintiff therefor, which they did, subsequently to the making and delivery of the note in suit, it being then and there understood and agreed that payments should be made on said car from time to time and said defendant Charles E. Burch then and there as a part of the same transaction, made over and assigned to the plaintiff his interest in a certain mechanical base ball game invention, or his interest in the letters patent or his patent rights therein, as security, to be reassigned to said defendant, Charles E. Burch, or canceled, on payment of said indebtedness; also that said promissory note was paid in full on August first, 1925, by a new promissory note of that date signed by said defendants, at said Rockland, promising to pay the plaintiff, or his order, the principal sum of six hundred dollars, on demand, with interest at seven per cent. per annum, payable semi-annually until fully paid, suit on which new note is now pending in this court.

The jury returned a verdict for the plaintiff in the sum of $694.50 and the defendants bring the case to this court on exceptions and general motion for a new trial

THE EXCEPTIONS:

The first exception was to the admission of a question propounded to Mrs. Burch, one of the defendants, by plaintiff's counsel, and her answer thereto. The record discloses not only the question and answer but also the colloquy which accompanied the same, and is as follows:

"Q. On the date that this note in suit was given what property did you or your husband own in Rockland?

"MR. INGRAHAM: I object.

"MR. TIRRELL, JR.: They set out in their defense that this was an accommodation note. I wish to show that the defendants had

no financial standing so that they could give an accommodation note that would be of any value to any body.

"MR. INGRAHAM: Whether that be true or not the testimony of our witness is that Mr. Berliawsky asked it and they complied with his request.

"THE COURT: She may answer this question."

Thereupon the witness answered that they had an interest in real estate on Park street, giving her opinion as to its value and the amount of incumbrances upon it.

In argument of this exception the defendants cite no authorities to sustain their contention, as matter of law, but claim that they were prejudiced because the admission of the testimony led the jury to infer that the defendants had no financial standing when such was not the case; also that the fact of the existence of a large mortgage on the real estate, taken alone, may have led the jury to a conclusion that was not warranted by all the facts, and led them to believe that the note of the defendants would be of no value in raising money. As to whether or not the defendants, by reason of their financial standing, could or could not lend value to the note as accommodation makers, was a question of fact for the jury to determine, open to testimony from both sides, and they were to determine the issue. We cannot say, as matter of law, that there was error in admitting the testimony and this exception must be overruled.

The second exception is the exclusion of a page from a loose-leaf account book alleged to have been kept by Marcia A. Burch, one of the defendants. She was permitted to refresh her recollection by referring to the account as to payments on the automobile, shown on this page of the book, but the book was excluded. The defendants admit, in argument, that the loose-leaf was an account of credits only, and not of charges, and that it would not be admissible under the "shop-book" rule. But they claim that it would corroborate the testimony of Mrs. Burch that certain payments by the defendants were on the automobile and not as interest on the note. Having been permitted to refresh her recollection by reference to this loose-leaf, the claim made that payments therein minuted were upon the automobile, was before the jury, and the defendants cannot now properly demand that an established rule governing the admission of shop books may be disregarded merely for the purpose of corroboration of a party to the suit. This exception must also be overruled.

The third and fourth exceptions relate to the exclusion of two stubs found in a check book which were in the hand-writing of Mr. Burch, who was not in court at the time of the trial, but evidently on a business trip to Florida. The checks could not be found but the plaintiff admitted that the defendants paid interest on the notes by check, and the defendants admit that these stubs showed payments of interest on the note. The exclusion of these stubs, even if admissible under some circumstances which we do not find applicable to the case at bar, was not prejudicial to the defendants and these two exceptions must be overruled.

THE MOTION.

The case involves primarily these issues of fact; first, whether or not the note in suit was an accommodation note; second, whether or not it had been paid by giving a renewal note. The note in suit was not produced at the trial and the evidence is practically conclusive that it was lost. Upon these issues, and others, some of which are collateral, the jury found for the plaintiff and, after careful examination of the record, we cannot say that having seen and heard the witnesses the jury was clearly wrong in its conclusions.

Motion and exceptions overruled.

THE LASHER COMPANY *vs.* LAURENT LABERGE.

Androscoggin. Opinion November 15, 1926.

In an action brought on a written contract for the conditional sale of a known, described and defined article, with a count on a promissory note given in payment, in which contract was a clause that it contained all the agreements between the parties, oral representations by agents in negotiating the sale will not bind the principal, and afford no ground for the rescission of the contract or for recoupment.

Under such a stipulation in the contract, there was no implied warranty of quality or fitness.

In the instant case the buyer, by his written order, selected the type of freezer he desired. If he received the article described in his contract, there being no warranty, he cannot complain, if it proved unsuitable or inefficient.

On exceptions by defendant. An action of assumpsit on a written contract for the purchase of a Lasher Freezer Display Case, and on the note given by defendant to plaintiff pursuant to the contract. At the close of the evidence the presiding Justice directed a verdict for plaintiff and defendant excepted. Exceptions overruled.

The case is fully stated in the opinion.

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

Louis J. Brann, for defendant.

SITTING: WILSON, C. J., PHILBROOK, DEASY, STURGIS, BARNES, BASSETT, JJ.

WILSON, C. J. An action to recover the balance due on a contract of conditional sale of an article, described in the contract as a "No. 110 Lasher Freezer Display Case," with a count on a promissory note given in payment.

The contract of purchase was in the form of an order, on a printed blank supplied by the plaintiff, and signed by the defendant and accepted by the plaintiff. The note declared on was payable in monthly installments and contained the stipulation that, in case of failure to pay any one installment when due, the entire sum should immediately become due and payable.

The display case was delivered in December, 1924, and after setting it up in his store, the defendant made two monthly payments on the note in addition to a payment made upon signing the order and one on the delivery of the case as provided in the written contract.

On February 18th, 1925 and again on February 25th, the defendant wrote the plaintiff, refusing to make further payments and claiming that the display case was not as represented and notifying the plaintiff that he rescinded the contract, and that the display case would be placed in storage in Auburn, subject to the plaintiff's order.

In his brief statement under the general issue, the defendant sets up a breach of a warranty; that the display case would keep meats and around and below the freezing point, and would be of a certain height and hold tubs of lard of a certain size; and also claims recoupment because of a failure to comply with said representations and also by reason of a total failure of consideration.

In the court below, after the evidence was in, the court directed a verdict for the plaintiff, and the case is here on exceptions to the ruling of the presiding Justice.

The case was tried below on the issues of whether there was a failure of material representations as to its refrigerating qualities, its height and capacity to hold articles of a certain size, and whether the defendant's attempted rescission was within a reasonable time. It is upon these points that defendant relies under his bill of exceptions.

The exceptions must be overruled. The alleged representations of quality, height, and capacity were oral and made by the salesman of the plaintiff, if made at all. The order signed by the defendant, which became a contract upon its acceptance by the plaintiff, contained the express stipulation, that it contained all the agreements between the parties, which was notice to the defendant that the salesman had no authority to bind the plaintiff to or by any additional or collateral agreement or representations. If the defendant relied on any such oral statement, he did so at his peril. *Guth Piano Co.* v. *Adams*, 114 Maine, 390, 393. A breach of any oral representations or warranties by the salesmen, therefore, afforded no ground for a rescission of the contract by the defendant or for recoupment in this action.

It was not claimed at the trial below, nor urged before this court, that there was an implied warranty of quality or fitness. Indeed

none could be claimed under the stipulation of the written contract that it contained all the agreements of the parties. *Lombard Co.* v. *Paper Co.*, 101 Maine, 114, 120, *Whitmore et al.* v. *So. Boston Iron Co.*, 2 Allen, 52, *Chanter* v. *Hopkins*, 4 M. & W., 399.

The only inference to be drawn from the evidence is that the contract was to furnish a known described and defined article, viz.: a "No. 110 Lasher Freezer Display Case," and not an order to supply or manufacture an article for a particular purpose, where the selection or design of the articles is left to the seller or manufacturer.

The buyer, by his written order, selected his own type, a "No. 110." If he received that article, he cannot complain, if it proved unsuitable, or inefficient, there being no warranty. *Lombard Co.* v. *Paper Co.*, supra; *Chanter* v. *Hopkins*, supra; *Seitz* v. *Refrigerating Machine Co.*, 141 U. S., 510. If the defendant desires assurance of quality or fitness, he should have demanded a warranty from the plaintiff itself. If its agents exceeded their authority after the notice contained in the contract and made material representations that failed, the defendant's remedy is against the agent and not the company, *Guth Piano Co.* v. *Adams*, supra.

There being no binding warranties or representations on which the defendant could rely, there was no ground for rescission or recoupment, and, upon the evidence, the plaintiff was entitled to a verdict for the balance due on the note. Whatever the ground was, on which the court below directed the verdict, which does not appear in the printed case, the defendant was not aggrieved.

Exceptions overruled.

GUSTAV F. HEIM *vs.* SARGENT S. COLEMAN ET AL.

Oxford. Opinion November 19, 1926.

In cases tried before a single justice it has usually been considered that his findings upon matters of fact are conclusive, and that errors of law must be presented by a bill of exceptions.

A stipulation made before the Law Court, regarding exceptions taken in the court below, does not constitute a proper bill of exceptions.

A bill of exceptions must set forth enough to show that its points are material, and that material error occurred; it must be specific, giving distinctly the grounds of complaint, and not of a wholesale character.

The Law Court, in this state, is not a constitutional court, but one created by statute, and has that jurisdiction only which the statute has conferred upon it, and that is a limited jurisdiction. The court cannot properly extend its statutory powers.

The Supreme Court, sitting in banc as a court of law, is not a court of original jurisdiction and cannot grant leave to amend.

In this case no proper bill of exceptions being before the court, and a motion for a new trial not being the correct procedure, the motion must be dismissed.

On motion for new trial by plaintiff. An action of debt on a bond given by defendant, Sargent S. Coleman, as principal, and Fidelity & Deposit Company of Maryland, as surety, to plaintiff to secure the performance of the conditions of a written contract for the construction of certain camp buildings, entered into on October 22, 1923, by plaintiff and defendant, Sargent S. Coleman, who became a bankrupt. The surety company contended that the parties to the written contract had departed from its terms resulting in extra work and additional construction for which it was not holden. The cause was heard by the presiding Justice who found for the defendant and plaintiff filed a general motion for a new trial. Motion dismissed.

The case is sufficiently stated in the opinion.

Hastings & Son, for plaintiff.

A. J. Stearns, for Sargent S. Coleman.

W. G. Conary, for Fidelity and Deposit Company of Maryland.

SITTING: WILSON, C. J., PHILBROOK, DEASY, STURGIS, BASSETT, JJ., MORRILL, A. R. J.

PHILBROOK, J. This case was heard by a single justice, the docket entry showing, "Hearing before Court without intervention of jury with rights of appeal to Law Court." The Justice below made a finding for the defendant and the plaintiff filed a motion for a new trial upon the grounds usually alleged in a case where there has been a jury trial.

In cases tried before a single justice it has usually been considered that his findings upon matters of fact are conclusive, and that errors of law must be presented by a bill of exceptions. *Thompson* v. *Thompson*, 79 Maine, 286.

When the case was about to be argued before this court the irregularity of procedure became apparent and thereupon the following stipulation was presented, signed by counsel for all the parties, and allowed and assented to by the Justice presiding below.

STIPULATION.

In as much as it now appears that the docket entries in said case are not in accordance with the fact, and insufficient to give the Law Court jurisdiction to hear the above entitled matter:

It is mutually agreed between counsel for all parties hereto that the record of the printed case shall be taken to read;

"Exceptions taken below to all questions of law material to the decision of the presiding justice as rendered. Failure to seasonably perfect exceptions waived, same to be taken as perfected upon filing in the Law Court of this stipulation assented to by the presiding justice below." It is further mutually agreed that argument shall be in writing on both sides under the rule 30-30-10. Dated this thirteenth day of June, 1926.

The Law Court in this state is not a constitutional court, but is one created by statute, and has that jurisdiction only which the statute has conferred upon it and that is a limited jurisdiction. It has no other authority. . . . The court cannot properly extend its statutory powers. *Stenographer Cases*, 100 Maine, 275; *Mather* v. *Cunningham*, 106 Maine, 115.

The Supreme Court, sitting *in banc*, as a court of law, is not a court of original jurisdiction, and cannot grant leave to amend. *Baker* v. *Johnson*, 41 Maine, 15; *Crocker* v. *Craig*, 46 Maine, 327; *Mather* v. *Cunningham*, supra. *State* v. *Dondis*, 111 Maine, 17.

But further difficulty awaits the plaintiff because, even after the so-called stipulation was filed, he has not presented a proper bill of exceptions. From this stipulation to a bill of exceptions is a far cry. It is such well settled law as to need no supporting citations that the bill of exceptions must set forth enough to show that its points are material and that material error occurred; that it must be specific, giving distinctly the grounds of complaint, and not of a wholesale character.

There is no proper bill of exceptions before us, and as the motion for a new trial is not the correct procedure the mandate will be

Motion dismissed.

MEGUNTICOOK NATIONAL BANK *vs.* KNOWLTON BROS.

Knox. Opinion November 27, 1926.

One partner in a mercantile partnership has no authority to use the name of the firm, out of the scope of the partnership business, as accommodation indorser upon another's note, without the consent or subsequent ratification of the other partners.

The members not in fact consenting to, or having knowledge of the indorsement are unaffected by any inference deducible from the face of the note or the representations of any other member, unless the plaintiff is a bona fide holder.

When the indorsee purchases the note in good faith, for an adequate consideration, before maturity, without knowledge of any circumstances affecting its validity, the firm will be liable therefor.

If the holder knows at the time when he takes the paper that one of the partners has indorsed the partnership name thereon as surety for the maker, it is encumbent upon him to rebut the presumption that he received the firm name as surety for another in fraud of the partnership.

In the instant case the knowledge of the cashier of the plaintiff bank being the maker of the note which was indorsed for his accommodation by one member of the defendant firm, in the firm's name, without the knowledge or consent of

the other partners, who discounted the note at the bank, of which he was cashier crediting the proceeds to his own account, without the participation of any other officer of the bank in the transaction, must be held to be the knowledge of the bank, and the latter is bound by the cashier's knowledge of the circumstances under which he obtained the note.

The mere crediting of the proceeds to the cashier's account is insufficient to constitute the bank a bona fide purchaser for value.

On exceptions. An action of assumpsit by an indorsee on a promissory note given by R. L. Bean and payable to Knowlton Bros., the defendants, and indorsed "Knowlton Bros.," a partnership, by one of the members of the firm, without the knowledge, consent, or subsequent ratification of the other members of the firm, for the accommodation of the maker, who at the time was the cashier of the plaintiff bank, and as cashier and maker discounted the note at plaintiff bank before maturity and credited the proceeds to his personal account. The cause was heard by the presiding Justice reserving the right of exceptions in matters of law to the defendants who found for the plaintiff and the defendants excepted. Exceptions sustained.

The case fully appears in the opinion.

William R. Pattangall and Alan L. Bird, for plaintiff.

Z. M. Dwinal and O. H. Emery, for defendants.

SITTING: WILSON, C. J. PHILBROOK, DEASY, STURGIS, BASSETT, JJ., MORRILL, A. R. J.

MORRILL, A. R. J. Action of assumpsit by an indorsee, upon a promissory note dated January 26, 1921 for five thousand dollars, signed by R. L. Bean, payable to the order of Knowlton Bros. ninety days after date, and indorsed "Knowlton Bros."

The case was heard, without the intervention of a jury, by the presiding Justice who found for the plaintiff, reserving the right of exception in matters of law to the defendants.

The defendants present three exceptions to special findings of the presiding Justice. They also except generally to the ruling that they are liable on the note.

Upon the record before us the facts are few and not in dispute; there is no conflict of evidence. R. L. Bean, the maker of the note, was at its date the cashier of the plaintiff bank and continued to hold that position for a month or more thereafter. At the date of the

note Knowlton Brothers was a firm composed of John D. Knowlton, Willis D. Knowlton and E. Frank Knowlton, doing a general foundry and machine business in Camden, where the plaintiff bank was located The firm did business at the plaintiff bank and as occasion required discounted there its customers' notes, such notes being indorsed in the firm name, quite frequently by E. Frank Knowlton, sometimes by other members of the firm. The indorsement on the back of the note in suit,—"Knowlton Bros.",—was written by E. Frank Knowlton, who died January 24, 1925, while the action has been pending, and before trial. The testimony of Willis D. Knowlton that the firm received no consideration for the note, is positive and uncontradicted. Neither of the surviving partners knew at the time, nor until sometime thereafter, of the making of the note. There is no evidence that R. L. Bean was indebted to Knowlton Brothers. The parties stipulated, and the presiding Justice found in accordance therewith, that the proceeds of the note were credited by the bank to the account of R. L. Bean, before maturity thereof. The record does not show that the note was presented to the directors or any committee of the bank for discount, or seen by any officer of the bank, other than Mr. Bean, before it was discounted and the proceeds credited to Mr. Bean's account. The only inferences to be drawn from the facts presented in the record are that the indorsement was an accommodation indorsement made for the benefit of R. L. Bean by one partner of Knowlton Brothers without the knowledge, consent, or ratification of his copartners, and that R. L. Bean was the only officer of the bank who had any part in discounting the note at the bank and in crediting the proceeds to Mr. Bean's account.

Counsel for plaintiff upon the brief do not seriously dispute that the note was an accommodation note, and claim to recover against all the partners upon the authority of certain well considered cases, which are noted hereafter. The absence of any record or of any testimony by any officer, director, or employe of the bank to the contrary, renders unavoidable the conclusion from the facts upon the record, that Bean was the only officer of the bank who had any part in the discounting of the note and in the crediting of the proceeds to his account. Neither Bean, nor any officer, director, or employe of the bank was called as a witness.

It is familiar law that one partner has no authority to thus use the name of the firm, out of the scope of the partnership business, unless

the consent or subsequent ratification of the others is obtained. *Rollins* v. *Stevens*, 31 Maine, 454. Such consent or knowledge may be shown by a course of business dealing, as where there has been a frequent exchange of accommodation paper (*Darling* v. *March*, 22 Maine 184, 188); or where it appears that one firm has been in the habit of indorsing at the bank or elsewhere for another, such general course of dealing would be evidence of authority from all members of the firm, and such use of the firm name would bind all. *Sweetser* v. *French & al.*, 2 Cush., 309; *Gansevoort* v. *Williams et al.*, 14 Wend., 133, 139. There is no evidence of such course of action in the case. One of the surviving partners testified that he had never known the firm to become an accommodation party to any other note. The members not in fact consenting to, or having knowledge of the indorsement are unaffected by any inference deducible from the face of the note or the representations of any other member, unless the plaintiff is a bona fide holder. *Gansevoort* v. *Williams*, supra. But where, as urged by counsel for plaintiff, the indorsee purchases the note in good faith, for an adequate consideration, before maturity, without knowledge of any circumstances affecting its validity, the firm will be liable therefor; *Redlon* v. *Churchill*, 73 Maine, 146. *Waldo Bank* v. *Lumbert*, 16 Maine, 416; and the plaintiff is not obliged, in the first instance, to show that the note was given for a partnership transaction. *Waldo Bank* v. *Greely et al.*, 16 Maine, 419.

The counsel for plaintiff rely upon the last three cases cited, and upon *Wait* v. *Thayer*, 118 Mass., 474, and *Parker* v. *Burgess*, 5 R. I., 277. In all these cases the note or bill was indorsed for the benefit of a member of the firm and bore his name, and the holder had no knowledge that the partnership name was used without authority, or of any infirmity in the note. It was accordingly held that the form of the note did not give notice to the holder that the indorsement was for accommodation, and in fraud of the firm.

If, however, the holder knows at the time when he takes the paper that one of the partners has indorsed the partnership name thereon as surety for the maker, it is incumbent upon him to rebut the presumption that he received the firm name as surety for another in fraud of the partnership. *Darling* v. *March*, supra. *Sweetser* v. *French*, 2 Cush., 309, 314. *Nat. Security Bank* v. *McDonald*, 127 Mass., 82, 84. The authorities are collected in a note to *Altoona Second Nat. Bank* v. *Dunn* (151 Pa. St., 228) in 31 Am. St. Rep.

754 et seq. In *Parker* v. *Burgess*, supra, cited by plaintiff, it is said: "The holder of such paper is debarred from a recovery only when he participates in the fraud or wrongful act of the partner; and in every case where he takes it with notice, he is deemed to be a participator in the fraud and is not allowed to profit by it."

The mere crediting of the proceeds to Bean's account is insufficient to constitute the bank a bona fide purchaser for value. *Union Bank* v. *Winsor*, 101 Minn., 470, 472, 118 Am. St. Rep. 641, 642; *Security Bank* v. *Petruschke*, 101 Minn., 644, 118 Am. St. Rep. 644; *Citizens State Bank* v. *Cowles*, 180 N. Y., 346, 105 Am. St. Rep., 765, 767; *Dreilling* v. *First Nat. Bank*, 43 Kan. 197, 19 Am. St. Rep., 126; *Drovers' Nat. Bank* v. *Blue*, 110 Mich., 31, 64 Am. St. Rep., 327. To the same effect under the Uniform Negotiable Instruments Law, Crawford's Nego, Inst. Law, Page 97.

Upon the case as presented Bean was the only officer of the bank concerned in the transaction, and his knowledge of the acts of E. Frank Knowlton must be held to be the knowledge of the bank. *Fall River Union Bank* v. *Sturtevant*, 12 Cush., 372; *Atlantic Mills* v. *Indian Orchard Mills*, 147 Mass., 268, 274; *National Security Bank* v. *Cushman*, 121 Mass., 490; *Loring* v. *Brodie*, 134 Mass., 453; 1 Morse on Banks & Banking, 4 Ed., Sec. 166. The facts do not bring the case within the rule sustained in *Indian Head Nat. Bank* v. *Clark* 166 Mass., 27; nor within the rule of such cases as *Innerarity* v. *Merchants Nat. Bank*, 139 Mass., 332; *Corcoran* v. *Snow Cattle Co.*, 151 Mass., 74, *First Nat. Bank* v. *Babbidge*, 160 Mass., 563, and the cases cited in a note in 3 R. C. L., Title "Banks," Sec. 107, where the officer of the bank (occupying the position of Bean in this litigation) having knowledge of the equities affecting the discounted note, acted independently, in his individual interest, the bank of which he was an officer being represented by another; upon such facts it is held that his knowledge is not the knowledge of the bank. In *First Nat. Bank of Grafton* v. *Babbidge*, supra, the court recognized the distinction, saying: "If Linley alone had acted in discounting the note and in placing the proceeds to his own credit, the bank would be bound by his knowledge of the circumstances under which he had obtained it from the defendants."

The bank received the note, being charged in law with actual knowledge of the unauthorized act of E. Frank Knowlton and of the rights of the other partners. There is no evidence in the case that

does or can rebut or explain away the legal aspect of the transaction. The finding, therefore, of the presiding Justice that the bank is a holder of the note without notice of want of authority or of circumstances which should put it on inquiry, and is entitled to hold all the members of the firm, is an erroneous decision of the legal conclusions to be drawn from the facts in the case, and is error in law, to correct which exceptions will lie. *Morey* v. *Milliken*, 86 Maine, 464, 481; *Chabot & Richards Co.* v. *Chabot*, 109 Maine, 403, 405.

Exceptions sustained.

L. C. HOLSTON ET ALS. *vs.* CHARLES J. HALEY.

ERFORD EMMONS ET ALS. *vs.* F. L. DURGIN ET AL.

York. Opinion November 30, 1926.

Under the common law and the Uniform Negotiable Instrument Act of this State, indorsers are prima facie liable in the order in which their names appear on the instrument, but evidence is admissible to show that, as between themselves, they have agreed otherwise.

It is not necessary that an express agreement for a joint liability be proven. An implied agreement may satisfactorily appear from the circumstances under which and the purposes for which the notes were given and from the acts of the parties.

Where, as in the instant case, in order to raise capital for a joint undertaking, the officers of a corporation who are mutually benefited indorse the notes of a corporation, though without any conference between them as to their respective liability, but by their acts an understanding may be fairly inferred that their liability was joint and not successive, a finding by a Justice below that their liability was joint will not be disturbed.

On appeal. Bills in equity, two cases heard together, to determine the liability of certain officers of a corporation as indorsers on a corporation note; as to whether their liability was joint or successive. Upon a hearing on bill, answer, replication and proofs, the sitting

Justice found for the plaintiffs, sustaining the contention that the liability of the indorsers was joint and not successive and that defendants should contribute to plaintiffs. From which finding defendants appealed. Appeal dismissed with additional costs. Decree below affirmed.

The case is sufficiently stated in the opinion.

Elias Smith, for plaintiffs.

Cram & Lawrence, for defendants.

SITTING: WILSON, C. J., DEASY, STURGIS, BASSETT, JJ., MORRILL, A. R. J.

WILSON, C. J. The two cases above entitled were heard together, and as they involve the same question, may be considered and decided together.

In April, 1918, certain residents of the towns of Cornish and Hiram, twenty or more in number, and farmers by occupation, organized a corporation under the name of the Cornish Farmers Union for the purpose of handling and disposing of their produce, operating creameries, selling fertilizer, flour, grain, groceries, and other articles of merchandise. From the name, purposes, and the evidence, it is obvious that the corporation was organized for the mutual benefit of its members and of such other farmers in the same or adjoining communities as might afterwards become associated or deal therewith.

Only a nominal sum was paid in by the incorporators, the par value of the shares being ten dollars, the capital for doing business being chiefly obtained upon notes of the corporation indorsed by its directors.

On May 11th, 1917, according to the records of the corporation, the directors indorsed a note for $1800, and on May 29th another note for $500 to buy grain or other merchandise. Later other notes were issued from time to time by the corporation, indorsed by five or more of the directors, who were seven in number. On one or more of these notes were all of the plaintiffs, except A. F. Clark. These notes were all discounted at the Limerick National Bank, and on January 1st, 1920, totaled in the principal amount $6900. On January 1st, 1920, a single note in renewal of these several notes for the sum of $6900 was executed by the corporation and indorsed by the entire board of directors, which then consisted of the five plaintiffs

in the second action and the two defendants. The evidence shows that the Bank relied entirely upon the indorsers and not upon the maker.

On March 17, 1920, a prior note of the corporation for $2020, which bore the indorsement of J. S. Weeks, C. J. Haley, Erford Emmons, L. C. Holston, and A. F. Clark, was reduced to $2,000, and a new note for the latter sum was issued, indorsed by its then directors, A. F. Clark, J. S. Weeks, Erford Emmons, L. C. Holston, F. L. Durgin, H. B. Wadsworth, and Charles J. Haley, which note, together with the note for $6900, forms the basis of the second action.

On September 22, 1920, a note for $2500 was discounted at the Bank indorsed by five of the directors, viz.: Clark, Pike, Wadsworth, Weeks, and Haley. On January 1st, 1922, Mr. Pike having apparently, as the testimony indicated, paid his respective share of the twenty-five hundred dollars; viz., five hundred dollars, the obligation was renewed for the amount of $2,000 by a note bearing that date and indorsed by five of the directors, including the plaintiffs in the first action: Holston, Clark, Wadsworth, and Berry; and the defendant, Haley.

The new enterprise appears to have been profitable until 1921, when severe losses were suffered, in part, from a sudden drop in the price of grain after its manager had ordered a large amount, which losses also continued into 1922, and in 1923 action was taken by the stockholders to dissolve the corporation and wind up the business.

The Limerick Bank then called upon the indorsers for payment of the notes held by it. The plaintiffs met and each agreed to pay his respective share on the basis of a joint liability on or before July 1st, 1923. Though he did not attend the meeting, the defendant Durgin, also, and with the knowledge of the defendant Haley, according to the testimony of the cashier of the bank, sometime in June sent to the bank $500 on his obligation, and with the instruction to the cashier to hold it until the full amount was paid in. The plaintiffs, as the other indorsers, jointly paid the balance due on the notes, and bring these two bills in equity for contribution: the first, against Mr. Haley as one of the indorsers on the note given January 1st, 1922 for $2000, and the second against both Durgin and Haley on the note for $6900, given January 1st, 1920, and the note for $2,000, given March 17, 1920. The plaintiffs based their claim for contribution on the ground that the defendants' obligation as indorsers, under the

circumstances, was joint; and the defendants contending that there was no agreement to that effect, and that, under Section 68 of the Uniform Negotiable Instrument Act of this State, Chapter 257, Public Laws 1917, they are only liable in the order in which the names appeared on the notes.

Section 68 of the Act apparently did not change the common law liability of indorsers in this state, they being "liable *prima facie* in the order in which they indorse, but evidence is admissible to show that as between or among themselves, they have agreed otherwise." *Smith* v. *Morrill*, 54 Maine, 48; *Coolidge* v. *Wiggin*, 62 Maine, 568; *Hagerthy* v. *Phillips*, 83 Maine, 336.

On a note alone, this section would be conclusive, unless, of course, it is otherwise indicated on the note itself; but evidence, parol or otherwise, may be admitted to overcome this presumption. Nor is it necessary that an express agreement to the contrary be shown. An implied agreement of a joint liability may satisfactorily appear from the circumstances under which and the purposes for which the note was given and from the acts of the parties. *Hagerthy* v. *Phillips*, supra, *Coolidge* v. *Wiggin*, supra; *Weeks* v. *Parsons*, 176 Mass., 570, 575; *Trego* v. *Estate of Cunningham*, 267 Ill., 367, 378; *Plumley* v. *Bank of Hinton*, 76 W. Va., 635, 639. *Talcott* v. *Coggswell*, 3 Day (Conn.), 512. *McDonald* v. *Whitefield*, L. R., 8 App. Cases, 733.

The judge below, upon the evidence, found there was such an understanding or agreement for a joint liability on the part of the indorsers of these notes, and held that each of these defendants was bound to contribute his respective share and liable for that amount to the other indorsers paying the full sum. His finding of fact having the effect of a jury verdict, to sustain the appeal, must be shown to be clearly wrong.

The undertaking for the furtherance of which these notes were issued was clearly designed for the mutual benefit of its members. It had no capital of any substantial amount contributed by its stockholders. Its directors proceeded to raise the necessary capital to begin business by discounting notes of the corporation at a bank, and on the strength of the indorsement of a majority or all of its directors. The benefits derived from the notes was presumably mutual between all the stockholders, including the directors. While the evidence does not show that the respective obligations of the

indorsers was ever discussed prior to the indorsements, it was evidently understood by all the other indorsers, if not by these defendants, to be joint. In one instance a director paid his respective share rather than indorse a renewal note, and one of these defendants contributed to the joint fund for the taking up of these notes without insisting upon a successive liability.

The order of indorsement of the renewal notes was never the same as on the originals. The evidence discloses that the directors indorsed, without regard to the order of their indorsement, as they happened into the store, or as the officer who had the note happened to meet them. While a different order of indorsement on renewal notes may not alone be sufficient to overcome the presumption of several and successive liability; *Enterprise Brewing Co.* v. *Canning*, 210 Mass., 285; yet when taken with other circumstances, viz.: a joint undertaking or interest, and an understanding by all the other indorsers than the one denying joint liability, that the liability was joint, and a payment upon that basis, it is not only consistent with joint liability, but is, under such circumstances, of no little significance.

In states when the rule as to successive indorsers was the same as ours and which now have the Uniform Negotiable Instrument Act, it has been held, that, where the officers of a corporation for the furtherance of a joint undertaking in which they were mutually interested, have indorsed a note for the corporation to obtain the necessary funds to carry on the corporate enterprise, it was sufficient without an express understanding or agreement between the indorsers, each with all the others, to sustain a finding that there was at least, an implied agreement that the obligation thereby assumed was joint and not successive.

In *George* v. *Bacon*, 123 N. Y. S., 103, where several parties indorsed a corporate note for their mutual advantage, but without any express agreement or understanding as to their respective liability, the court said: "The significant circumstances in the present case are that all the indorsers were engaged in a common enterprise; that the money was to be raised on the note in furtherance of that enterprise, and, so far as it appears, one indorser was as much interested in the enterprise and as much benefitted by the money as was any other. It is likewise a very significant circumstance as bearing upon the mutual obligation of the indorsers to each other, that all indorsements were put on the

note before it was issued, and solely to give it credit with the bank; and that no indorser gained any profit except such as was shared in by all in pursuance of the common enterprise."

To the same effect is *Strasberger* v. *Myer Strasberger Co.*, 152 N. Y. S., 758, where it is held that such a mutual benefit presumably arising from a corporate enterprise in which all the indorsers were interested was sufficient to raise a question of fact as to whether it was the intent of the parties to become jointly liable. Also see *Middleton* v. *McCarter*, 13 D. C., 420; *Lee* v. *Boykin*, 11 A. L. R., 1328, 1331, Anno., 1332.

While there may be some elements in each of the cases cited not present in the cases at bar, the general principle is found in them all that when the indorsers are engaged in a common enterprise and their indorsements are for the sole purpose of furthering that enterprise in which each one's interest is equal with that of each of the others, it may be sufficient, without any express understanding, on which to base a finding by a court or jury that the indorsements were joint and not successive. Under such circumstances, payment by any indorser on account of such joint liability, unless explained, as it was not in this case, is surely sufficient to warrant such a conclusion. *Talcott* v. *Coggswell*, supra.

The fact that the notes on which these actions are based were renewal notes does not militate against the plaintiffs' contention; since the benefits accruing from the original notes were also shared in by the indorsers of the renewals, as all were for the promotion of the same enterprise in which all were interested at the time of the issuing of the original notes, or became interested shortly afterward as stockholders and sometime before the renewal notes were signed. The case of *Hunt* v. *Chambliss*, 15 Miss., 532 cited by defendants on this point is not *contra*. There the indorser prior to the renewal had no interest in the enterprise or purpose for which the note was given, and further, the court in that case in closing says: "This position rests upon principles of equity, even if it were not still more substantially supported by the evidence respecting the actual and special contrast of the appellee, which clearly was to become liable in the event the others did not pay, but not to become jointly liable with them." In other words, not only the circumstances in that case, but the evidence, showed that the new indorser on the renewal note was not a joint, but a successive indorser.

From the evidence in the cases at bar, it cannot be said that the findings of the Justice below were clearly wrong. The entry in each case will be:

Appeal dismissed with
additional costs.
Decree below affirmed.

GUY HAMMOND *vs.* CONSOLIDATED RENDERING COMPANY.

Aroostook. Opinion November 30, 1926.

Where services are admittedly performed without expectation of compensation, even though without such admission the relation of debtor and creditor might have been presumed, the person performing such services cannot recover.

In the case at bar, although there may have been evidence to warrant the jury's finding that there was no understanding or agreement that the services were to be performed without compensation, in view of the admission of the plaintiff that he had no expectation of compensation, until just before the services terminated, the jury in finding for the plaintiff the amount of the verdict must have misunderstood the law.

On motion for new trial. An action of assumpsit, one count on account annexed and a second count on a quantum meruit, to recover for boarding and pasturing certain horses, property of defendant. Defendant contended that plaintiff retained the horses to use for their keeping and had no expectation of being paid anything for either services or supplies for the horses. A verdict of $1710 was rendered for plaintiff and defendant filed a general motion for a new trial. Motion sustained. New trial granted.

The case is fully stated in the opinion.

W. R. Roix, for plaintiff.

Cook, Hutchinson & Pierce, for defendant.

SITTING: WILSON, C. J., PHILBROOK, DEASY, STURGIS, BASSETT, JJ.

WILSON, C. J. An action of assumpsit to recover for the boarding and pasturing of certain horses alleged to be the property of the defendant company.

In 1922, the plaintiff, who was then indebted to the defendant for fertilizer furnished the previous year to the amount of $1374.32, gave to the defendant his note for the amount, secured by a mortgage of certain chattels, including six horses. In February, 1923, not being able to meet his obligation, the chattel mortgage was foreclosed, his right of redemption expiring in the ordinary course, April 27, 1923.

The horses and other chattels, consisting mainly of farm machinery and carts, remained in the possession of the plaintiff until September 30, 1925. It is for the care and keep of the horses during the period between April 27, 1923 and September 30th, 1925 that the plaintiff seeks to recover in this action. The jury awarded a verdict for $1710, and the case is brought to this court on a motion for a new trial on the usual ground.

Two reasons are assigned by the defendant why the motion should be sustained: first, because the chattels were left with the plaintiff with the express understanding that he might have the use of them until the defendant called for them, and no charge should be made for their keep, and with the further understanding that, in the meantime, by paying up his debt, they would be restored to him; and second, that, in any event, they were kept by the plaintiff without any expectation on his part of compensation.

Upon the first point the evidence was conflicting. And while there is much evidence in corroboration of the testimony of the defendant's attorney, who foreclosed the mortgage, that the chattels were left with the plaintiff with the distinct understanding that no charge for their keep should be made, it is unnecessary to decide whether the motion should be sustained on this ground.

As to the second reason urged by the defendant in support of its motion, that the defendant, at least until sometime in the Summer of 1925, had no thought or expectation of receiving any compensation for the care and keep of the horses, it has the virtually conclusive support of the plaintiff's own admission, and in addition his acts during the entire period. Although demand was repeatedly made upon him for the payment of his debt in 1924 and 1925 and additional fertilizer was refused him on credit, and he was unable to plant any potatoes for the market during these years, he never suggested, until July, 1925, that he had a claim against the defendant, which it now appears was considerably more than enough to pay all his indebtedness to the defendant.

While it is true, as urged by the plaintiff's counsel, that where services are rendered or benefits conferred under conditions not inconsistent with that of debtor and creditor, the law implies an agreement to pay; it is equally true that when services are rendered or benefits conferred voluntarily without expectation of compensation on the part of the one rendering the service or of obligation to pay on the part of the one receiving the benefit, no contract or agreement to pay is implied. *LaFontain* v. *Hayhurst,* 89 Maine, 388; *Clary* v. *Clary,* 93 Maine, 220; *Leighton* v. *Nash,* 111 Maine, 525, 528; *Gordon* v. *Keene,* 118 Maine, 269.

In view of the plaintiff's own admission that he had no expectation of receiving pay for the care and keep of the horses, at least until July, 1925, it is clear that the jury's verdict must have been either the result of some bias or prejudice or they must have misunderstood the law.

Under the mortgage, the plaintiff was lawfully in possession even after foreclosure, until after demand by the defendant for possession. Counsel for plaintiff, however, contends that the defendant was repeatedly notified to remove the chattels. That it was a notice to this effect, however, is denied by the agents of the defendant to whom it is claimed it was given. From all the evidence, we think it is clear that such statements as were made by the plaintiff as to taking away the "stuff" were made in response to the demands of the defendant for payment, and in connection with a statement that he was unable to pay the note and, therefore, the defendant would have to "take the stuff," meaning the mortgaged chattels, as its only recourse to obtain payment of the note, and alone formed no basis for thereafter making a charge against the defendant for their keep in the light of his own testimony that he did not expect compensation and he had no intention of making a claim against the defendant until the Summer of 1925.

What effect, if any, the talk with the defendant's agent in July, 1925 had on his right to compensation for the remainder of the period the horses remained in the plaintiff's possession, we do not decide, but leave it for determination at another trial.

Motion sustained.
New trial granted.

H. MERRITT CUNNINGHAM, Receiver *vs.* W. BURNS LONG.

Aroostook. Opinion December 1, 1926.

Supreme Court Rule XXVIII., which provides for trial at return term, when notice demanding such trial has been given, like other Supreme Court Rules, when properly established, have the force of law and are binding upon the court as well as upon the litigating parties.

The party giving such notice has thereby gained some legal right, and the opposite party has the burden of showing sufficient grounds for a continuance.

Granting or refusal to grant a continuance is a matter of discretion, and in the absence of anything tending to show that this discretion was not properly exercised it is not subject to exceptions.

Any person having a direct pecuniary interest in the result of a controversy, ought not to adjudicate in such controversy, but there are exceptions to that rule, sometimes from the necessities of the case and more generally where the interest is too remote, uncertain, contingent, speculative, theoretic, and unsubstantial.

Where a contract requires that a party "shall" do a certain thing, the meaning of of the word ranges under two general classes, according as it is used as implying futurity or implying a mandate; and when the meaning of a word, phrase, or sentence, in a contract may be fairly said to be in doubt, its true meaning, as expressing the understanding of the parties, should be ascertained by an examination of the entire contract. The conduct of the parties, acting under the contract, oftentimes may throw light upon their understanding of the disputed construction.

Where a requested instruction is not given in the precise language offered, but is given in practically the same form, and to it the court adds any suggestion of facts, which facts are distinctly referred to the consideration of the jury, and the suggestions do not appear to be prejudicial to the excepting party as a matter of law, an exception will not avail.

When a requested instruction is simply a rehearsal of a paragraph of a contract, easy to understand, the whole contract being in evidence before the jury, a refusal to repeat the paragraph as a matter of law, especially when the law governing the paragraph has been correctly given elsewhere in the charge, is not such error in law as will warrant this court in sustaining the exception.

When the factual element of a contract is correctly submitted to the jury, and its legal interpretation correctly stated by the court, a refusal to give a requested instruction in the precise words of the contract is not such error in law as will sustain an exception.

When a case has been tried in an environment, and before a jury, peculiarly adapted to the arrival at a true verdict, that verdict must stand unless it be shown that such verdict was reached through bias, prejudice or plain misunderstanding of the law governing the case.

On exceptions and motion. An action by the plaintiff as receiver for Maine Potato Growers' Exchange to recover the sum of $336.81, alleged to be due him as receiver, from the defendant for payments made to defendant out of the proceeds of the sale of his 1924 crop in excess of what he should have been paid. The jury rendered a verdict for plaintiff for full amount claimed. Exceptions were taken by defendant to a refusal to grant a continuance; to the exclusion of certain evidence and also to certain instructions given, and to a refusal to give certain requested instructions. A general motion also was filed. Exceptions and motion overruled.

The case is fully stated in the opinion.

Archibalds, for plaintiff.

Herbert T. Powers and Ralph K. Wood, for defendant.

SITTING: WILSON, C. J., PHILBROOK, DEASY, STURGIS, BASSETT, JJ.

PHILBROOK, J. This is an action in assumpsit brought by the plaintiff, admittedly the duly appointed and qualified receiver of the Maine Potato Growers' Exchange, to recover from the defendant a balance of $336.81, the items of debit charged to the defendant, in the account annexed, being for money paid by said Maine Potato Grower's Exchange to the defendant for potatoes delivered, or to be delivered by the defendant, and for storage of potatoes of the defendant furnished at his request. The credit items are for potatoes delivered by the defendant to the Growers' Exchange. There is also a money count in the plaintiff's writ. The general issue is pleaded. The jury returned a plaintiff verdict in the sum of $339.33, being the full balance sued for, plus allowable interest. The defendant brings the case to this court upon exceptions and the usual motion for a new trial.

THE EXCEPTIONS.

These are five in number and will be discussed in the order following:

1. MOTION BY DEFENDANT FOR CONTINUANCE.

The writ was dated January 1, 1926, real estate attachment was made the same day, and service on the defendant made January 2,

1926. The writ was returnable on the first Tuesday of February, 1926, the plaintiff giving notice, at the time when the writ was served, that he demanded trial at the return term. Since the notice demanding trial was given on January 2d, and the return term opened on February second, the plaintiff had complied with Supreme Court rule XXVIII. which provides that any action shall be considered in order for trial at the return term when the party desiring it shall have given written notice thereof to the adverse party, which notice, when given by the plaintiff, must be so done thirty days before the sitting of the court. Under the provisions of R. S., Chap. 82, Sec. 3, the Supreme Judicial Court may establish, and cause to be recorded, rules not repugnant to law, respecting the modes of trial and conduct of business in suits at law and in equity. When so established these rules have the force of law and are binding upon the court, as well as upon parties to an action, and cannot be dispensed with to suit the circumstances of any particular case. *Fox* v. *Conway Fire Ins. Co.*, 53 Maine, 107; *Nickerson* v. *Nickerson*, 36 Maine, 417; *Maberry* v. *Morse*, 43 Maine, 176. Under the rule now being considered this case must be considered in order for trial at the return term, since the plaintiff had complied with the rule, thereby gaining some legal right, and the defendant had the burden of showing sufficient grounds for the continuance which he requested.

The motion for continuance shows two grounds upon which the defendant relied for support; first, alleged interest of the presiding Justice; second, insufficient time for properly examining records, and other evidence, and properly preparing his defense. As to the first ground, the defendant alleges and offered testimony in support thereof, that at the time when he entered into his contract with the Maine Potato Growers' Exchange, the construction of which and the determination of the legal rights of the parties thereunder, form the real issues in the case at bar, the Justice presiding at the return term was counsel for the Exchange; that said justice was also a signer of a similar contract with the Houlton District Potato Growers' Association, and was a member of that corporation, which last named Association was interested in the result of this suit as its members would be entitled to share proportionately in any funds remaining in the hands of the receiver for distribution.

The theory of the common law is that any person having a direct pecuniary interest in the result of any controversy ought not to

adjudicate in such case from fear that his interest might influence his judgment. He was required therefore to be indifferent as to both parties to the litigation, having no pecuniary interest either way. But there are exceptions to that rule, sometimes from the necessities of the case, and more generally where the interest either way is too remote, uncertain, contingent, speculative, theoretic, and unsubstantial to be legally estimated. *State* v. *Bangor and Brewer,* 98 Maine, 114; *Fletcher* v. *Somerset Railroad Company,* 74 Maine, 434. The Maine Potato Growers' Exchange is in the hands of a receiver and the record does not disclose any likelihood that any dividend from the assets of the Exchange would ever be paid to the Houlton Association.

The ruling of a presiding Justice, denying a motion for continuance, is clearly a matter of discretion, and in the absence of anything tending to show that this discretion was not properly exercised the ruling is not subject to exceptions. *Fitch* v. *Sidelinger,* 96 Maine, 70. Such rule has been adhered to by this court since the decision in *Rumsey* v. *Bragg,* 35 Maine, 116, more than seventy-five years ago, and its universality in other courts of justice is shown by the statement in 6 R. C. L., 544. "The fundamental principle running throughout the subject of continuance is that the granting or refusal of a continuance rests in the discretion of the court to which the application is made, and that its ruling in reference thereto will not be disturbed by an appellate tribunal unless an abuse of discretion is shown;" which statement is supported by citation not only of federal authorities but also from more that twenty state jurisdictions, as well as from English courts. In the light of these authorities, and the record of the case, after careful examination, we are unable to find that this exception will avail the defendant.

2. EXCLUSION OF EVIDENCE THAT CERTAIN PROVISIONS OF THE CONTRACT BETWEEN THE DEFENDANT AND HIS DISTRICT ASSOCIATION, WHICH CONTRACT, AS DEFENDANT CLAIMS, WAS INCORPORATED IN AND FORMED A PART OF THE CONTRACT BETWEEN THE DISTRICT ASSOCIATION AND THE EXCHANGE, WERE NOT CARRIED OUT BY THE EXCHANGE.

For a better understanding of the defendant's position under this exception we may briefly state the genesis and gist of the transactions which developed the controversy in the case at bar.

In the so-called potato belt of Aroostook county a proposition arose to organize non-profit associations, without capital stock, under appropriate laws, for the purpose of promoting, fostering, and encouraging the business of marketing potatoes cooperatively; for reducing speculation; for stabilizing potato markets; for cooperatively and collectively handling the problems of potato growers; and for other pertinent purposes. About thirty of these associations were formed, each controlling certain territorial districts. On January 25, 1923, the defendant became a member of the Presque Isle district association by signing an instrument which was declared to be "one of a series substantially identical in terms. All such instruments shall be deemed one contract for the purpose of binding the subscriber, to the same extent as if all the subscribers had signed only one such contract."

In paragraph thirteen of this instrument, so signed by the defendant, it was provided that "This association shall unite with other associations, organized under a similar agreement, and for similar purposes, to form a central agency for co-ordinating the activities of all such associations within this State, and for carrying out the purposes thereof in an efficient and centralized manner. This central agency shall be organized as soon as five such organizations have been duly and legally incorporated according to this Standard Association Agreement. The central agency shall be called the Maine Potato Growers' Exchange." The same paragraph stipulated expressly that the Exchange shall not act for itself, but "wholly and solely as the agent, under specified and authorized powers, of such association." Thus the Maine Potato Growers' Exchange came into being. It was purely and simply an agency, whose principal was the combined district associations. The defendant did not sign a contract with the Exchange but did sign one with the Presque Isle district association, a constituent part of the principalship. The contract between the defendant and his District Association contained the following provisions:

"5. The Association shall pool or mingle the potatoes of the grower with potatoes of a like variety, grade and quality, delivered during the same week by other growers. The Association shall grade the potatoes and its classification shall be conclusive.

"6. The Association agrees to resell such potatoes, together with potatoes of a like variety, grade and quality, delivered by other

growers under similar contracts, at the best prices obtainable by it under market conditions at the time of resale; and to pay over the net amount received therefrom (less freight, insurance and interest) as payment in full to the growers named on contracts similar hereto, according to the potatoes delivered in the same week by each of them, after deducting therefrom, within the discretion of the Association, the costs of maintaining the Association and costs of handling, grading, storing and marketing such potatoes, and of reserves for credits and other general purposes, (said reserve not to exceed two per cent. of the gross resale price). The annual surplus from such deductions must be prorated among the growers delivering potatoes in that year on the basis of the value of deliveries.

"7. The grower agrees that the Association may handle, in its discretion, some of the potatoes in one way and some in another; but the net proceeds of all potatoes of like variety, quality and grade in any weekly pool, less charges, costs and advances, shall be divided ratably among the growers in proportion to their deliveries to such pool, payments to be made from time to time until all accounts in each pool are settled."

The defendant attempted to offer evidence that these provisions of the contract had not been carried out by the Exchange. This testimony was excluded by the court and the defendant seasonably excepted. This element constitutes the basis of the second exception.

In argument of this exception the defendant claimed that these provisions prescribe the method, and the only method, in which potatoes should be handled by the Association, and in order to recover in this action the Exchange must show that it complied with the express terms of the contract under which it sold the potatoes grown by the defendant; also that he was prepared to show that if his potatoes had been handled in accordance with these provisions a much larger sum would have been received by him than was actually received.

All testimony relating to the breach of these provisions was excluded by the court on the ground that "the provision in the Association Contract and Marketing Agreement presented to the court, namely paragraph 5, page 10," (above quoted) "is not mandatory."

The contract says that the Association "shall pool," and "shall grade" the potatoes of its members, and the defendant claims this to be such a mandatory "shall" that its failure in respect to these provisions is a conclusive bar to recovery in this suit.

The various meanings of the word "shall" range under two general classes according as it is used as implying futurity or implying a mandate, and it is familiar law that when the meaning of a word, phrase, or sentence, in a contract, may be fairly said to be in any doubt, its true meaning, as expressing the understanding of the parties should be ascertained by an examination of the entire contract. The conduct of the parties, acting under the contract, oftentimes may also throw light upon their understanding of the disputed construction. That the word "shall," in this contract, contains an element of futurity is plainly to be seen since nothing was to be done by the Association relative to pooling and grading until some future time in which potatoes were delivered to it by the grower. If the mandatory element were to be attached to the word "shall," as claimed by the defendant, he must ask the court to ignore not only other provisions of the contract but also the conduct of both the defendant and his association in the handling of his potatoes in the previous year, under the same contract, and his own admissions in testimony as to his reasons for offering this element of his defense. We have carefully examined the entire contract, as well as the conduct of the parties under that contract, as shown by the record, and are of opinion that there was no error in the ruling of the court below upon which this exception should be sustained.

3. REFUSAL TO GIVE REQUESTED INSTRUCTION.

The defendant requested the court to give the following instruction:

"The plaintiff was bound to distribute the net proceeds of potatoes sold by it so that every grower should receive the same as every other grower for the same quantity of any variety, grade and quality of potatoes delivered to and sold by it."

The court declined to give this instruction in the precise language asked for by the defendant, but did give the following instruction:

"This plaintiff was bound to distribute the net proceeds of potatoes sold by it in any one season so that each grower should have and receive as return for his potatoes proceeds computed by exactly the same method and under the same rule, regardless of the quantity offered, in variety, grade and quality of potatoes delivered to and sold by it, other conditions being the same. Defendant says that the fact that the Portage Lake shipments were taken, just when they

were, shrunk him too hard, the fact that when the house was being used in the winter months to load cars through, and his were not put out, caused him excessive shrinkage, unfairly and unjustly; that he suffered in money because the shrinkage became greater every thirty days, or every day. Well, now, I instruct you that if it were not a cooperative proposition, more weight would attach to what he suggests. As I look at it, with these men situated, a great many of them a long distance from ware-houses, with the right and the urge on the part of the Exchange that there shall be a farm storage, this will inure to the benefit of those who participate in a greater surplus, because they do not have to pay for the building of so many houses. Is it fair business, gentlemen, to hold houses at the loading points ready to receive the barrels that come down through the frosts, over the icy roads, in the cold months of December, January and February, and hold back for a time those that are safely stored in snug, tight, warm houses? That is for you to say. If discrimination was directed against W. Burns Long and his potatoes in his two and a half bins, and his other bins, by virtue of concerted acts, or by neglect, on the part of this association, and he suffered thereby, he is to be recompensed by reducing this charge against him, provided you find there is any charge against him, but if, in the attempt in a rational and businesslike way by the officers of this great corporation to handle this crop of eight million bushels or barrels, or whatever it is, in the most fair and equitable manner for all who are within the limits of that circle of membership, it were reasonable to take care of the stuff that was liable to be hurt by frost, and to have the storage room ready for that purpose, then you should find that there was no discrimination against him."

The defendant seasonably excepted to the refusal of the court to give the requested instruction, and to the instruction as given by the court.

The requested instruction was given in practically its exact form, but to it the court added suggestions regarding the Portage Lake shipments, including questions of fact which were properly left to the decision of the jury, which addition does not appear to be prejudicial to the defendant as matter of law. This exception must also be overruled.

4. REFUSAL TO GIVE REQUESTED INSTRUCTION REGARDING RESERVE.

The defendant requested the court to give the following instruction:

"The contract between the Association and the Exchange is the contract which governed the conduct of the business of the Exchange. Under that contract the Exchange did not have authority to retain as reserve any amount in excess of one per cent of the total gross value of potatoes handled by it during the year."

The defendant, in asking for this instruction, relied upon a paragraph in the contract between the District Association of which he was a member, and the Exchange, which reads as follows:

If at the end of each fiscal year a surplus of funds is on hand the Association may retain as a reserve any amount not in excess of 1% of the total gross value of potatoes handled by it during the year and any balance shall be prorated among the members of the Exchange according to the gross value of the potatoes handled by the Exchange for them respectively during the calendar year."

The defendant claimed that the evidence showed that the Exchange retained, out of the 1923 crop, a sum in excess of that which should have been retained, and that he was entitled to credit upon his account for his proportion of the balance of said sum retained by the Exchange as reserve.

The amount of excess, and the portion thereof actually reserved, were questions of fact for the jury. The contract was in evidence before the jury. The requested instruction was simply a reiteration of a paragraph of the contract, easy to understand, and was not one of law, error in which would be ground of exception. Moreover, the court had given the law relating to this excess reserve, in another part of his charge, and his refusal to give the instruction, as requested, was not an error in law which would avail the defendant.

5. THE EDGAR W. RUSS TRANSACTION.

It appeared from the evidence of Andrew J. Beck, business manager of the Exchange while it was in operation, that in the Fall of 1924 one Edgar W. Russ held a number of crop mortgages upon the crops of individuals who were members of the several District Associations. The Exchange made a contract with Mr. Russ under which it guaranteed to pay him a sum equal to the 1924 fertilizer bills of these mem-

bers covered by his crop mortgages. This transaction resulted in a loss to the Exchange, that is to say, that the sum paid Mr. Russ exceeded the net amount received for potatoes delivered by his mortgagors.

The defendant contended that this transaction was in effect a purchase of potatoes by the Exchange from Mr. Russ and that he (the defendant) was not bound to reimburse the Exchange any portion of the loss incurred in this transaction.

The court instructed the jury as follows:

"The Association, under the provisions of Deft's Exhibit 1, section 13, sub-section c, page 11, had the right to pay the Russ mortgages, so-called, and had the right to use its property for that purpose, and the Maine Potato Growers' Exchange, as the agent of the Association, had the same right to pay the same from its property, and in either event to charge any payment so made to the debtor grower proportionately; and if you did find that it did no more in the Russ incident than as expressed in c, on page 11, it is no defense in this suit that that incidental transaction was made either in whole or in part, or to any degree, the paragraph reading as follows: 'If the Grower places a crop mortgage upon any of his crops during the term hereof, the Association shall have the right to take delivery of his potatoes and to pay off all, or part, of the crop morgtage for the account of the Grower, and to charge the same against him individually'."

The factual element of this instruction was properly submitted to the jury and the legal interpretation correctly stated by the court. This exception is without avail.

THE MOTION.

The reasons for a general motion for new trial, including the controversy regarding the charge for storage, are covered by the discussion of the exceptions and hence the motion does not call for further discussion. There is little, if any, controversy concerning the facts. The case was tried before a jury, and in an environment, peculiarly adapted to the arrival at a true verdict. That verdict must stand.

Exceptions and motion overruled.

MEMORANDA DECISIONS

CASES WITHOUT OPINIONS

BERTRAM S. PEACOCK *vs.* BERTA E. RICH AND EDWARD M. SMALL.

Cumberland County. Decided October 17, 1925. An action of replevin to recover possession of certain household goods. It was reported to this court on an agreed statement of facts, the writ and certain exhibits.

From the report, it appears that a mortgage of the replevied chattels was given by the defendant, Berta E. Rich, and her husband, Payson Rich, to the defendant, Edward M. Small, under date of April 4th, 1923 to secure the payment of the principal sum of $100.00 in two months from date with the right of possession in the mortgagor until a breach of the conditions; on December 1st, 1924, the defendant, Berta E. Rich, conveyed the mortgaged chattels to the plaintiff by a bill of sale and mortgage; on December 29th, 1924, the defendant, Edward M. Small, began foreclosure of his mortgage by one of the methods provided by Statute; and on January 19th, 1925, this action was brought to recover possession of the goods which the agreed statement admits were in the possession of the defendant, Berta E. Rich, and were never in the possession of the defendant, Edward M. Small, unless it otherwise appears from the agreed statement. From the agreed statement and mortgage, it appears he was entitled to possession, there having been a breach of the condition of the mortgage, but there is nothing to indicate he ever took or had possession. Quite the contrary. The officer's return shows that the goods were not taken from the possession of the defendant Small.

There is no ground, therefore, upon which an action of replevin could be maintained against him.

The defendant, Berta E. Rich, having suffered a default, the entry as to her will be, Judgment for the plaintiff. And as to the defendant Small, Judgment for the defendant. *Roland H. Peacock,* for plaintiff. *Frank A. Morey,* for defendant.

STATE *vs.* EUGENE SOUCY.

Androscoggin County. Decided November 20, 1925. The respondent has been convicted of keeping and maintaining a common nuisance as defined and prohibited by R. S., Chap. 23, Sec. 1. He brings the case to this court on exceptions to the refusal of the presiding Justice to give certain requested instructions, except as contained in the charge, and to his refusal to order a verdict for the respondent.

The requested instructions are definitions of the term "common nuisance." But turning to the charge we find that the term is defined with a sufficient degree of accuracy thus:

"What is a common nuisance? It would be a place that is used—and that means commonly and habitually used—although it may be for a greater or less length of time. It may be for years; it may be even only for part of a day. It is a question of the character of the keeping and the evidence will vary in respect to that proposition in different cases very considerably The place that is commonly and habitually used, under the definition I have given you, for the illegal sale of intoxicating liquors or for the illegal keeping of intoxicating liquors intended for sale, any keeping of liquors, intoxicating liquors, with intention of sale would be illegal."

The court amplified this definition by pertinent comment and illustration. We do not see how the jury could have failed to comprehend the elements which the State is bound to prove.

The evidence tends to show that the respondent on November 4th, 1924 sold, at his house, two bottles of beer, which were drunk on the premises, and a pint of alcohol, which was taken away, and that on the following day upon search of the house, an improvised still, six gallons of mash, thirty bottles of home brewed beer and ninety empty bottles were found. This evidence does not "necessa-

rily and as a matter of law" (*State* v. *McIntosh*, 98 Maine, 400) prove that the respondent kept and maintained a common nuisance, but it justified the jury in so finding. *State* v. *Stanley*, 84 Maine, 561. Exceptions overruled. Judgment for the State. *Benjamin L. Berman, County Attorney*, for the State. *M. L. Lizotte and Frank T. Powers*, for respondent.

NELLIE A. HALL *vs.* ALWYN J. TREADWELL, Executor.

Piscataquis County. Decided November 28, 1925. The plaintiff acted as housekeeper and nurse for the defendant's testatrix, Mrs. Weltha A. Treadwell, during the latter's last illness. The deceased was suffering from tuberculosis and finally became bedridden, requiring the special attention such a condition demands. The plaintiff's services covered a period of twenty-nine weeks.

Declaring upon an account annexed with a count in quantum meruit added, the plaintiff recovered a verdict of $433.82 in the court below, which the defendant seeks to set aside upon motion, claiming that the services were rendered gratuitously, or if not, the verdict is excessive and in fact accord and satisfaction was executed.

The plaintiff's claim, that she left a remunerative employment and undertook the care of Mrs. Treadwell and her home at the latter's request, with a mutual understanding that her services were to be paid for, was evidently accepted by the jury as true, as was her denial of any settlement or arrangement amounting to an accord and satisfaction. The amount of wages to be paid not being fixed by the parties, their value was for the jury to determine. The verdict is neither excessive nor clearly wrong. Motion overruled. *Martin L. Durgin*, for plaintiff. *George E. Thompson and Ross St. Germain*, for defendant.

FRED A. LITTLEFIELD, Libelant *vs.* BERTHA E. LITTLEFIELD.

Penobscot County. Decided December 5, 1925. This libelant prays for a divorce from his wife on the ground of her adultery. The

case was submitted to a jury whose verdict was "that a divorce should not be decreed." Divorce was denied.

The evidence justified a finding that the libelee had been guilty of adultery, and that the libelant had committed the same offense, but that his infidelity had been condoned. The libelant excepts to denial and to certain instructions given and to the refusal of requested instructions.

The three exceptions present one and the same issue to wit:— whether in a suit for divorce for the libelee's adultery the libelant's guilt of the same offense, when condoned, can be interposed as a valid defense. The Superior Court answered this question in the affirmative.

The Maine statute which confers authority to grant divorces and specifies adultery as a cause provides that "when both parties have been guilty of adultery . . . . it shall not be granted." R. S., Chap. 65, Sec. 2. A majority of the court are of opinion that this statute, being plain and unambiguous, must be construed as it reads and that, even if the husband's guilt has been condoned by the wife, since both parties have been guilty of adultery, no divorce can be granted. Exceptions overruled. *B. W. Blanchard and Percy A. Hasty*, for libelant. *George E. Thompson and Ross St. Germain*, for libelee.

HILDING FROLING *vs.* ELIZABETH HOWARD.

Hancock County. Decided December 23, 1925. In the trial court, the taking of evidence in this case closed without the defendant having offered any. Counsel for the defendant moved the directing of verdict favorable to his side, and the motion obtained.

Thereupon the plaintiff saved the exception which is argued, for and against, here.

Times there are when verdicts ought to be directed. This is on the concept that where, as matter of law, on established facts, verdict in one way only could be sustained, it would be even worse than the

wasting of time to await a correct decision, and if not given to do indirectly what might have been directly done before.

Where, however, from the one record competent minds may validly deduce contrary inferences, gather different meanings, and arrive at unlike conclusions then the judge must not presume to command what shall be the judgment of the jury.

Such was the state of the testimony in the instant action. And, therefore, the direction of the verdict constitutes reversible error.

The decision on the foregoing point sending the case back for another trial, it is not perceived that it would suffice material purpose to pass upon the remaining exception which has relationship to the exclusion from the evidence at the former trial of a proffered deposition. First exception sustained. *Wood & Shaw*, for plaintiff. *Lynam & Rodick*, for defendant.

J. IRENE JENKINS *vs.* FRANK A. CASE.

Androscoggin County. Decided January 16, 1926. An action to recover damages for injuries received while the plaintiff was driving the car of and accompanied by the defendant through the alleged negligence of defendant in seizing the steering wheel while the plaintiff was endeavoring to pass another car going in the same direction.

The issue was one of fact and whether the defendant unnecessarily seized the steering wheel and endeavored to direct the car in passing the other automobile or whether the plaintiff in trying to pass had been forced into a position of danger by the car in front, the driver of which had apparently purposely refused to turn out to give her room to pass, and the defendant had only seized the wheel when danger was imminent and the injuries to the plaintiff occurred while he was endeavoring to steer the car back into the road.

The jury heard the evidence and saw the witnesses and found in favor of the plaintiff. This court cannot, from the printed testimony, say that the verdict was clearly wrong. Motion overruled. *Frank A. Morey*, for plaintiff. *Harry Manser and S. Merritt Farnum*, for defendant.

MILES M. RHODA *vs.* FRED DRAKE, JR.

Aroostook County. Decided January 19, 1926. Defense to an action on a promissory note, by brief statement, set up fraud in obtaining it and conspiracy of the plaintiff and the original payee to enforce payment and share the proceeds.

The note declared upon was received in evidence and the defendant rested, without having introduced any evidence that plaintiff, indorsee, when he took it had knowledge of any infirmity of the note, or such knowledge of the transaction in which the note was evolved as to render his taking it an act of bad faith.

Plaintiff then moved for and received a directed verdict, and defendant brings the case up on general motion.

After a directed verdict, the issue raised is one of law on the ruling of the presiding Justice, and "In our practice complaints of the rulings, opinions or directions of the presiding Justice at nisi prius, as to matters of law, must be presented in the form of exceptions, unless the case is reported by him for the consideration of the full court." *Stephenson* v. *Thayer*, 63 Maine, 143.

That a jury verdict is against the law, on motion for a new trial, is often matter for the consideration of this court; but when a verdict is directed, and particularly in this case where the record does not disclose any evidence in defense, the entry must be, Motion denied. *Cyrus F. Small*, for plaintiff. *Joseph E. Hall*, for defendant.

MICHAEL OULLETTE *vs.* VAN BUREN TRUST COMPANY.

Aroostook County. Decided January 20, 1926. Appeal from an equity decree.

The issue decided in these proceedings to redeem certain real estate from an outstanding mortgage concerned whether money

which this defendant had for credit at its choice on any of several indebtednesses created by the plaintiff was or not appropriated to what for the want of a better term will be called his homestead mortgage, an instrument which the bill alleges and the answer admits is security for a note bearing interest at the rate of 8 per cent. per annum, written on 6 months and long overdue.

In the posture that the close and appreciated arguments of counsel leave the record, no other matter is calling for consideration or mention; excepting from the offering to this court of the note itself as showing that contract worded to carry interest at the stipulated rate till the principal be paid, and not merely to the maturity of the instrument.

Whether the note is thus written is beside the point. The document was not in evidence before the Justice whose decision is under review. He had but the allegation of the bill and the admission of the answer, and where they led he followed. On appeal, the record made at the trial is ruling, in distinguishableness from that which might have been.

Coming again to the main proposition. Frequency of repetition has made trite the axiom that in equity the finding of a Judge takes rank with a verdict at law, but this settled principle has especial appropriateness in the presented situation, and hence its stating once again.

To the sitting Judge was submitted the versions for or against the plaintiff's bill, each abundantly supported by believable and consistent but quite different evidence. In the very nature of things it was for him to assent to the one and not to the other. He was convinced and believed and accorded the plaintiff's side. The position the plaintiff contended for may not of necessity be strictly veritable, but with becoming propriety it was accepted and upheld, and herein is the efficaciousness which attends the appealed-from decision still.

There will be need, when the case is back to the original docket, for the extending of the limitation of time for tendering the defendant its pay for the amount due on the mortgage, the appeal being the cause of this.

In all other respects the decree below is affirmed. And the appeal is dismissed. Appeal dismissed. *Archibalds*, for plaintiff. *Powers & Mathews and Peter C. Keegan*, for defendant.

LEVASSEUR MOTOR CO. *vs.* ALEXANDER BOULET, JR., ET ALS.

Androscoggin County. Decided February 5, 1926. Action upon a promissory note dated May 10, 1924, given by defendants to plaintiff for balance due upon an exchange of motor cars between the plaintiff and Boulet; the note provides that the car received by Boulet, called the Chandler car, is to remain the property of plaintiff until the note is paid. The car was burned the following September. Defendants now plead that "plaintiff promised and agreed, as a part of said sale and purchase of said automobile, and in consideration thereof, *to keep said automobile insured against fire and theft* in some reputable insurance company at the expense and cost of said defendants," and allege failure so to do, and damage thereby suffered by defendants.

It is sufficient to say that the record fails to furnish evidence of such a contract. The testimony of the defendant, Boulet, and of Boisvert, plaintiff's salesman, the only witnesses to the transaction, is to the effect that the plaintiff required Boulet to pay for insurance on the car to protect its interest; it further appears that plaintiff obtained a policy of insurance on the car, which was later cancelled by the insurer, charging the premium to Boulet, and giving him credit for it upon cancellation.

The record is entirely wanting in any evidence of an agreement on the part of plaintiff to *keep the automobile insured.*

The trial of the case seems to have drifted away to the contention that Boulet was not notified of the cancellation, and thereby the jury apparently lost sight of the important issue.

As a matter of law, no defense to the note is shown and the entry must be, Motion sustained. New trial granted. *George C. Wing, Jr., Benjamin L. Berman, Jacob H. Berman and Edward J. Berman,* for plaintiff. *Clifford & Clifford,* for defendants.

WESLEY D. JACKSON, Pro Ami,

vs.

JACKMAN WATER, LIGHT AND POWER COMPANY.

CHARLES W. JACKSON *vs.* SAME.

Cumberland County. Decided February 5, 1926. These actions are for damages caused by the alleged negligence of the defendant in supplying polluted water through its public water system, whereby the plaintiff in the first action became ill of typhoid fever, and the other plaintiff incurred expense arising from his son's illness. They are before the Law Court upon general motions by the defendant for new trials.

The principles involved were fully considered, and must be considered as settled, in *Hamilton* v. *Madison Water Company,* 116 Maine 157; counsel on both sides recognize and adhere to those principles.

It was there held that the burden rests upon the plaintiff to establish three propositions, viz.:

First, that the typhoid fever from which the minor plaintiff suffered was contracted from the use of the water furnished by the defendant.

Second, that the defendant was guilty of negligence in supplying him with such contaminated water.

Third, that the plaintiff exercised due care on his part and was not guilty of contributory negligence.

Upon these issues the cases were submitted to the jury after a trial lasting several days; no exceptions to the rulings or charge of the presiding Justice are presented. An examination of the long record discloses a trial conducted with all the thoroughness and resourcefulness of able counsel. The burden of sustaining the motions is upon the defendant; its counsel says upon his brief, "We leave this case with the suggestion that no man knows or can know the source of the plaintiff's infection." Yet the plaintiffs were able, by testimony tending to eliminate other sources of pollution, by testimony of specific indications pointing to the water supply as the source of pollution, and of specific local conditions leading, or which might lead, to pollution, to satisfy the burden of proof, in the minds of the

jurors, within the rules of proof laid down in the Hamilton case; so, also, with reference to the two other propositions; the case presented by the plaintiffs proved convincing against all counter evidence and suggestions presented by defendant. The record discloses no ground for disturbing the verdicts; the parties must be satisfied with the decision of the jury, the triers of fact. Motions overruled. *Pattangall, Locke & Perkins*, for plaintiffs. *Benedict F. Maher and James L. Boyle*, for defendant.

MILTON C. BENNETT *vs.* F. HERBERT HATHORN ET AL.

Penobscot County. Decided February 5, 1926. This is an action to recover stipulated compensation as the pastor of the "Klan Church," so called, in Brewer and Bangor, under an alleged contract between the plaintiff and the defendants. The action is based upon a typewritten letter, dated at Brewer, December 19, 1923, signed with a typewriter, "F. Herbert Hathorn, Brewer, D. D. Terrill, Bangor," in which the period of employment is fixed at eighteen months, and the compensation at forty-five dollars per week and house rent. The plea is the general issue. There was no denial of signature by affidavit under Rule X. The case is before the Law Court upon a general motion by defendants for a new trial.

Under the general issue the defendants introduced evidence which they assert supports the following defenses: (1) that they did not contract with the plaintiff to serve as pastor of the "Klan Church;" that they neither signed, nor authorized any person to affix their names to the letter in question, and that neither of them saw or knew of the letter until several months after its date; (2) that the plaintiff resigned as pastor of said "Klan Church" on July 23, 1924 in Brewer, and on July 24, 1924 in Bangor, and that his resignation was accepted; (3) that on October 25, 1924 he was paid the amount of back salary due him to that date. On the brief defendants' counsel has argued another point, viz.: that by accepting the office of "Kleagle," and performing the duties thereof, the plaintiff had himself broken the contract, or at least had abandoned his position of pastor, and renounced the contract.

We need only to say that an examination of the record discloses so many improbabilities, inconsistencies and contradictions in the evidence, that the jury were fully warranted in accepting the plaintiff's version of the transactions in question. We take occasion to repeat, as frequently stated on former occasions, that the weight to be given to evidence presented depends not so much on the number of witnesses as upon the quality or power of their testimony to convince of the truth. Motion overruled. *Pattangall, Locke & Perkins,* for plaintiff. *Fellows & Fellows,* for defendants.

GEORGE COULAKOS *vs.* LOUIS N. MANDRAPELIAS.

Androscoggin County. Decided February 18, 1926. Motion for new trial presented by defendant. The issue is solely one of fact. The jury saw and heard all the witnesses and examined the book account presented in evidence by the defendant. The action was instituted for the purpose of recovering wages alleged to be due from defendant to plaintiff. After careful examination of all the evidence we are unable to discover any reason why we should invade the province of the jury and usurp their functions, there being no evidence that the triers of fact were influenced by any bias, prejudice or failure to understand the law governing the case. Motion overruled. *Frank A. Morey,* for plaintiff. *William H. Newell,* for defendant.

ERNEST COTE *vs.* CLIFTON R. SHAW.

Kennebec County. Decided March 12, 1926. An action to recover money paid, or its equivalent, on account of the purchase price of an automobile, the contract of sale being alleged to have been fraudulent and upon this ground rescinded, and the car returned to the vendor and accepted by him.

After the evidence of the plaintiff was in, counsel for the defendant requested that a verdict be directed for the defendant on the ground

that there was not sufficient evidence of fraud to go to the jury. The motion was granted, and the case is before this court on exceptions to this ruling.

One of the allegations of fraud was that the car was represented to be one of the 1925 models, and that its list price was $2300 delivered at Augusta. There was also an allegation of other representations which was alleged to be fraudulent, but whether they related to its condition does not appear.

By admission it was agreed that the car was not one of the 1925 models, and the evidence of the plaintiff was that its list price was $2,155.00 and not $2300.00. There was evidence of its defective condition.

But in addition to this the plaintiff's testimony would have warranted the jury in finding that the contract of sale had been rescinded and the car returned and accepted by the defendant. It also appeared from the uncontradicted testimony of the plaintiff that the defendant, though he accepted the car returned to him, refused to return any part of the consideration paid to him.

Upon the evidence, a directed verdict for the defendant was not warranted as a matter of law. Exceptions sustained. *Pattangall, Locke & Perkins,* for plaintiff. *Burleigh Martin and Benedict F. Maher,* for defendant.

STATE *vs.* ROBERT ROGERS.

Cumberland County. Decided March 17, 1926. Indictment for adultery. The respondent excepts to the ruling of the court denying his motion for a directed verdict, and also moves for a new trial on the ground of newly-discovered evidence.

One Peter Zarambokus testified that he discovered his wife and the respondent together under circumstances which unexplained were consistent with guilt and inconsistent with innocence. The explanation offered by the respondent was unconvincing. The jury's verdict was upon the evidence presented to them, justified. But the respondent has presented to the court new evidence which appar-

ently could not have been discovered by reasonable diligence at the time of trial. Two witnesses testify to admissions made to them by Zarambokus, in important and vital particulars at variance with the testimony given by him at the trial. We think it probable that if this testimony had been produced when the case was tried, the jury would have rendered a different verdict. New trial granted. *C. F. Robinson and R. M. Ingalls, County Attorney,* for the State. *Harry E. Nixon, Jacob H. Berman and Joseph E. F. Connolly,* for respondent.

JENKIN'S CASE.

Cumberland County. Decided April 7, 1926. Appeal from the decree of the sitting Justice upon the finding of the Industrial Accident Commission.

The finding reads as follows:—"Based upon the information contained in the agreed statement as submitted it is found that the petitioner, Albert K. Jenkins, was, on November 28, 1923, an employee of the Prout's Neck Country Club and that he did, on said date, receive a personal injury by accident arising out of and in the course of his employment as alleged, and that he is therefore entitled to compensation."

The finding of the Commissioner shows that he found in the agreed statement that which justified him in concluding from the facts and inferences therefrom that petitioner should be awarded compensation; and although the evidence is slight, it seems sufficient to justify the Commissioner's finding and that it should not be disturbed. Appeal dismissed. Decree affirmed, with costs. *Ralph M. Ingalls and Francis W. Sullivan,* for claimant. *William H. Gulliver and William B. Mahoney,* for respondents.

STATE *vs.* SARAH B. DONAHUE.

Cumberland County. Decided June 2, 1926. When the evidence in support of a criminal prosecution is so defective or so weak that a

verdict based upon it cannot be sustained, the jury should be instructed to return a verdict of not guilty, and a refusal to so instruct them would be a valid ground of exception.

We do not, however, regard the case before us as one in which such an instruction could properly be given. If the testimony of the State's witnesses was believed, it was sufficient to establish the guilt of the respondent beyond a reasonable doubt. The evidence offered by the respondent and her daughter in direct denial of the State's charges and contradiction of the State's witnesses raised an issue of fact which it was the duty of the court to submit to the jury. The exception to the refusal of the court to instruct the jury to return a verdict of not guilty must therefore be overruled. Exceptions overruled. Judgment for the State. *Ralph M. Ingalls, County Attorney, and Frank U. Burkett,* for the State. *Samuel L. Bates and John J. Devine,* for respondent.

BENJAMIN F. JORDAN *vs.* JAMES P. HOLLAND.

Penobscot County. Decided June 4, 1926. On trial of the above-captioned case in the Superior Court in Penobscot County, to recover damages for personal trespasses declared to have been done the plaintiff by the defendant, the verdict was for the plaintiff in the sum of $1289.16.

Now the defendant argues the plain failure of the evidence to support the verdict, and on this sole ground relies for its voiding, but the record carries believable and jury-believed evidence on which and without prepossession or other considerations than those belonging to it, the verdict was fairly and consistently founded, wherefore the argued motion for a new trial lacks basis. Motion overruled. *Donald F. Snow and William Cole,* for plaintiff. *Wilfred I. Butterfield,* for defendant.

OWEN T. HURDLE *vs.* JOSEPH P. LANG.

York County. Decided August 3, 1926. On defendant's general motion. The declaration contains two counts, one alleging alienation of affection by means of enticements, persuasion and gifts, and the other charging criminal conversation.

There is abundant evidence to prove that the defendant debauched the plaintiff's wife.

Some evidence tends to show connivance which is set up as a defense. This issue, however, the jury decided in favor of the plaintiff, and in so deciding it made no manifest error.

The verdict is large,—twenty-two thousand five hundred and forty-two dollars. The jury were authorized to award, and probably did award punitive damages. In this connection there was testimony that the defendant was worth one hundred and twenty-five thousand dollars.

We adopt and affirm the language of the late Chief Justice CORNISH in *Audibert* v. *Michaud*, 119 Maine, 298. "It was for them (the jury) to say how much the plaintiff should recover for a stolen wife and a broken home." Motion overruled. *E. P. Spinney and George A. Emery*, for plaintiff. *Sewall & Waldron*, for defendant.

ALONZO M. TIBBETTS *vs.* JOHN J. MCNEIL.

Cumberland County. Decided August 6, 1926. Action of assault and battery alleged to have been committed upon the plaintiff by the defendant, a deputy sheriff of the County of Cumberland, and before this court on a general motion.

The defendant, accompanied by two other deputy sheriffs and armed with a warrant to search the premises occupied by a person other than the plaintiff, by mistake entered the plaintiff's house and there searched for intoxicating liquors. The plaintiff offered evidence that in the course of the search the defendant seized the plaintiff by the wrists and compelled the latter to accompany the deputy into the cellar.

Admitting the search of the plaintiff's premises and the lack of a warrant so to do, the defendant made an absolute denial of the plaintiff's claim of assault.

Upon this conflict of evidence, the jury found for the plaintiff, and assessed damages in the sum of four hundred dollars. A careful reading of the record discloses no error in the verdict. Motion overruled. *Elton H. Thompson and William A. Connellan,* for plaintiff. *Harry E. Nixon,* for defendant.

THOMAS F. HEALY

vs.

CUMBERLAND COUNTY POWER & LIGHT COMPANY.

JOHN LEONARD, JR. *vs.* SAME.

Cumberland County. Decided September 29, 1926. Exceptions to directed verdict in favor of defendant. It is well settled that in considering exceptions to the direction of a verdict the only question is whether the jury would have been warranted by the evidence to find a verdict contrary to the one ordered. If a verdict to the contrary could not be sustained it is the duty of the presiding Justice to direct the verdict. If such a verdict would be sustainable the issue of fact should be submitted to the jury. *Royal* v. *Bar Harbor & Union River Power Company,* 114 Maine, 220.

A careful examination of the record fails to discover evidence of the negligence of the defendant, and upon the same record a verdict in favor of the plaintiff could not be sustained. Exceptions overruled. *Jacob H. Berman, Edward J. Berman and Benjamin L. Berman,* for plaintiff. *Verrill, Hale, Booth & Ives,* for defendant.

INHABITANTS OF THE TOWN OF LISBON

vs.

INHABITANTS OF THE TOWN OF MINOT.

Androscoggin County. Decided October 4, 1926. This action is for pauper supplies alleged to have been furnished by the plaintiff town to relieve the distress of a family which plaintiff claimed had a pauper settlement in the defendant town.

The evidence was fully taken out and no copy thereof is presented with the bill of exceptions, a situation which in itself renders it inappropriate for this court to disturb the finding of the Superior Court.

Further, it appears that after the taking of evidence was closed the defendant moved for a nonsuit. This motion was denied, and defendant asks to have its exception to the refusal to grant a nonsuit sustained, and on this exception alone rests its case.

Upon exactly this point our court, in *Ricker* v. *Joy*, 72 Maine, 106, has held, "A motion for a nonsuit, after the evidence is all out, is addressed to the discretion of the judge, and to his refusal exceptions do not lie." Exceptions overruled. Judgment on the verdict. *L. A. Jack*, for plaintiff. *Tascus Atwood*, for defendant.

DEVEREUX ET AL. *vs.* PUBLIC UTILITIES COMMISSION OF MAINE.

Cumberland County. Decided October 4, 1926. Exceptions to denial of writ of certiorari brought to correct alleged errors in law in decision of the Public Utilities Commission.

Petitioners sought redress, but the method chosen is not open to them. The law governing the action of the Public Utilities Commission, and regulating the conduct of litigants in the situation in which petitioners found themselves, after decision by the Commission, Sec. 55, Chap. 55, R. S., requires that further procedure shall

be by alleging exceptions to the decision of the Commission, which are to be certified to the Chief Justice of this Court.

Litigants are entitled to know when the end of a contention is reached. If no exceptions are taken to the decision of the Public Utilities Commission, in a case such as this, the Utility can confidently assume the contention is ended. Exceptions overruled. Result to be certified by the Clerk of this court to the Clerk of the Commission. *Emery G. Wilson,* for petitioners. *Charles E. Gurney,* for Public Utilities Commission of Maine. *William B. Skelton and L. E. Thornton,* for Castine Water Company.

ADOLPHUS S. CRAWFORD, JR.

vs.

PETER C. KEEGAN ET ALS, Committee of Aroostook Bar.

Aroostook County. Decided October 6, 1926. The petitioner was suspended as an attorney at law and solicitor in chancery in the courts of this State. He now petitions for reinstatement. At the hearing the presiding Justice reported the evidence to this court for determination, "whether if the bar against the petitioner in the capacity of an attorney and counsellor at law were lifted it would probably be promotive of the right administration of justice."

The Law Court of this State derives its powers from statute, and its jurisdiction is limited to the cases therein enumerated. Consideration upon report of this petition is not included.

Whether or not a disbarred attorney shall be reinstated rests in the sound discretion of the Justice hearing the petition. As no question of law arises in the case reserved for the determination of this court, the report must be dismissed and the case remanded to the court below for further proceedings. Report dismissed. Case remanded to the court below for further proceedings. *W. S. Brown,* for plaintiff. *Herbert T. Powers,* for defendants.

ARCHIE FRENCH, Petitioner *vs.* H. F. CUMMINGS, Sheriff.

Kennebec County. Decided October 7, 1926. This case is submitted upon exceptions to an order of the Justice of the Superior Court of Kennebec County discharging, upon a writ of habeas corpus, the petitioner, committed to jail upon an execution issued to enforce a decree of divorce, ordering the petitioner to make payments for the support of his minor child.

The exceptions are not properly before us. It is a well-settled principle that exceptions do not lie to the discharge of a prisoner upon habeas corpus. *Knowlton, Petr.* v. *Baker*, 72 Maine, 202. *Stuart* v. *Smith*, 101 Maine, 397. Exceptions dismissed. *Benedict F. Maher*, for petitioner. *Mark J. Bartlett and C. A. Blackington*, for defendant.

EDWARD J. RYAN *vs.* CARTER & MILESON.

JAMES RYAN, pro ami, *vs.* CARTER & MILESON.

Cumberland County. Decided October 7, 1926. These cases are presented upon motions by defendant corporation for new trials on the ground of newly-discovered evidence. The trial at nisi prius, the actions being tried together, began on October 22, 1925; the motion is dated November 24, 1925.

Upon examination of the testimony taken in support of the motion, in connection with the evidence presented at the trial, it is very evident that by the exercise of reasonable diligence the testimony now offered could have been discovered in season for use at the trial. For that reason, in accordance with well established practice, the motion must be overruled. *Woodis* v. *Jordan*, 62 Maine, 490, 495. *Cobb* v. *Cogswell*, 111 Maine, 336, 340. *Smith* v. *Booth Brothers*, 112 Maine, 297, 301.

The actions are based upon the alleged negligence of one Murray, who while driving defendant's truck struck and injured the minor plaintiff. The defendant denied that Murray was in its employ at

the time of the accident, and that he was negligent. The witness, Bjorn, whose testimony is now offered, was employed in the garage where defendant kept its trucks, and continued there for about two months after the accident; he was acquainted with Murray, Carter, and Mileson, and was available at all time. He was driving a short distance behind the truck when the boy was struck; Murray and a bystander picked up the boy, and put him into Bjorn's car; the latter took him to the hospital. The accident happened about noon; during the afternoon of the same day Murray came to the garage and inquired of witness whether he saw how the accident happened, and was told that he did. If defendant actually relied upon the defense of want of negligence by Murray, this evidence was at hand, and the most casual inquiry of Murray would have disclosed it.

Upon the question of damages, the amount fixed by the jury is so conservative, that we think Bjorn's testimony would not have affected the amount, and for that reason also should not be ground for granting a new trial. Upon the whole case it is not apparent that injustice has been done. *Woodis* v. *Jordan*, supra. Motion overruled. *Joseph E. F. Connolly and Harry C. Libby*, for plaintiffs. *Elton M. Thompson*, for defendant.

KEZAR & STODDARD COMPANY *vs.* PORTLAND WET WASH LAUNDRY.

Cumberland County. Decided October 8, 1926. This was an action brought to recover the purchase price of a pump installed by plaintiff in defendant's laundry. Defendant contended that the pump was unfit for the purpose for which it was intended. Plaintiff denied this contention. A plain issue of fact was joined. The jury found for the plaintiff and it cannot be said that the record discloses any sound reason for disturbing the verdict. Motion denied. *Harry C. Libby*, for plaintiff. *Harry E. Nixon*, for defendant.

MADELINE SILVER *vs.* FLORENCE WEEKS.

Cumberland County. Decided October 8, 1926. In this action for alienation of the affections of the plaintiff's husband, the jury found for the plaintiff and assessed damages at One Thousand ($1,000) Dollars.

The case comes to this court on motion.

The issues were purely of fact. The evidence was conflicting but there was sufficient in support of the plaintiff's contentions to warrant a verdict and the damages were obviously not excessive. Motion denied. *Henry C. Sullivan,* for plaintiff. *Jacob H. Berman, Edward J. Berman and Benjamin L. Berman,* for defendant.

FOGG'S CASE.

Cumberland County. Decided October 15, 1926. This is a workmen's compensation case in which Addie H. Fogg is petitioner and the Woodcock Lunch is the employer. The Industrial Accident Commission awarded compensation, and also all charges for reasonable and necessary surgical and hospital bills, and bills for medicines and appliances as designated in the Workmen's Compensation Act.

The defendant seasonably filed its answer denying notice and in its appeal from the decree of a justice of this court, affirming said award, relies wholly upon lack of notice.

In her petition for award of compensation the following questions and answers appear.

"Did employer have notice in writing of the accident? No, I was not familiar with compensation insurance and did not consider it serious.

"Did employer have knowledge of the injury?

"Yes, Mr. Murch was in the kitchen at the time, also I reported it to him."

From the record it appears, by his own testimony, that the Mr. Murch referred to was one of the proprietors of the Woodcock Lunch.

Under the statute in effect at the time of the accident, Public Laws 1919, Chap. 238, Sec. 17, it is provided that no proceedings for compensation for an injury under this act shall be maintained unless a notice of the accident shall have been given to the employer within thirty days after the happening thereof; and unless the claim for compensation with respect to such injury shall have been made within one year after the occurrence of the same, or in case of physical or mental incapacity, within one year after death or the removal of such physical or mental incapacity. Section 18 of the act provides that such notice shall be in writing. Section 20 provides that want of notice shall not be a bar to such proceedings if it be shown that the employer or his agent had knowledge of the injury, or that failure to give such notice was due to accident, mistake or unforeseen cause.

The petitioner alleges that on the last of May, 1924, (exact date forgotten) while working as a general helper in the kitchen of the Woodcock Lunch, she slipped on the floor and in falling struck her breast on the corner of the serving table, which fall resulted in a sore breast for a few days, that a tumor followed in July, 1924, which was removed in December, 1924.

Evidently the accident was not regarded as serious at the time of its occurrence for she declined medical attendance and continued to work in the same kitchen, doing the same work which she had been doing, until the first of July, 1924.

The word "injury," as used in Section 20 of the Compensation Act, is synonymous with "accident." An accident sometimes occurs long before compensable injury, arising from it, is suffered. *Bartlett's Case*, 125 Maine, 374, 134 Atlantic Rep., 163. The Accident Commission found that the employer had knowledge of the accident within thirty days thereafter. This is a finding of fact, conclusive if the record discloses any evidence to sustain it. There is evidence that the employer had knowledge of the accident at the very time of its occurrence. That it was not then regarded of consequence is immaterial.

This injury became compensable December 15, 1924, which is the date recognized in the award for the compensation to begin. The claim for compensation was filed December 10, 1925, which is within the year from the incapacity. When the workman's wages, earnings or salary are lost or reduced by reason of an industrial accident, he becomes in theory of law incapacitated. Then he is entitled to claim

compensation. Then the year given for making claim begins to run. *Hustus' Case*, 123 Maine, 428. Appeal dismissed. Decree below affirmed. *William A. Connellan*, for petitioner. *Hinckley, Hinckley & Shesong*, for respondents.

LETTIE LEWIS *vs.* DANIEL BOWIE.

Knox County. Opinion October 15, 1926. An action to recover for services rendered. The amount claimed was six hundred and ninety dollars. The jury gave a verdict for fifteen dollars and fifty cents. The case is before this court on a motion for a new trial on the usual grounds.

The issues raised were solely questions of fact. The testimony was conflicting. The jury evidently accepted the defendant's version, and awarded the plaintiff a sum equal to five dollars per week for the last three weeks she worked for the defendant, with interest. Plaintiff's contention is that damages are inadequate.

If the defendant's testimony was accepted by the jury, the verdict was sufficient. This court cannot say from the printed case that the jury was clearly wrong in accepting the testimony of the defendant as true and rejecting that of the plaintiff. Motion overruled. *O. H. Emery*, for plaintiff. *George S. McCarty*, for defendant.

STATE OF MAINE *vs.* JAMES HOLLAND.

Penobscot County. Decided October 30, 1926. In the instant case, there was certified to the Chief Justice under Sec. 55, Chap. 82, R. S., from the Superior Court in Penobscot County attested copies of a complaint, warrant, demurrer, and joinder. On the original paper containing the joinder appear certain indorsements, respectively signed by the presiding Justice and counsel for the respondent,

showing merely that the demurrer was overruled and exceptions were taken, followed by a certificate of the presiding Justice to the effect that "exceptions were filed and allowed" and "adjudged frivolous and intended for delay," and were ordered transmitted to the Chief Justice.

The paper on which the several endorsements appear, if intended as such under the statute, lacks several essentials of a written bill of exceptions. Nothing appears in the papers certified forward to show what the alleged defect in the complaint is, nor has this court been apprised of it by any argument of counsel.

A bill of exceptions under Sec. 55, Chap. 82, R. S., as construed in repeated decisions of this court, when presented to the court below for allowance should summarily set forth the issue, the ruling of the court excepted to, and contain within itself, by reference or otherwise, and in succinct form, sufficient to show that the excepting party was aggrieved, as this court "cannot travel outside the bill itself" to supply its deficiencies. When once presented and allowed, neither counsel nor the presiding Justice can add anything or amend it without the consent of all parties; nor may this court refer to papers not properly made a part of the bill of exceptions.

Such an informal method, as here adopted, of presenting exceptions to this court may save labor where the exceptions have no merit, and are merely intended for delay, but has little else to commend it. On the face of the papers certified forward, the court below was clearly warranted in adjudging the respondent's exceptions frivolous and intended merely for delay. An entry may be made: Exceptions overruled. Judgment for the State. So ordered. *Artemus Weatherbee, County Attorney,* for the State. *E. P. Murray,* for respondent.

BEN BUCCI *vs.* HOWARD E. DYER.

Cumberland County. Decided November 9, 1926. Action to recover for labor done and materials furnished by plaintiff in a building job for defendant. No questions of law are involved. The

issues were solely those of fact and upon those issues the jury found for the plaintiff. The defendant comes to this court upon motion for new trial based upon the customary grounds.

While the defendant offered testimony which, if taken at its full value, would militate against the verdict, yet there is evidence to support the verdict, and the defendant must abide the jury finding since he has failed to convince us that we should substitute our judgment of the weight of the evidence for that of the jury under familiar rules governing situations like the one at bar. Motion overruled. *H. C. Libby,* for plaintiff. *H. E. Nixon,* for defendant.

QUESTIONS AND ANSWERS

QUESTIONS SUBMITTED BY THE GOVERNOR OF MAINE TO THE JUSTICES OF THE SUPREME JUDICIAL COURT OF MAINE, APRIL 10, 1926, WITH THE ANSWERS OF THE JUSTICES THEREON.

TO THE HONORABLE JUSTICES OF THE SUPREME JUDICIAL COURT OF MAINE.

WHEREAS the Seventy-eighth Legislature of Maine submitted to the people a proposed amendment to Section 10 of Article 9 of the Constitution relative to the tenure of the office of Sheriff,, which said proposed amendment is printed as Chapter 30 of the Resolves of 1917; and proclamation by the Governor was made on September 25th, A. D. 1917 that the proposed amendemnt had been adopted, which said proclamation is printed on Page 721 of the Acts and Resolves of 1919, and

WHEREAS on complaint dated March 12th, A. D. 1926, brought under the provisions of said amendment, and after due notice, a hearing has been held before the Governor and Council of charges of unfaithfulness and inefficiency preferred against Henry F. Cummings, Sheriff of Kennebec County, and

WHEREAS three members of the Council have voted affirmatively to sustain said charges—the Governor also voting in the affirmative—and three members of the Council have voted in the negative, and

WHEREAS important questions of law have arisen relative to the constitutional rights, powers and duties both of the Governor and of the Council, and it would appear to be a "solemn occasion" within the Constitutional provision;

NOW, THEREFORE, I, Ralph O. Brewster, Governor of Maine, respectfully request an answer to each of the following questions:

1. Is the amendment, proposed and proclaimed as aforesaid, now a part of the Constitution of the State of Maine?

2. Is it necessary that both the Governor and a majority of the members of the Council shall determine affirmatively the truth of charges of unfaithfulness and inefficiency in order to make a valid finding that a sheriff is not faithfully and efficiently performing his duties?

3. After complaint, due notice, hearing, and a finding by the Governor and Council that a sheriff is not faithfully or efficiently performing the duties imposed upon him by law, has the Governor the power of removal without the advice and consent of the Council?

Dated at Augusta, Maine, this tenth day of April, A. D. 1926.

Respectfully submitted,

RALPH O. BREWSTER,
Governor.

To his Excellency Hon. Ralph O. Brewster, Governor of Maine.

The undersigned, Justices of the Supreme Judicial Court, having maturely considered the questions propounded by you under date of April 10, 1926 for an advisory opinion by the members of this Court under Section 3 of Article VI. of the Constitution of this State respectfully submit: that if the questions propounded involved only the passing upon the question of whether the amendment of 1917 relating to the tenure of sheriffs was adopted and of passing upon the action already taken by the Governor and Council we might hesitate to reply upon the ground that no "solemn occasion" existed within the meaning of the Constitution. No questions of fact are submitted that seem to raise any doubt as to the adoption of the amendment, and the passing judgment upon acts already done in our opinion would not ordinarily constitute a solemn occasion, unless there was also involved the propriety of some immediate future action.

Your Excellency, however, is now confronted with the question of whether upon the acts of the Governor and Council, outlined in the statement prefacing the questions, you may now proceed farther and, if so, what is the way marked out for you by the amendment of 1917.

For this reason and also because important constitutional questions are involved we are of the opinion that a solemn occasion exists, and as the future action of the Governor depends upon the effect of the action already taken, we submit the following answers to all the questions.

The request for answers to the questions propounded contained the following preliminary statements:

WHEREAS the Seventy-eighth Legislature of Maine submitted to the people a proposed amendment to Section 10 of Article 9 of the Constitution relative to the tenure of the office of sheriff, which said proposed amendment is printed as Chapter 30 of the Resolves of 1917; and proclamation by the Governor was made on September 25th, A. D. 1917 that the proposed amendment had been adopted, which said proclamation is printed on Page 721 of the Acts and Resolves of 1919, and

WHEREAS on complaint dated March 12th, A. D. 1926, brought under the provisions of said amendment, and after due notice, a hearing has been held before the Governor and Council of charges of unfaithfulness and inefficiency preferred against Henry F. Cummings, sheriff of Kennebec County; and

WHEREAS three members of the Council have voted affirmatively to sustain said charges—the Governor also voting in the affirmative—and three members of the Council have voted in the negative, and

WHEREAS important questions of law have arisen relative to the Constitutional rights, powers, and duties both of the Governor and of the Council; and it appearing to be a "solemn occasion" within the Constitutional provision:

QUESTION ONE.

1. Is the amendment, proposed and proclaimed as aforesaid, now a part of the Constitution of the State of Maine?

This question we answer in the affirmative. The only ground we can conceive for entertaining a doubt upon this point is that under the language of the resolve proposing the amendment, the question to be submitted to the people did not correctly state the effect of the proposed amendment, if it is to be construed as creating a single tribunal consisting of the Governor and Council and the Governor upon its finding is authorized to remove a sheriff without further action by his Council, and, therefore, the people did not vote to adopt such an amendment. This suggestion, however, is entitled to no weight.

The form of the question printed on the ballots, even though framed by the Legislature, which Article X., Section 2 as amended does not require, is no part of the amendment itself. It is a mere formula adopted by the Legislature as a convenient means of ascertaining the popular will as to the amendment actually proposed.

Not only that, but the law requires all public resolves to be printed in the state paper, and the resolve in this case required a copy of the resolve to be sent to the selectmen of all the towns and plantations; and, as is the custom, this amendment was printed in full on the ballot used at the special election held September 10, 1917, together with the question framed by the Legislature.

The electorate, therefore, must be held to have had full knowledge of the terms of the amendment. In voting "yes" on a question so submitted an elector does not vote upon or adopt the question as a part of the amendment, but thereby merely expresses his assent to the amendment as proposed.

The vote upon the formula adopted in this instance was in the affirmative, and the amendment was duly proclaimed by the Governor as a part of the Constitution. Acts and Resolves 1919, Page 765.

Question Two.

2. Do the Governor and Council, under the said amendment, constitute a single tribunal for the hearing of complaints against sheriffs; and has the Governor the power of voting, as a member of said tribunal, in the determination of charges contained in said complaints?

We answer this question also in the affirmative.

The amendment as adopted reads: "Whenever the Governor and Council upon complaint, due notice and hearing shall find that a sheriff is not faithfully or efficiently performing any duty imposed upon him by law, the Governor may remove such sheriff from office and with the advice and consent of the Council appoint another sheriff in his place, etc."

By the question propounded we understand your Excellency desires to be advised whether in hearing the charges and acting upon them under this amendment the Governor has any voice in determining whether such charges have been sustained.

Prior to the adoption of this amendment, the only method of removing unfaithful and inefficient sheriffs was by impeachment, if guilty of some misdemeanor in office, or by address under Section 5, Article IX. of the Constitution, which required a special session of the Legislature, in case the cause occurred in the interim between the regular sessions.

It was, undoubtedly, to avoid this delay or expense that this amendment was proposed. The language of the amendment clearly implies proceedings judicial in their form and character in that there is a "complaint," "due notice and hearing" and a finding.

If it had been the intent of the Legislature, in proposing the amendment, that the hearing and determination of the charges should be by the Governor with the advice and consent of his Council, we think it would have said so, having aptly used the phrase "with the advice and consent of the Council" with reference to the appointment of a successor.

Three steps are clearly provided: first, a tribunal to hear and adjudge; second, the removal based upon the findings; and third, the appointment of a successor.

The hearing and adjudging is by the "Governor and Council." In so doing they are not performing an ordinary executive act, but a quasi judicial one. To hear and adjudge on complaint after due notice is a judicial function. The duty of the Governor and Council in hearing and adjudging under this amendment is unlike that imposed upon them under any other section of the Constitution. It is *sui generis*. They have been constituted a special tribunal as triers of facts. While not a court in the ordinary meaning of the term, or judicial in the sense that its findings are in any manner subject to review by the regularly constituted courts, up to and including the findings the proceedings are, at least, quasi judicial in their nature. The purely executive acts of removal and appointment follow. The duties of the Council as defined in Sec. 1, Art. V. part second of the Constitution are "to advise the Governor in the executive part of the Government," except in cases, of course, where the Governor is expressly authorized to act without their advice or consent.

This is not a case where the appointment was made by the Governor with the consent of the Council, and the presumption followed that, even if not expressly provided, the power of removal is vested in the same body which appointed; or where under a statute the appoint-

ment was by the Governor with the consent of the Council and the power of removal was in the "Executive," and the word "Executive" was properly construed in the particular case by the members of the court in their replies to questions submitted by the Council and found in 72 Maine, 542 to mean the Governor, with the Council acting in an advisory capacity.

A sheriff holds his office by mandate of the people. There is, therefore, no presumption that the proceedings for his removal shall be by the Governor upon the advice of his Council. As in case of removal by address, which, together with impeachment was the only method by which a sheriff could be removed prior to the adoption of this amendment, the amendment very properly provides a tribunal to hear and adjudge before the executive power may act and remove. The removal in case of a sheriff cannot be made, as under Section 6, Article IX. of the Constitution, by the mere executive act of the appointment of a successor, 72 Maine, 550, but must be preceded by an adjudication.

We think from the language of the amendment that the framers in proposing, and the people in adopting, must have intended that the Governor, on whom alone the Constitution expressly imposes the duty of seeing that the laws of the state are "faithfully executed," and who receives his mandate direct from the people, should, at least, have an equal voice with his Council in determining whether there had been unfaithfulness or inefficiency in the case of sheriffs on whom the Governor must depend in a large degree for the faithful execution of the laws. If the Governor is not a part of this tribunal and only acts with the advice and consent of his Council, and adjudication of unfaithfulness is, in effect, not his, but that of the Council alone, unless he could be said to have a veto upon their findings. We cannot agree that such is the proper or intended construction of the language of the amendment.

We now come to question three, which involves the executive act of removal.

Question Three.

3. After complaint, due notice, hearing and a finding by the Governor and Council that a sheriff is not faithfully or efficiently

performing the duties imposed upon him by law, has the Governor the power of removal without further action by members of the Council?

The amendment so provides in plain terms. The removal of a sheriff is not governed by Section 6 of Article IX. of the Constitution because the tenure of his office is "otherwise provided for." Both his tenure and removal is especially provided for in Section 10 of Article IX., as now amended; and while his removal is an executive act, executive acts may be performed by the Governor without the consent of the Council, where the authority is given in express terms, 72 Maine, 549, Article XXVIII., Cons. of Maine.

The doubt, if any can exist, is raised only by the question submitted to the voters; but that is no part of the amendment. If the formula, or question, framed for this purpose differs from a proposed amendment in any respect, it cannot be claimed that the amendment, if adopted, has been added to or curtailed to accord with the question submitted. *Cooney* v. *Foote*, 142 Ga., 647, 654; *Cudihee* v. *Phelps*, 76 Wash., 314.

A resolve of this nature is not a legislative act which must be construed as a whole. Only the amendment proposed ever becomes a part of the organic law, and if its provisions are unambiguous, it must be construed by itself according to the well established rules of construction. One of the cardinal rules of construction applied to constitutions is that where the language of the constitution is unambiguous, resort cannot be had to outside sources; and never to create a doubt where no ambiguity exists.

"Where a law is plain and unambiguous, whether it be expressed in general or limited terms the Legislature or framers of a constitution should be intended to mean what they have properly expressed and consequently no room is left for construction. Possible or even probable meanings when one is plainly declared in the instrument itself the courts are not at liberty to search for."

"Where no ambiguity or doubt appears in the law, we think the same rule obtains here as in other cases that the court should confine its attentions to the law and not allow extrinsic circumstances to introduce a difficulty where the language is plain." Cooley's Cons. Lim. Pages 69, 84.

Evidence outside the amendment here involved is not required to remove any ambiguity as to in whom the power of removal lies.

After a finding of unfaithfulness or inefficiency, the amendment in absolute terms says: "The Governor may remove such sheriff from office." The very fact that by the terms of the amendment the "advice and consent of the Council is expressly required for the appointment of the successor is a clear indication that by omitting it in relation to the act of removal it was intended that the act of removal in such cases might be done by the Governor without the advice of Council. We have no occasion to inquire why any particular formula was selected for ascertaining the will of the people as to the adoption of the amendment. We are not interpreting the resolve passed by the Legislature, but the amendment adopted by the people. Therefore, in accordance with the plain terms of the amendment we answer the third question in the affirmative.

Respectfully submitted,

SCOTT WILSON,
WARREN C. PHILBROOK,
JOHN A. MORRILL,
GUY H. STURGIS,
NORMAN L. BASSETT.

Answer of Justices Deasy and Barnes.

To his Excellency Gov. Brewster:—

Answering questions of April 10th, the first must be answered affirmatively. The second relates to things already done, but the third question relates to a contemplated future act, and in order to answer this it is necessary to consider the second.

In 1917 the Legislature by a resolve proposed an amendment to the constitution. The amendment authorized "the Governor and Council" to inquire into the faithfulness and efficiency of a sheriff. If the sheriff be found unfaithful or inefficient, "the Governor may remove him" from office.

The meaning of the term "governor and council" as used in the resolve is doubtful. The fact that it is found necessary to apply to the Justices of the Supreme Court for a construction of these words shows that they are ambiguous.

One theory is that the amendment creates a new and anomalous tribunal in which the governor does not govern, nor the councillors give counsel, but in which each councillor has one vote and the governor one.

The other theory is that the governor and the council each acts as such, as is true in the exercise of every other power and the performance of every other duty.

To determine the meaning of these words we must seek for the intent of the Legislature in proposing the amendment and of the people in enacting it. "The purpose of construction of a constitutional amendment is to give effect to the intent of the framers and of the people who have adopted it." *State* v. *Zimmerman*, 187 Wis., 180.

If we look to the phrase quoted only, there is a presumption that the word "council" means the council as such and not as a part of another tribunal which has no name and for which there is no precedent.

"The duty of the council is to advise the governor in the executive part of government." Constitution, Article V., Section 1.

"The removal of unfit and incompetent men belongs to the executive part of the government." 72 Maine, 548.

To determine the meaning of a legislative act or resolve we may if necessary look beyond its four corners. But in this case it is not necessary. In that part of the resolve providing for submission to the people the legislative intent is made manifest. The resolve prescribes the question which was to be and was in fact submitted to the people as follows:

"Shall the constitution be amended as proposed by a resolution of the legislature granting to the Governor *by the consent and advice of the council* the power to remove sheriffs."

The intent of the Legislature is we think apparent. It is that the council is to act as council and not as part of a convention. It is that the council shall "advise the governor in the executive part of government." Constitution Article V., Section 1. The removal of officers is an executive act. 72 Maine, 548.

The governor, not being a member of the council is not authorized to vote as a part of it.

Until the council or a majority of it have acted affirmatively upon the proposition we think that the governor has no power of removal. But the intent of the people who adopted the amendment must also be ascertained. There is no doubt as to their meaning. They voted upon a proposed amendment couched in ambiguous language, but explained and construed by the Legislature itself. They granted to the governor the power of removal only "by the consent and advice of the council" which consent and advice is in the present case lacking.

It is said that the proposed amendment was set forth in full in the ballot, and that by reading it the voter should have perceived that the question submitted mis-stated its meaning.

I think it unlikely, however, that the voter by reading the proposed amendment would have discovered in it a meaning which the Legislature apparently did not think of, and concerning which the governor is in doubt and the Supreme Court divided.

To fill a vacancy ad interim the Constitution requires action by the governor and the concurrence of a majority of the council. We think that nothing less is contemplated in the removal of an officer elected by the people. True the removal is the governor's act. The consent and advice of the council is not required, because the removal is not to be made until a majority of the council have found the officer

unfaithful or inefficient and then only if the governor as governor, and not voting merely as a member of a joint caucus, finds the charges sustained.

In previous hearings governors have voted with the council. In no case, however, has there been a tie. The question therefore has never been important and has apparently not been passed upon or controverted. It was natural and not unreasonable that these precedents be followed.

But our study of the subject convinces us that in removal cases the council acts as such, and that the governor not being a part of the council has no authority to vote with it either to break or make a tie or otherwise.

Very respectfully,

LUERE B. DEASY,
CHARLES P. BARNES.

ANSWER OF JUSTICE DUNN.

April 15, 1926.

THE HONORABLE RALPH O. BREWSTER THE GOVERNOR OF MAINE,

Sir:

Your communication of recent date, with preamble to the unitary action which the Governor and Council has taken already and concerning, too, the action which depending on what has been done, the Governor may take yet, under what stands proclaimed as the Thirty-eighth Amendment to the Constitution of this State, with regard to the Sheriff in Kennebec County, and requesting the expressing of opinion, has been considered.

It is not in all instances, but only where occasion is solemn, and the question of law is important, that constitutional prerogative permits a governor to exact each member of the court to define his view on matter of public moment.

The attempt will not be made to state within a narrow compass my conception of the purpose of the organic provision. Suffice it to

say, that in the presented situation, as it is seen and understood by me, the quality of solemnity is lacking, and though the inquiry of law is not without a mixture of importance, still in the language of the Amendment, as it reads on the book, there is no uncertainty.

But even if essential were at hand, it is evident that replying in dogmatic form to the propounded questions would substantially affect the rights of him who now is serving as sheriff.

To pass upon his rights, with but the side of the subject adverse to him shown, when in this quick and active age, the opposites might be exhibited in turn, and after argument by counsel the cause be determined in open court, would go to the very heart, the very essence of the system of jurisprudence that has made of our government a government of law as distinguished from that government of functionaries which another and older country knew.

The facts stated do not indicate that any solemn occasion exists within the meaning of the Constitution, which requires the giving of an ex parte opinion.

Most respectfully,

CHARLES J. DUNN,

Associate Justice.

LESLIE COLBY CORNISH

IN MEMORIAM

SERVICES AND EXERCISES BEFORE THE LAW COURT, AT AUGUSTA, DECEMBER 8, 1925, IN MEMORY OF

HONORABLE LESLIE COLBY CORNISH

FORMER CHIEF JUSTICE OF THE SUPREME JUDICIAL COURT.

Born October 8, 1854. Died June 24, 1925.

SITTING: WILSON, C. J., PHILBROOK, MORRILL, DUNN, STURGIS, BASSETT, JJ. SPEAR, A. R. J.

The exercises were opened by HON. LEROY T. CARLTON, President of the Kennebec Bar Association, who spoke as follows:—

MAY IT PLEASE THE COURT:

By direction of Kennebec Bar Association with a very deep sense of public sorrow, mingled with a most unfeigned feeling of personal grief, I rise to make the formal motion that this Honorable Court pause in its most laborious and important duties in recognition of the loss that has befallen the State in the death of LESLIE C. CORNISH, late Chief Justice of this court, and that some resolutions by the Committee appointed for that purpose and some remarks by members of the Bar, may be submitted for the consideration of the court upon the life, character, attainments and services of our deceased brother and associate.

BY CHIEF JUSTICE WILSON:—

The motion of Brother Carlton is granted. It is the further pleasure of the court to receive the resolutions of your Committee and listen to any remarks by members of the Bar that may be deemed appropriate to the occasion.

Mr. Carlton resuming continued as follows:—

MAY IT PLEASE THE COURT:

Before calling upon the Committee on Resolutions for their report I trust I may be permitted to say a few words as a personal tribute to the life, character, attainments and public service of him in whose memory we are here assembled.

I cannot reconcile myself to think that LESLIE C. CORNISH is dead except in a mere physical sense.

It was my great good fortune to know him somewhat intimately for more than fifty years, as student, legislator, lawyer, judge and Chief Justice of this court.

I wish to say with all the emphasis possible first he was at all times everywhere a true gentleman, kindly, considerate, thoughtful, sweet minded.

The innate gentility of his nature, his unfailing courtesy, his unaffected kindness, his consideration for the welfare and failings of others profoundly impressed me through the years and leaves with all who knew him the sweetest of recollections.

I have thought that his attitude towards life might well be stated in the lines

"Let me live in my house by the side of the road and be a friend of man."

Throughout his life he walked in the love and fear of God and a desire to be of service to his fellow man.

These are the qualities which form the most essential attributes of character, and the character of such a man is ever worthy of emulation; possessed of stainless honor, one of the most unselfish and lovable of men.

I never like that statement of Addison which he gave utterance to while viewing the Bridge of Life on the mountain top of Bagdad:

"Man is but a shadow
and life a dream."

I turn from this dreary melancholy utterance to our own immortal Longfellow and read with delight;

"Life is real
Life is earnest
And the grave is not its goal
Dust thou art to dust returnest
Was not spoken of the soul."

And so it was with the life of our departed brother. Life was very real, very earnest to him, until the day,

"He sailed away" to life eternal, to lands immortal.

I knew him as a lawyer, an able, conscientious, earnest advocate and counsellor, giving unsparingly of his intellectual strength and attainments to preserve and promote the interests of his clients. He was at once a credit and an honor to the noble profession of the law. He was known as a worthy and honorable opponent. He was none the less a fighter, and an able-bodied, verile, two-fisted, red blooded adversary. The kind of fighter we like to meet in the legal forum.

I will not undertake to review his great work as a Judge and Chief Justice of this great Court. Others will do that so much better than I can. I wish to say, however, in passing I once heard Chief Justice Taft of the United States Supreme Court say,

"Chief Justice CORNISH was one of the great judges of the Country."

Now when we add to this that he was not only a learned Judge but a just Judge, so regarded by all our people, of all classes and conditions, human language can pronounce no greater tribute to his memory. Duty to him meant something more than a mere abstract expression; to him obligations were sacred things, not to be postponed but to be performed. With Daniel Webster he believed,

"That our whole concern in life is to do our duty, and let the consequences take care of themselves."

His memory will endure with affectionate remembrance with all with whom he came in contact in the various walks of life, as neighbor, acquaintance, associate, lawyer and Judge.

Surely he was born to a higher destiny than that of earth.

Death is the most illogical and therefore the most unexplainable fact in life.

But in the beautiful "World of Somewhere" he stands with white hands beckoning us all to follow; we shall meet him in the morning.

"He is gone
The abyss of Heaven has swallowed up his form,
Yet on our hearts hath sunk deeply the lesson thou hasn't given;
And shall not soon depart."

And so I repeat, LESLIE C. CORNISH is not dead but lives in our hearts and memories; lives in the realms beyond the skies and will live forever more.

In the language of George Prentiss,

"It cannot be that earth is man's only abiding place. It cannot be that our life is a mere bubble, cast up by eternity to float a moment on the waves and sink into nothing."

Else, why is it that the glorious aspirations which leap like angels from the temple of our hearts, are forever wandering and unsatisfied.

Why is it that the stars which hold their festival around the midnight throne are set above the grasp of our limited faculties forever mocking us with their unapproachable glory?

And finally why is it that their bright forms presented to our view are taken from us, leaving the thousand streams of our affections to flow back in alpine torrents upon our hearts?

There is a realm where the rainbow never fades, where the stars will spread out before us like the islands that slumber in the ocean and where the beautiful things that pass before us like shadows will stay in our presence forever. There lives and rejoices LESLIE C. CORNISH.

The world is better for his life, and there are very many to whom his memory is and will continue to be an inspiration and a benediction.

This is but a feeble, imperfect tribute to a very dear friend. The orator may be reasonably well satisfied with his rounded sentences, well chosen words and fitting climaxes upon some lofty theme. But words fail; they are empty things when we attempt to pay fitting tribute to a friend.

Resolutions of the Kennebec Bar Association read by JUDGE HAROLD E. COOK, a member of the Kennebec Bar Association:

MAY IT PLEASE THE COURT:

I respectfully submit the following Resolutions:

BE IT RESOLVED: That the Kennebec Bar Association hereby record the passing of former Chief Justice LESLIE C. CORNISH, at the time of his decease a most distinguished member of this Association.

That, with the minds and hearts of all his associates filled with appreciation of the multitude of his noble attributes as lawyer and

citizen, Judge and friend, public servant and man, we hereby simply inscribe for all time our deep and sincere gratitude for the life, so full and so fine, and for the sustaining influence of that life upon the membership of this Association as well as upon the Bar at large and upon the State he loved and served.

That in his death, the personal loss of each individual and that of the community, great and lasting as it is, must be inseparably associated with the thought that, through the privilege of knowing Judge CORNISH, we have gained clear perception of what a true life should be, and lasting inspiration to strive to follow his steadfast guidance in all that makes for character and true worth.

That, as his loss may not be measured in mere words, neither may the great and enduring influence of his presence, but that influence shall remain enshrined in our minds and hearts forever, there to reach its most perfect beauty and its highest earthly reward; to which memorial, mindful of the ideals which he so splendidly exemplified, we, his brethren of the Bar, consecrate ourselves.

That it be requested of the court with which Judge CORNISH was so long and so vitally associated and whose records of accomplishment now and throughout the future years stand imperishably monumental to his ability and his character, that these resolutions, indicative of our unqualified love and respect, be entered of record in his memory.

HAROLD E. COOK,
EMERY O. BEANE,
ERNEST L. MCLEAN,
FRANK G. FARRINGTON,
GEO. W. HESELTON,
HARVEY D. EATON,
For Kennebec Bar Association.

Remarks of HARVEY D. EATON, ESQ., a member of the Kennebec Bar:—

LESLIE COLBY CORNISH was born, reared, graduated from college, admitted to the bar, practiced, in fact spent his whole life here in Kennebec County.

Coming later to the same college, to the same fraternity, going to the same law school, then returning here to practice I enjoyed his acquaintance and friendship for more than forty years and through most varied and diverse experiences.

In this company where so many have spoken from the depths of rich knowledge of his noble qualities I will allude to but one phase of his many sided character and that is his abounding and abiding love for younger people.

Denied the privilege of personal fatherhood he made all youth his own.

Serving for forty years as a trustee of his alma mater he long ago came to be the head of its corporate organization and was always prompt, faithful and efficient whether performing the most trivial duties or presiding over its most important meetings.

But he was even more earnest and painstaking in cultivating the acquaintance of individual students encouraging and assisting their ambitions as his judgment approved.

It must be more than thirty years ago that in talking with a young man in whom I felt interested I asked him about his prospects and especially about meeting his expenses and he assured me he was getting on finely. "LESLIE CORNISH is helping me" he said.

Only a few years ago I was talking with a young student at Colby who had come from a distant part of the State and he expressed his wonder that the Chief Justice of Maine while holding court in his county had sent for him, talked with him about education, encouraged him to go to college and after he had come to Colby had again looked him up and proved that he remembered him.

These two instances nearly thirty years apart are typical of his constant attitude.

While he graced the chair at a meeting to do honor to America's foremost educator he was equally at home and even more anxious to attend meetings of the undergraduates of his college fraternity.

The love of younger men sprang perennial in his heart. A great friend of youth has gone from us.

GEO. W. HESELTON, ESQ., of the Kennebec Bar spoke as follows:—

MAY IT PLEASE THE COURT:

As a member of the Bar of this State and county, it is my privilege to pay a brief and simple tribute to the memory of former Chief Justice CORNISH. While he was born, reared, lived and died in this county, his life work as Justice and Chief Justice of this court was for his native state. Although in the future his greater influence will rest upon the opinions in our reports which bear his name, there is another and ever-widening influence which he has transmitted, and which will impress itself upon the lawyers of this State for years beyond our ken, and that is the influence of his life and character, "whether we knew him as a judge, citizen, or a man."

His personal appearance is indelibly fixed in our memory. We recall his commanding physique—tall, finely proportioned, with an alert and vigorous carriage and tread—his was a presence which attracted attention both within and without the court.

Nature had not only been lavish with him in his physical appearance, but had endowed him with intellectual abilities of the highest order.

These gifts of fortune were his to make or mar. They were his to cultivate, or by indifference or indolence to fritter away. Here enters the personal equasion of Chief Justice CORNISH, and that personal equasion marks his attitude toward life and the ideals which he maintained, and that attitude will have its most direct and powerful influence on the members of our profession and through them extend beyond the conception of living man. He chose to make the most of his intellectual gifts, and through his untiring industry he became what he was—one of the greatest Justices of the many eminent and worthy Justices who have graced the Supreme Court of our State.

He might have so used his gifts as to become a very learned Judge, but in the end fallen far short of what should be regarded as a real Justice. The former course did not appeal to him, it was not in harmony with his conception of the great office which he occupied. He cultivated and practiced those traits of character which made for truth and Justice, and which give to the public and the profession their abiding confidence in our Courts.

The profession at large will comment upon his clear, logical mind, his comprehensive grasp of the principles of law involved in the opinions which he drew, and his manifest purpose to discover and declare the truth. But what the moving causes were which gave him that grasp of law and that quick responsiveness "in settling private rights and the vindication of public wrongs" in accordance with law and equity, cannot be garnered from the cold type of those written decisions. Those moving causes are more clearly revealed by his own words spoken in memory of his deceased associates of this court. On those occasions he reviewed with discriminating power and inimitable grace the traits of character of those jurists which so appealed to him. The written words of his tributes to Justices King, Madigan, Haley and Symonds, and to the Chief Justices Savage, Emery and Whitehouse, revealed the ideals of his own lifework. Their virtues, methods, singleness of purpose and devotion to duty mirrored those characteristics which were his, and for which he strove and so fully realized. Moreover, it is evident that the purpose of his words were not merely to pay a passing tribute to the memory of those men, but more especially to note and point out how they achieved their successes so that those who came after him might profit by their example. As the written biographies of great men influence the lives of others, so, through a careful and discriminating study of the lives and works of his associates, and through a portrayal of the secret of their successes, he sought to influence the members of that profession which he so loved and of which he was such a conspicuous member.

What appealed to him as the greatest prize of that profession? Not the acquisition of wealth, but the proper administration of justice in the courts and by a worthy Judge. To him the aim of such a Judge was to secure justice "to discover the way the light of legal proof leadeth," or, as he approvingly said of one of his associates, to be "desirous of administering justice between man and man in accordance with the well settled rules of law and equity." But evidently he believed that the love of justice alone would not make the worthy judge. That love should be combined with unremitting mental labor, with patience, tolerance and abounding charity—free from moods to be watched for, or idiosyncrasies to be pampered.

To him it seemed possible that with this love of justice, (free from every taint of envy, malice, hypocrisy, and all prejudices), any lawyer

with the disposition to work, or who acquired the habit of industry, might well aspire to and possibly gratify the high ambition of becoming a worthy justice of this great court. This seemed to be the message he wished to convey to the members of his profession and to inspire among them the worth-while ambition for achievement. With these qualities of mind and heart he pointed out that the goal which he idealized was within the reach of all. It was not limited to the rich and influential; it was as well open to the poor and worthy who had "The unconquerable spirit within him; the determination that could not be thwarted; the fire that could not be smothered."

Apparently Chief Justice CORNISH was not content with doing the work of his great office day by day, but he was looking into the future and seeking to inspire in others the further accomplishment of the work which he loved and exemplified, and so grasped the opportunity of speaking to us through these tributes to his friends and colleagues.

His worth as a citizen, his loyalty as a friend, his gracious courtesy to all, his patience, charity and tolerance so enveloped and imbued his personality that it is impossible to realize that he is dead. It may be that this impression is due to the fact that we think of him in terms of what he was, and what he lived for. How can this feeling be better expressed than in the language of Justice Arno W. King's tribute to Chief Justice Andrew P. Wiswell, language which was feelingly paraphrased by Chief Justice CORNISH in his tribute to Justice King and which I again paraphrase and use here.

"You say he is dead. Go tell them no. For so long as truth shall prevail, so long as justice shall be tempered with mercy, so long as human sighs call not to human hearts in vain, so long as friendship and love shall last, so long shall LESLIE C. CORNISH live."

HON. FRANK G. FARRINGTON of the Kennebec Bar added the following:—

MAY IT PLEASE THE COURT:—

One morning in September, twenty-six years ago I entered as a law student the offices of Chief Justice CORNISH. They were three rooms in the Vickery Building on Water Street and the one overlooking the Kennebec River was his private office. It was there

I found him seated at his desk under the chandelier in the center of the room and facing the door through which I entered. On either side of the room were handsome cases, which I later found were of his own designing, filled with law books. Looking down upon the river were two windows, in the corner was a large hospitable fireplace. He loved this office, as I have often heard him say, and the river flowing on to the sea; he loved to look across it and note the changes of the seasons, the budding green of the willows on the Eastern bank in the Spring time; to see, as he said, the river men "hang the boom" as soon as the ice went out in the Spring; to mark the heavier green foliage of the Summer and the changing colors of the Autumn and the glistening white of Winter. He dearly loved nature in all her shifting moods and forms. All this comes back to me vividly today because I too learned to love it. And I shall never forget my first impressions of the man as he rose to greet me on that morning, the first time I had ever been in his office or had met him except in a casual way.

I saw a somewhat stern yet most kindly face, keen gray eyes that seemed to search my very soul, sensitive lips, a firm, strong chin, an erect figure, carried with the perfect poise of the gentleman that he was, and when I heard his voice my surrender to him whose memory we honor today was complete. I can see him now as I saw him then, as if the curtain of the years had been lifted on the stage of yesterdays.

The step from the principalship of a Maine High School to the new field of work brought a marked change and the need of a re-adjustment, and as the days passed I found a safe and sure influence in the inspiration that radiated from him in the daily round of business.

He was alert and active physically as well as mentally. When there was work to be done it was done without delay and it was done thoroughly and accurately. He had no patience with careless, slipshod effort, nor with weak evasion of responsibility. He himself accepted the obligations and duties of life without reservation and did not excuse others for failure to meet those obligations and duties in the same spirit.

Sharp practices and questionable methods were abhorred by him. Himself the very soul of honor and integrity, he could brook no compromise on the part of others. He hated sham, hypocrisy and deceit and a lie was an abomination to him. Strict himself in the observance of the best ethics of the profession, he expected the same observ-

ance from those with whom he came into contact. I saw him in many trying situations while I was in his office, many times when it was hard to tell on which side of the line the truth was to be found and when selfish interest might have prompted him to lend his effort to the one side or the other, but never did he yield to expediency or self interest. He made his decision with those clear gray eyes unashamed and with his heart at the judgment seat of God.

His keen sense of humor so well known to the court and to his friends relieved many a tense situation when the feelings of clients or attorneys were at the breaking point. While always conscious of the influence of his deep culture, his high ideals, his thorough business methods and the power of his example and personality in countless ways, it was the kindly love in the great, tender heart beating within his breast that drew me to him as it did others and which has held us all with the passing years, which have served only to deepen our love for him.

Truly no man can live unto himself alone and the influence of a man like Chief Justice CORNISH does not end with his death. His thoughts, his acts, his words become a part of God's great economy and, if there is such a thing as immortality, and I believe there is, those human attributes may well be a part of that immortality.

So whether from the standpoint of his associates on the Bench and at the Bar, his lifelong friends, the student, or those most closely bound to him by the ties of blood, we all join in a last tribute to his memory here in the room where he often tried cases as a member of the Bar and where later he presided as Justice and Chief Justice with characteristic dignity and fairness. From the spot where I stand I can see the windows of his office where as a member of this court he labored so long, so happily and so unselfishly in the interest of law and justice, and in some mysterious way it brings to the heart a sense of comfort and of peace to speak the last words of our esteem and affection amid the scenes and surroundings he knew and loved so well.

JUDGE CHARLES O. SMALL, President of Maine State Bar Association, spoke as follows:

MAY IT PLEASE THE COURT:

My first real acquaintance and relations with our late Chief Justice CORNISH came about twenty or more years ago by my being asso-

ciated with him as counsel for one of the large industrial corporations of the State. I, of course, acting as junior counsel. This association I consider one of the greatest privileges of my professional life.

Before this time I had but a slight acquaintance with him. I had seen him a few times in court in my county engaged in the trial of cases. I had heard of him as a law partner of that great trial lawyer and legal luminary, the late Orville Dewey Baker. I also had heard some of the members of the Somerset County Bar discuss some matters or cases that had been referred to him, or in which he had given an opinion, and to the effect that if LESLIE C. CORNISH had given his opinion it was decisive. Later in my somewhat intimate association with him I learned that the opinion expressed by my brother members of the Bar was none too high. This association, thus begun, continued until his well merited appointment by Governor Cobb as an Associate Justice of this court.

During these years I came to learn some things of our late lamented Chief Justice, which other members of the Bar, perhaps less fortunate than myself, lacking the associations that I enjoyed, could not learn. I learned why his opinion on any legal subject was held in such high respect by his brother members of the profession and regarded by them as decisive. I learned too that in every case, large or small, and the result important or unimportant, he gave the same thoughtful consideration.

But it was not alone by his painstaking care, great legal learning and acumen that won him the high regard and respect of his brethren of the Bar before his merited elevation to the Bench. But these combined with his kindly manner and gentle courtesy to all his associates, his unimpeachable character, his correct habits, and the implicit confidence of all of his brother members of the Bar that he was too clean and honest to resort to any low and unworthy thing or devise to win a case however great or important might be the interest involved.

The foregoing is my judgment of our late Chief Justice CORNISH. And I think I bespeak without exception the judgment of the members of the Bar of the State at the time he was appointed Associate Justice of this court.

It is in his memory that I, this afternoon in this solemn hour, speaking in a measure for the members of the Maine State Bar Association, of which he was really the founder and for many years its

efficient secretary and treasurer pay our tribute of love, honor and respect. I wish some other member far abler than myself would perform this duty. I do not feel able to perform with any degree of adequacy the duties of the task. It is not given to me by anything I can say to do meet justice to the high and spotless character, the great legal learning and work of our late Chief Justice CORNISH. I have not the ability to voice the sentiments of the members of the Bar of the State of Maine and express the deep love and respect we all had for him while with us and the reverence we all have for his memory.

It was always a pleasure to the members of the Bar of any county to know that Judge CORNISH was to be the presiding Justice at any term of court. The members of the Bar were always willing to try their cases when he presided. They one and all knew that they would receive from him the same courteous treatment, and that cases, great or small, would get the same consideration.

As a trial Judge he always presided with courtesy and dignity, directing or restraining, ruling quickly and usually unerringly, and at all times keeping the case within bounds so that the minds of the jurors would not be led away from the issue involved by any attempt on the part of counsel to introduce any extraneous matter or irrelevant or immaterial testimony.

We older members of the Bar of the State first knew our late Chief Justice as a member of it. Later we knew him as an Associate Justice of this court presiding at terms of court in our several counties and at hearings in chambers. And later still we knew him as Chief Justice of this Court, sitting as you are today as an appellate tribunal. Your Honors knew him as one of your members, and for a time as Chief Justice. As one of your members and your associations with him, it is not for me to speak. But to those of us to whom has come the privilege and duty of arguing cases in this court we still found Chief Justice CORNISH the same, always ready and willing to listen, ofttimes to pedantic and tiresome briefs and arguments, and while some of your members (of course the present membership excepted) may have shown some uneasiness during the reading by counsel of long briefs containing, perhaps, many wrong interpretations of the law applicable to the facts in the case, yet we always found him maintaining that calm judicial mein and manner so characteristic of him, and which we all so much admired.

While the written opinions of our late Chief Justice CORNISH, appearing in many volumes of our Maine Reports, are apparently the greatest and most lasting monument of his great ability and legal learning as a jurist,—whose fame as a great Judge has spread beyond the confines of his native State, which he so dearly loved, yet we members of the Bar of Maine to whom was given the privilege and opportunity of knowing him and associating with him as a brother lawyer, will remember him best, as the years go by, as a kind and social companion, a good lawyer, a fair adversary and above all as a good and an honest man.

True we shall miss him. The members of the Bar of the State in the different counties of the State will miss him, for he will never again act as their presiding Justice. You of this court will miss him for he will never again take part with you in your deliberations. We all shall miss him, and mourn the loss of him whom it was our privilege to know and associate, but whose life, character and work will be an inspiration to us to still carry-on. Chief Justice CORNISH was

"Strong to the end, a man of men, from out the strife he passed."

Tribute by JUDGE CHARLES F. JOHNSON of the United States Circuit Court of Appeals, following the unveiling of a portrait of the late Chief Justice, a gift by him to the Kennebec Bar Association.

MAY IT PLEASE THE COURT:

This excellent portrait of our beloved late Chief Justice was ordered by him and he wished it to be hung in this old court house, the scene of so many trials in which he participated and where he presided for eighteen years as an Associate or Chief Justice of the Supreme Court.

I know that, in behalf of the Kennebec Bar Association, I can acknowledge its deep sense of gratitude for the gift and the thoughtfulness of the donor.

The sight of that face, upon which refinement and culture are so indelibly stamped and human sympathy so plainly depicted, will be a source of inspiration and encouragement to all who knew him and awaken within them pleasant memories of most genial companionship and sympathetic acquaintance. As I gaze upon it I am led to pay my tribute, not so much to his great intellect, his learning and

his untiring industry, as to the human qualities of which it is the index and which made him a complete and well rounded man. To him Shakespeare's characterization could most appropriately be applied:

> "His life was gentle, and the elements so mixed in him, that nature might stand up and say to all the world, 'This was a man'."

Intellectual powers often make their possessor cold and indifferent to others—an icy peak glowing in the sunlight that bathes it, but never reflecting warmth upon those below, who turn away from their admiration of its glistening summit with a feeling of chillness. This is the portrait, however, of one whose great talents and attainments gave him eminence and who lived no life of icy isolation, but by his genial companionship cheered others with his kindly sypmathy and inspired them to purer thought and nobler act.

There have always been, since law became the directing and conserving force of civilization, great judges, eminent jurists and devoted worshipers at its shrine; but among them men of warm, human sympathies and attractive character, whose hearts were filled with love of their fellow men, have been limited.

The great Chief Justice whom we honor today is worthy not only of the eulogies which have been pronounced upon his services as a great and impartial Judge, who not only honored the law, but was honored by it, but his qualities of mind and heart which won the affection of his associates and the members of the bar, should receive no less worthy tribute.

Born in the same town in this State, my acquaintance with him, beginning in youth, bound me to him by stronger and stronger ties with advancing years. He was ever a leader in whatever he engaged and, as a scholar in the public schools and a student at College, he early exhibited those traits of character which, expanding and ripening during the years of an active life, have caused so many to love him. He was always too proud to do a mean act and in his refined and cultured soul the little meannesses of human nature found no root.

Even in his youth that face had the same expression of refinement that it presents in the portrait unveiled today and never upon it have been written the defacing lines caused by debasing thought or selfish passion. To him what was pure, noble and generous never appealed

in vain and by him viciousness, malice and hatred were easily avoided, because they could find no place within his heart.

His boyhood home was one where a father's strong character, appreciative and thoughtful consideration guided him; a mother's love and pride were lavished upon him, and the influences exerted by both—who were of the best type of sturdy New England characters—were thrown about him. His advantages for early education were ample and the means for their enjoyment easily provided. That he made the most of these advantages and, in spite of the ease with which they were obtained, wasted no opportunities, showed his strength of character.

He fitted for College at Waterville Classical Institute, now Coburn Classical Institute, and Colby University, now Colby College, was his alma mater, from which he graduated in 1875. He studied law in the office of Baker & Baker in the City of Augusta, whose senior member was noted for his great legal knowledge and sound common sense, and whose junior member was the learned, eloquent and versatile Orville D. Baker, known to all of us. His studies here were supplemented by a course at Harvard Law School and he began his professional life as a member of the firm of Baker, Baker & Cornish at Augusta, within twenty miles of his birthplace; so that he was brought into the closest contact, as attorney, neighbor and friend, with the people of this county and the members of this bar.

If it be true that, "A man is never without honor save in his own Country," his life, with all its ennobling influences, has proved a most notable exception to the rule, for he has always been loved and honored in the town of his birth; and in this city, his home for more than forty years, the field of his active pursuit of the practice of law and where he lived during the years of his great service upon the Bench, I know I can say that none was more honored, respected and loved.

In his busy life, full of engrossing cares and great responsibilities, he found time and made it his object to connect himself with activities outside of his profession which had for their purpose the betterment of society.

Colby College, of whose Board of Trustees he was for many years the President and to which, for its work and constant development, he gave unstintedly of his great ability and intimate knowledge of men and affairs; the banking room in this city, where he met men of

large financial interests and sacredly guarded the rights of property and depositors; the church which he attended; the library which was carefully nurtured by him in its earlier years, will all miss his wise counsel and his steadying influence.

We who were his friends and companions working with him in his chosen field have lost a loyal friend whose counsel, sympathy and kindly services were always freely given, whose genial companionship, enlivening and sprightly wit lightened our burdens and made life sweeter and brighter.

His attachment for the members of the bar was expressed by him at the meeting of the State Bar Association one year ago when he said:

"For eighteen years we have journeyed on together and we have come to know each other pretty thoroughly in all that time. Will you permit me to say that for all you have done to make these the fullest, happiest years of my life, I wish to express to you my heartfelt acknowledgement. I have endeavored to give to the State the best that was in me. If I have failed it is because that best was inadequate. If I have succeeded it is because I have felt that I had behind me the bar of Maine encouraging, sustaining and helping in every legitimate way."

In these words we discover the reason for his most successful life. No man ever had a deeper sense of the obligation of duty than he and because he brought to its performance in whatever line it might lie, the resolution to give his best, he succeeded. His rapidly working mind and his keen perception rendered him most efficient when he brought to the accomplishment of any task the best that was in him.

His sympathies, his merry wit without a sting, his pleasurable companionship, his considerate and patient conduct toward all have left a lasting impression upon the members, not only of the bar, but upon the citizens of this State whom he served so loyally and so well.

This portrait will be hung where he wished, but we shall carry away in our memories many portraits of him which shall keep ever fresh within us recollections of a loyal friend and his splendid character.

RESPONSE FOR THE COURT

BY

CHIEF JUSTICE WILSON

Well do the members of the court recall the shock which came to them, when the word was received during the sitting of the last Law Term at Portland that our former respected and beloved Chief Justice had passed from this life into the Great Beyond. It was not because we were unprepared. Word of his failing physical powers had reached us, but the mind refuses to accept the inevitable when it involves personal loss and sorrow until the imperative summons comes.

Associations so close as those existing between members of the court, after extending over a period of years, and, in addition, personal relations, in some instances, extending over nearly a liftime, are not to be severed without a pang. The Judicial relations are, of necessity, so intimate, and, in truth, so pleasant and agreeable, that the loss of one of our number, and especially of one who has been our leader as well as valued counsellor and friend, strikes deep.

It is, therefore, with heads bowed, and hearts filled with emotions too strong for words to adequately express, that the court joins with the Bar, not only of this county, but of the entire state, in paying a final merited tribute to our former associate and Chief, a loyal friend, a distinguished citizen, and a great jurist.

LESLIE COLBY CORNISH was distinctly a product of Maine. Of Maine parentage, born October 8th, 1854, in one of our rural communities, in the town of Winslow, the son of Colby Coombs and Pauline Simpson Cornish, he received the first rudiments of his education in one of the old-fashioned District Schools of his native town. At an early age he entered that well-known and admirably conducted school, now known as Coburn Classical Institute; then known, by reason of the great educator at its head, as Dr. Hanson's School.

The mental attributes of his mature years were even then foreshadowed by the early age, of not quite seventeen years, at which he completed his course in the fitting school and entered Colby College, from which institution he was graduated in 1875, with high honors, before he had attained his majority. His standing as a student is indicated by the coveted membership in the Beta Chapter of Maine, of the Phi Beta Kappa Society at Colby, conferred upon him after his graduation in recognition of his scholarship while in college.

After completing his college course, he taught two years as principal of the High School at Petersborough, New Hampshire, but his natural talents and aspirations called him to other fields of endeavor. The following year, in pursuance of a somewhat unusual promise made after his graduation to his mother, for whom he had the greatest filial love and respect, that, before permanently leaving the parental roof, he would spend one year with her, he remained at home. In the Fall of 1878, he entered the law offices in Augusta of that well-known firm of Baker & Baker, then composed of the father, Joseph Baker, and his even more distinguished son, Orville D. Baker.

He pursued his legal studies under the eyes and guidance of these two great lawyers for one year, and then entered Harvard Law School, intending to complete his preparation for the Bar with two years' work in that institution, but at the end of the first year in the Law School, at the urgent request of his former office preceptors, he returned to their office and was admitted to the Kennebec Bar in November, 1880.

His talents and attitude for his chosen life work soon gained him recognition, and he was taken into the firm, which then became Baker, Baker & Cornish. This relation continued until the death of the elder Baker, when the firm became Baker & Cornish, and so remained until 1894, when his matured talents demanded greater scope than was afforded under the dominating personality and fame of its senior member, and he opened an office on his own account.

His ability as a lawyer and already established reputation for sound business judgment quickly brought to his office an extensive and lucrative practice, in which, in 1901, he associated with him his nephew, Norman L. Bassett, now Justice Bassett, an honored and valued member of this court. This association continued until his elevation to the Bench, March 31, 1907.

Referring briefly to his other public services before speaking of his chief work as a member of this court,—upon his return home to his native town in 1878, he was honored by his fellow-citizens by election to the House of Representatives, where he served for a single term. In 1891 and 1892, he gave of his time to the service of his adopted city of Augusta by serving in its Common Council and Board of Aldermen. From 1900 to 1907 and his elevation to the Bench, he was a member of the State Board of Bar Examiners; and from 1891 to 1907, he was Secretary and Treasurer of the State Bar Association. By his zeal, efforts, and ideals, that organization was made an effective force and influence for the elevation of the standards of the Bar of this State. In 1922 he was selected as a member of a Committee for the American Bar Association, of which Chief Justice Taft was Chairman, for drafting a code of Judicial ethics.

Even this wide range does not mark the extent of his public and quasi public service in addition to his work as a member of this court. In 1892, he was elected a trustee of the Augusta Savings Bank, and in 1905 was made its President, serving in this capacity until his death. In 1893, he was elected a trustee of the Lithgow Library and in 1904 was made its President and served as its head until the end. In 1888, he was made a member of the Board of Trustees of Colby College, serving as Secretary of the Board from 1891 to 1907 and as Chairman during the remainder of his life. He was also one of the incorporators of Coburn Classical Institute and continued a member of its Board of Trustees from 1901 until his death.

These varied activities and official positions held by him are not mentioned here in any sense of so many honors conferred, or as merely merited recognitions of his ability and wisdom as a counsellor, but as showing his loyalty to his city, state, and *alma mater*, and his willingness to serve, not for material considerations, but in acknowledgment of an obligation which every man owes to the community and state in which he lives.

Another phase of his character should not pass unnoticed at this time. Though possessed of high ideals and standards of conduct and morality for his own guidance, and a strong religious sense, or respect for an Omnipotent Spirit, he was no Puritan. To serve his fellowmen, to uphold the sanctity of the home, the honor of his profession, which he loved, and of his state, to maintain its schools

and the church as the greatest sources of culture, as moulders of character and influence for good, and in all things to conform to that rule of conduct laid down by the Master nineteen centuries ago, was for him sufficient. His faith in the hereafter was unhampered by any narrow or arbitrary doctrines or creeds.

He was a member of the Unitarian Church of Augusta and a constant attendant at its regular services. A member of and for a long time Chairman of its Standing Committee, a Director of the American Unitarian Association from 1904 to 1913, and President of the Maine Unitarian Association from 1917 to 1919.

One instance alone is sufficient to show how deep was his respect for all religious customs. At a term of court, the clergyman who had been invited to offer prayer upon the opening of court, through inadvertence failed to appear. In order that a custom handed down to us by our forefathers might not be broken, the Chief Justice, then presiding, requested that the entire Bar present rise and join with him in the Lord's Prayer. We venture to assert that no term of court in this State was ever opened in a more reverential spirit.

Such have been his extra-judicial activities, not only in the service of the community in which he lived, and of his state, but also in the promotion of education, and the social and moral welfare of his fellowmen.

In 1904, his *alma mater*, in 1918, Bowdoin College, and in 1920, the University of Maine, each fittingly bestowed upon him, in recognition of his great ability and distinguished services, the Honorary Degree of Doctor of Laws.

It was fortunate for his State that it was into the field of jurisprudence, his inclinations finally led him. In 1907, he accepted an appointment as Associate Justice of this court, which honor he had hitherto refused on several occasions against the urgent request of his friends, the Bar, and the appointing power; and upon the death of Chief Justice Savage in June, 1917, Justice CORNISH, with the unanimous approval of his associates on the Bench and of the whole State, was elevated to the office of Chief Justice, which office he continued to fill with ever increasing approbation until his forced resignation by ill health on March 1st, 1925.

His service on the Bench covered a period of more than sixteen years and the fruition period of his life, during which time he enriched the jurisprudence of his State by three hundred and forty-four written

opinions found in Volumes 103 to 124, beginning with *Armstrong* v. *Munster*, in 103 Maine, 29 and closing with *Graney* v. *Connolly*, 124 Maine, 221, and in addition thereto several maturely considered and well-reasoned answers to questions submitted by the executive or legislative branches of the government; as in the instances of the questions relating to the State's control over water powers and the powers of the Governor and Council in cases of disputed questions arising in primary elections. While he could readily bring his mind to see the viewpoint of his associates, and without reservation adopt their view, if satisfied of its soundness, yet he could, and did on occasion, vigorously dissent or refuse to concur when their reasoning failed to convince.

His opinions, of necessity, cover a wide range of questions, and cases of varying degrees of importance, but among them one will readily find many, which will for all time serve as landmarks and guide-posts for shaping the course of jurisprudence in this State and in maintaining the security of property and safeguarding the lives and liberties of our citizens. Time will not permit even a brief summary of all the outstanding opinions in the reports which were the product of his brain and pen; but among them, *Libby* v. *Portland*, 105 Maine, 370; *Blaisdell* v. *Inhabitants of York*, 110 Maine, 500; *Laughlin* v. *City of Portland*, 111 Maine, 486; *Barry* v. *Austin*, 118 Maine, 51; *State* v. *Intoxicating Liquors*, 119 Maine, 1, and *Brown* v. *DeNormandie et als.*, 123 Maine, 535 will serve to show the analytical as well as logical powers of his mind, his grasp of legal principles, his clarity of expression, and his readiness and courage to meet new conditions as they arose.

At *nisi prius* terms he was always warmly welcomed by the Bar. Believing that a speedy dispatch of the business of the courts is of prime importance in the administration of justice, he permitted no unnecessary delays. The dignity of his court and its procedure was always maintained without stressing conformance to arbitrary rules. He could unbend on occasion and inject into the proceedings flashes of wit, occasionally for the deliberate purpose of exposing some sham or pretense, but more often as a spontaneous expression of his delightful sense of humor, and while it served to enliven the dull routine of court procedure, it was never of the sort that lowered its dignity in the eyes of the public.

When he sat at *nisi prius*, the members of the Bar sought trial, not continuances of their cases. Patient with well-meaning counsel, if their cause was just, he guided many an ill-prepared case to a just conclusion. Sham, trickery, shallow pretense, and deceit found no favor in his court, and the pettifogger who sought to circumvent justice or gain advantage by unfair methods often found himself deposited in a cavity of his own excavation.

It was in the Law Court, however, that his natural talents found a field most congenial and adapted to their fullest exercise, and in the work of which he took the greatest pleasure. A profound student of the sources and development of the common law from the days of Bracton, Coke, and Blackstone, with a wide knowledge of the elementary principles of law and equity, and an unusual faculty of appropriately applying those principles to the new conditions of modern life, a keen and discriminating power of analysis, and a mind delicately attuned to the harmonies of justice, and always faultlessly proceeding from premise to conclusion, he was ideally equipped for this work.

Possessing a command of English, "pure and undefiled," and a discriminating sense of proportion and fitness in expression, his opinions were not only sound in their conclusions and applications of the law, but were models of judicial style and of literary merit. Drawing both from the Anglo Saxon and the classics, his diction was both forceful and elegant, and flowed smoothly as from a master hand. His style, graceful, yet dignified, conformed to the best standards of English. He never sought effects by unusual words, forms of expression or arrangement. Nothing of the ornate or pedantic ever found its way into, or marred his opinions. The words chosen to convey his thoughts were always apt, expressive, and according to the best usage.

His aim was to state the facts, the issue, and the law governing the case, so that a layman as well as the lawyer might readily grasp the underlying principle on which the issues were decided. As he once said in writing his opinions, he always strove to keep in mind a plain citizen standing on the other side of his desk waiting to read the result of his labors. How nearly he approached his ideal, the printed reports give answer.

In presiding at the Law Terms, while always affable and courteous in his treatment of the Bar, judicial poise and dignity were never

lacking. Though he fully believed in and insisted upon an observance of all rules and forms of Court etiquette and procedure that to his mind lent dignity to the court as an institution and rendered more impressive the administration of justice, he never sought by ostentatious display of authority to compel servile respect for the court. It was accorded him and any tribunal over which he presided, as of course, by reason of those innate qualities with which he was so abundantly endowed, that command respect wherever found.

It was in the consultation room and at the head of his judicial family, as he loved to call his associates on the Bench, that they obtained an insight into those finer, nobler qualities, which gave to him the distinction, that set him apart from other men and endeared him to us all. Patient, open-minded, as ready to adopt the views of others, if sound, as to advance his own, his suggestions were always to the point and helpful, and his wise counsel and the results of his wide experience always at the service of the junior members.

Above the average height, of erect, dignified bearing, with features expressive of culture and refinement, he was an impressive figure in any gathering of men. His ready wit and keen sense of humor, his comprehensive knowledge, scholarly attainments, and aptness and felicity of expression made him a welcome speaker on any occasion. Though he was to his intimates a most genial and agreeable companion, he could not be said to wear his heart upon his sleeve, or "dull his palm with the entertainment of each new-hatched, unfledged comrade," but a friend adopted and tried, he grappled to his soul "with hoops of steel."

It did not fall to my lot to share those more intimate relations of daily contact and close personal friendship with which others of my associates were favored, and I cannot speak with that first-hand knowledge of all those delightful qualities of heart and mind, which to his intimates, made him the incomparable companion and coveted friend, or of the daily life, which is the true expression of the soul within. However, the resolutions of the Bar have been presented by those who are not lacking in knowledge of these qualities and the more personal side of his life; and they have feelingly and beautifully expressed, to be preserved for all time, the admiration and love of, and the respect in which he was held by the members of the Bar, both young and old, and the manner of man he was.

It would not be fitting on this occasion to invade the sanctity of his home, nor to dwell on the fireside happiness which was his for so long, nor the overwhelming sorrow which came to him, but which he uncomplainingly bore, though its effect was all too apparent, near the close of his life,—a loss which took a toll, that a physique already overtaxed could not pay. If the thought of the final parting with friends on this side gave him pain, it was, no doubt, in a large measure assuaged by the faith that he was only passing on to join her, whose life had been, in truth, part of his, and who had but so recently gone before.

The familiar form of Chief Justice CORNISH will no longer frequent the streets of his home city or in his robes of office grace the courts of justice of this State, nor his cheery smile again greet us at the threshold of his chambers; but his contribution to the jurisprudence of his State will endure for all time; his personality and spirit, which the artist has caught and imparted to the painted canvas just unveiled, will remain an inspiration, not only to those of us left behind, but to the members of our profession through all the years to come.

His place among the distinguished men of our State rests on solid foundation, ... a stainless character, unimpeachable integrity, great learning, sound judgment, and faithful service. No page in the book of his life need be turned down, or anything written there blotted out or passed over in charity. There is no occasion to invoke the injunction, *De mortuis nil nisi bonum,* as to his life. Such human frailties as he may have possessed were of the kind that endeared him the more to his friends and in no way marred the whole; as a false stroke or two of the artist's brush in some unimportant detail is lost sight of in the general excellence of the picture. He laid aside the judicial ermine as spotless as when he put it on.

Until his great sorrow came, it seemed as though some years of well-earned rest and enjoyment, with that peace and contentment which come from a consciousness of having "run the race," "finished the course," and "kept the faith," might be his. But the Supreme Authority willed otherwise. On June 24th of the current year, LESLIE COLBY CORNISH, the twelfth Chief Justice of this court, was

"Gathered to the quiet west,"

where eternal rest and peace are his.

The court notes with gratification the representative gathering of the Bar of the entire State, and the many friends who have assembled here today to pay their respects to the memory of our departed brother and former head of this court. The appreciative and fitting resolutions of the Kennebec Bar are received and approved and ordered spread upon the records of the court; and as a further token of respect, the court will now adjourn for the day.

GEORGE EMERSON BIRD

IN MEMORIAM

SERVICES AND EXERCISES BEFORE THE LAW COURT, AT PORTLAND, JUNE 22, 1926 IN MEMORY OF

HONORABLE GEORGE EMERSON BIRD

LATE ASSOCIATE JUSTICE OF THE SUPREME JUDICIAL COURT.

Born September 1, 1847. Died January 19, 1926.

SITTING: WILSON, C. J., PHILBROOK, DEASY, STURGIS, BARNES, BASSETT, JJ.

HON. EDWARD C. REYNOLDS, President of the Cumberland County Bar Association, opened the exercises as follows:

MAY IT PLEASE THE COURT:

The readers of our daily papers were startled and grieved to find in the issues of January 20th of this year notice of the decease of HON. GEORGE E. BIRD, an active retired Justice of our Supreme Court who was widely and well known throughout our State. In this way, it became a matter of common knowledge, known of all men. Notwithstanding this, it becomes my grievous duty, today, in behalf of Cumberland Bar Association, to make formal announcement of this sad event in the presence of this court.

Cumberland Bar, conscious of its duty in this respect, through its general committee and with the approval and assistance of our Chief Justice, has arranged for Memorial Exercises at this time. A special committee, named by and acting in behalf of this Bar, consisting of

Hon. Thomas L. Talbot, an ex-President of Cumberland Bar Association, a long time and intimate personal friend of the deceased, Hon. Charles O. Small, President of the Maine State Bar Association, and Hon. Benjamin F. Cleaves of York County Bar, which is, in a large measure, closely identified with our own, has prepared fitting resolutions which will be presented now. And I have no doubt that by them, the story of the active and useful life of Justice BIRD will be lovingly and eloquently told; that the members of this committee, inspired by their respect for the high position which he so worthily filled and by the personal affection and regard which they entertained for him, will tell, in its just and full interpretation, that story and the lesson which it teaches, especially to the members of our profession which he so conspicuously honored.

If I may characterize just one phase of his personality, I would say, without in the slightest depreciating his other eminent qualifications, it has ever seemed to me that temperamentally Justice BIRD was cast in the right mould for the Bench. And the matter of temperament embraces an essential qualification for a Judge, even though this is sometimes overlooked by the appointing power. It is important, for in part, it is a vital element in the makeup of a gentleman, and a Judge should ever be a gentleman, a kindly, considerate, even tempered gentleman. Great intellectual powers, however desirable, strong personal characteristics, however forceful and effective, but possessed by one lacking gentlemanly ways, do not fully qualify a man for the Bench. They may, in a measure, in my judgment, disqualify him for it. Justice BIRD, acting true to his natural impulses, I believe, never lost sight of this. The action of his mind was strong, his measurement of right insistent and dominant, but with him, gracious and kindly courtesy were never lacking. And in his presence self assertiveness was not, in any sense, requisite to secure from him that consideration and attention to which well poised self respect is always entitled.

The life of Justice BIRD was well rounded out, as we say. He had lived an earnest, hopeful and successful life. He acquired the habits of the student in his profession, but yielded himself, almost without reserve, to the requirements, exacting as he made them, justly due as he measured them, of the public positions which he held. He assumed and bore, as all should, the duties of good citizenship. He won the valued prize in the life of a lawyer in his elevation to the

Supreme Bench of his State. In a sense, his life work may be said to have been complete. In the hearts of the people of this community, on the pages of the history of this court and of our Bar will be found written the story of the life of Justice BIRD, and it will be the record of an honest man, a respected citizen, an upright Judge, and a courteous and patient gentleman. This was his task, and in the performance of it, the consciousness which he must have had, of his duty well done, was, to him, throughout, its own reward.

HON. THOMAS L. TALBOT of the Cumberland County Bar added the following address and Resolutions:

MAY IT PLEASE THE COURT:—

The Cumberland Bar Association has deputed me to announce to the court the death of GEORGE EMERSON BIRD which occurred at his home in Yarmouth on January nineteenth last, and to ask that a memorial setting out the esteem in which he was held by the Association and the sincere sorrow occasioned by this event may be entered upon the records of the court.

This duty is at once sad and pleasant,—sad in that we are called upon to mourn a public and personal loss in the passing of one whose like we shall not soon meet again; and pleasant because it needs no effort to praise him, and it is a privilege to add a word of appreciation of him who stood for what was highest and best in the profession which he honored and was a shining example of the eminent position which a good lawyer holds.

Why, it may be asked, consume the time of the court in listening to a eulogy on his professional and judicial achievements, when those achievements are within the cognizance of the court; and why attempt to enumerate the fine qualities of our departed Brother when his associates at the Bar can, one and all, bear witness to their respect for him as a Judge, their respect for him as a practising lawyer, and their regard for him as a friend. But those who sat with him on the Bench and those who, before his elevation, met him in the intimate relations of the profession, are fast following him to that land where are gathered those whom we have loved long since and lost awhile. We would not willingly allow his life to be forgotten, and it is the sacred duty of us who knew him, to hand down his name and fame to our successors.

It has been said "men's evil manners live in brass, their virtues we write in water." We would write his virtues on the enduring tablets of the records of this court where future lawyers may read and exclaim, "There were giants in those days."

GEORGE EMERSON BIRD was born in Portland, September 1, 1847, and here his early and middle life were passed. He was fortunate in the place of his birth. Then shipbuilding was at its height, American sailing vessels dotted the seven seas, and shipmasters, men of strong character and familiar with foreign lands, were an important element in the community in which he grew up. The harbor was full of brigs and barques engaged in the Cuban and South American trade and the wharves were piled with the merchandise of strange lands. Spanish and Cuban merchants were located here and our merchants had close business relations with peoples of different races. The building of the Atlantic and St. Lawrence Railroad opened a vista of commerical growth that was most promising. Probably few cities of its size in the country had more to stimulate the imagination or stir the ambition of a growing boy than Portland in the days of his youth. He saw the world with no provincial vision. He early perceived that he must compete with college trained men in his chosen career, and he entered Harvard, having prepared at the Portland High School,—becoming a member of the Class of 1869.

In 1872 he was admitted to the Bar and carried on business alone until 1878 when he formed a partnership with Hon. William W. Thomas which continued for a period of five years. He held the office of Attorney of the United States for the District of Maine from 1885 to 1890. From 1896 to 1908, he was senior partner in the firm of Bird & Bradley. In April, 1908, he was appointed an Associate Justice of the court, succeeding Hon. Sewall C. Strout, which position he held until his resignation, August 28, 1918.

Judge BIRD well merited the high honor conferred upon him, and his appointment met with universal approval. His legal training had been severe and thorough. He had gained familiarity with practice in the courts in his years at the Bar, where he tried many important cases. His intellect had been strengthened by close study of the recognized authorities, and above all, he was endowed by nature with a strong sense of justice between man and man,—a mind that could suspend judgment until he had heard both sides of a case.

His bearing in trials at nisi prius met every requirement of orderly procedure. He dominated and easily impressed his personality on litigants and jury alike. Not regarding himself as a mere umpire between contending parties, he gave such an impression of being actuated by a high sense of justice and fairness that even an adverse decision had no sting for the unsuccessful attorney, who rather attributed his failure to having picked the wrong horse, believing that no act or omission on the Judge's part had prejudiced him in any of his legal rights. He took his cases to heart. His work was wearing and exhausting, and the large draughts on his strength, mental and physical, undermined his health and shortened his life.

His written opinions begin with *Gifford* v. *Workmen's Benefit Association* reported in 105 Maine and end with *Harris* v. *Moses* in the 117th volume. Their literary style is admirable. They are expressed in language that is clear and accurate, their reasoning is convincing, their conclusions follow naturally from the legal principles applicable to the facts in the case. Those who study the thirteen volumes in which are contained his opinions, will give him a high place among the jurists who have adorned the Bench of this State.

They amply establish his position as a learned Judge, but one must read between the lines to get an adequate conception of his many admirable traits. His friends will recall his modesty and his consideration for the views of others; his bravery in bearing the troubles forced on him but kept to himself his buoyancy of spirit which made his society eagerly sought; his patience and his unswerving loyalty to what seemed to him right; his playful wit and his kindly heart. His was indeed a well rounded and symmetrically developed nature.

To that favored circle who enjoyed his personal friendship, his death is an irreparable loss. His attachment to his home, his literary tastes, his love of books, his capacity for lasting friendships, made his companionship precious; and social intercourse with him delightful.

Falsity and lack of integrity met his stern and immediate disapproval, but he had a generous charity for human failings and could discriminate between faults due to an evil intent and those that resulted from carelessness or undue temptation. As a citizen he worthily performed every responsibility put upon him.

RESOLVED:

That by the death of GEORGE EMERSON BIRD, our Judiciary has lost a member who well sustained the reputation for legal learning which our court has held among the States of the Union; this Bar a distinguished lawyer whose fidelity to the business intrusted to him, whose ability and absolute integrity won the confidence of an important clientage, and whose relations with his professional brethren were genial and courteous; the State a citizen who worthily performed his part in public life, who raised the standard of education, worked for good government and served the best interests of the community in which he lived.

RESOLVED:

That his constant study and continued devotion to the practice of the law, in the firm belief that success and recognition would at last follow and that ability and character would come to their own, make him an inspiration to young attorneys beginning their careers, strengthen their noble ambitions, encourage them in moments of depression and teach again the old truth, that present duty well done will, in the future, bring larger responsibilities and wider opportunities. He served the ever jealous mistress of the law with singular constancy and on him she bestowed her well earned honors.

RESOLVED:

That the court be requested to enter these Resolutions on its records and that a copy be sent to our Brother's widow with the most respectful sympathy of the Association.

JUDGE CHARLES O. SMALL, President of the Maine State Bar Association made the following remarks:

MAY IT PLEASE THE COURT:—

It is a duty mingled with a degree of sadness that I am present at these exercises this afternoon, and in behalf of the Maine State Bar Association add a few words to those which have already been spoken in memory and appreciation of the life, character and services of your late associate, GEORGE E. BIRD.

I do not expect anything I may say will add to the tributes that have been paid to his worth as a member of the legal profession, and his

services as an associate member of this court. But I felt it my duty as President of the Maine State Bar Association to accept the invitation of the Committee of Cumberland Bar Association having in charge these exercises, and be present.

It was not my personal pleasure and good fortune to become acquainted with the late Justice BIRD, until after his appointment.

I had heard and knew something of his efficient services as United States District Attorney for the District of Maine prior to his appointment as an Associate Justice of this court in 1908. I was a law student in one of the offices in this city for a part of the time that he was United States District Attorney and quite frequently saw him in the trial of cases in the United States District Court. And I can recall the concise and thorough manner in which he marshalled the facts and presented the evidence in the cases prosecuted by him. The way in which he conducted his cases impressed me then and showed a full and complete understanding of the facts and of the law applicable thereto.

He was always courteous in addressing the court, then presided over by the late Hon. Nathan Webb, and fair and just in his examination of opposing witnesses.

GEORGE E. BIRD was appointed an Associate Justice of this court April, 1908, and resigned, August 28, 1918. He held his first term of Court in my County (Somerset) September, 1909, and his last, September, 1917. He held in all five terms of Court in Somerset County.

At his first term held in Somerset County it was one of his first duties to impanel and instruct the grand jurors in their duties. His instructions were most painstaking and such that every juror must have understood that he was a material and important part of the court and charged with grave responsibilities.

While Justice BIRD may have shown some unfamiliarity with the work of "calling the docket," the assignment of cases and the rules of practice in the State courts, as the greater part of his practice had been in the United States Courts, he was always patient and obliging to the members of the Bar.

At his first term and at the other terms of court at which he presided in my county he was always the same kindly and dignified Judge. He wanted to hear and know, and he wanted the jury which was hearing the particular case, to hear and know all of the pertinent and

material facts. In other words he was willing that the lawyers should try their cases in their own way, but at all times keeping them within due bounds. I think he believed, as did our late Chief Justice Whitehouse, and who of us have not heard him say that he "considered haste one of the greatest enemies of justice."

It was my good fortune to try several cases with Justice BIRD presiding, and it is with pleasure that I recall the fair and impartial treatment I always received. What was true in my case was equally true in all.

The members of my County Bar came to love and respect him and this was also true of the members of the several Bars of the State. He retained the full confidence of the profession to the last.

There was one element of his character of which I desire to speak and that was his conscientiousness. I believe that no man was ever more conscientious than was the late Justice BIRD. I might enumerate instances, but do not consider it necessary. You members of the court with whom he served for ten years realized and appreciated his honesty, his conscientiousness, his ability and his worth, as did the members of the profession throughout the State.

He was a graduate of Harvard College, which conferred on him the honorary degree of Master of Arts. He was always a student and enriched his mind with something besides legal knowledge, which must have been of great enjoyment to him in his later years after his retirement from active service as a member of this court.

His manner was that of a kindly and polished gentlemen of the "old school," of whom, alas, there are now so few. One first meeting him may have received the impression that he was cold, reserved and somewhat austere, but such was not the fact. While not effusive he always greeted you with a kindly smile, a cheery word and a friendly handclasp.

> "His life was gentle; and the elements
> So mix'd in him, that Nature might stand up,
> And say to all the world, 'This was a man'."

JUDGE BENJAMIN F. CLEAVES in behalf of the York Bar paid the following tribute:

MAY IT PLEASE THE COURT:

No words which can be uttered, no ceremony which can take place, here or elsewhere, can make more green the spot in the field of our memory occupied by GEORGE E. BIRD. When he went through the opening in that dense curtain which separates the Here from the Hereafter and the curtain closed behind his mortal form, that closing was the force which opened the flood-gates of memory in those who knew him, and this Memorial Service is one of the agencies which keep them open.

As we ourselves pass the meridian of life our regret at the passing of a friend becomes keener, our sense of loss, greater. But if the friend who is gone was a real man he has left in the minds and hearts of those who knew him an ocean of recollections whose waves bring each day to our shore something of the friend we knew. In a thousand sweet ways his image and his influence confronts and keeps us as we go along; and if he lived well, our own lives are richer because for a time we marched and fought beside him.

It was my privilege, in an adjoining county, to know Judge BIRD both before and during his service on the Bench. While he was in practice I was his opponent many times. While he was a Justice of this court I was many times under his directing control. Naturally he was often obliged to set me right; but there was never a sting in his discipline, no barb in the arrow of his disagreement.

In chambers, on the Bench, among his fellow men he tempered dignity with patient kindliness. The hand which controlled was always available for helpfulness.

If I were requested to produce a word minature of Judge BIRD, I might well phrase it thus: able, dignified, just; patient beyond words; helpful in a way that left pleasant recollections; tolerant without undue yielding; always a builder and never a wrecker.

To his associates his passing brought lasting sorrow; to our State, a real loss. In this public manner I pay my tribute, as I have many times in silent retrospection.

RESPONSE FOR THE COURT

BY

CHIEF JUSTICE SCOTT WILSON

In accordance with a long-established custom, the court gladly pauses in its labors to join with the Bar in paying a merited tribute to a distinguished brother and former associate on this Bench. When the summons came for him to embark on what has been termed "Life's greatest adventure," though not unprepared, we were sensible only of the oppression that always follows the loss of one endeared by ties of family, of friendship or of close association. Today with vision undimmed by sorrow, and with clearer discernment and an adjusted perspective, though the void caused by his departure has not yet filled, we may properly review the span of his life, not so much in a spirit of sadness at his passing, but rather in grateful recognition of his great service to the profession we all love, to the community in which he lived and to the State he served with such great ability and fidelity.

Not only is the tribute, which his brethren of the Bar have so feelingly paid him, his due; but it is a fitting custom that so far as possible a reasonably accurate picture of the man and his personality and a permanent memorial of his public service be spread upon the records of this court, of which *magna pars fuit.*

The majority of our fellowmen in their coming and going, like the pebble tossed into the waters, leave but a ripple upon the surface of the sea of human life that soon disappears. Only the lives of the few leave an imprint upon society or its institutions that endures. Our brother has left behind him a record of personal and public service, performed without ostentation, that will leave its permanent impress upon the jurisprudence of our State.

There is today no regretful, "It might have been," by reason of a life cut short "ere his prime." It was permitted to him to round out the complete cycle: the preparatory training, the period of fruition, and the final, though brief, period of retirement; a full life, . . . full of years, of service, and of honors. He attained an eminence in his profession that few achieve; was beloved by his family and intimate

friends, respected by his fellowmen and will be gratefully remembered by many to whom, without display, he gave assistance in time of need.

A statistical biography means little on such occasions, except as it may in a colorless way indicate the heritage which was his, the extent and breadth of his preparatory training, the bent of his mind, his willingness to serve for other than mere personal gain, and the esteem in which he was held by his fellow citizens. Without it, however, the picture would not be complete.

GEORGE EMERSON BIRD, the forty-third Justice of this court in order of appointment, was born in Portland, September 1st, 1847, of New England stock, the son of Robert Alexander and Sarah Emerson Bird. He received his early education in the public schools of his native city, completing his preparatory course in the High School in 1865 with special honors, and in due course entered Harvard University, from which institution he was graduated in the year 1869 with the degree of Bachelor of Arts.

Following his graduation, he began his preparation for his chosen profession, entering the office of the late William H. Clifford, a son of Nathan Clifford, former Justice of the Federal Supreme Court, and was admitted to the Bar in 1872. In the same year he received from his *alma mater* the degree of Master of Arts, indicating that he did not, like so many, upon graduation from college, forsake

"the studious cloysters pale"

and the pursuit of a broader and deeper knowledge of the humanities, a love of which he continued to foster and which grew stronger with the passing years.

After his admission to the Bar, he later became associated in the practice of law with the Honorable William W. Thomas, afterward Minister to Sweden from this country, a man of strong personality, with whom he maintained a warm and intimate friendship until his death. His association with Mr. Thomas continued until 1885, when he was appointed by President Cleveland United States District Attorney for the District of Maine, which office he continued to hold and the duties of which he discharged with ability and fidelity until 1890.

In 1892, as indicating the respect and esteem in which he was held by his fellow citizens, in a city ordinarily strongly of the opposite

political faith, he was elected to the lower branch of the State Legislature, where he served on its most important committee, and proved himself an able and conscientious public servant.

After his return to private life in 1890, he continued the practice alone until 1896, when he entered into partnership with Wm. M. Bradley as the senior member of the firm of Bird & Bradley, which had a wide and lucrative clientage, and which continued until his elevation to the Bench in April, 1908, at the age of sixty years.

As a lawyer, he was a conservative and sound business advisor, a valiant defender of his clients' interests, if occasion required, and if cautious in adventuring into new fields, his thorough familiarity with the principles of the common law, made him a safe guide and sound adviser in the application of the old principles to the new conditions of modern society.

At his elevation to the Bench, he was in the full vigor of his physical and maturity of his mental powers. Above the average height, alert, erect, dignified, almost patrician in bearing, a face, in repose, indicating refinement and culture; and in action, lighting up with intellectual strength, or keen appreciation of some bit of humor or pointed wit. He was splendidly equipped by endowment, training, and experience for judicial work, . . . natural ability of a high order, a liberal education, broad and varied experience at the Bar, both in the trial of causes and as an office counsellor, a lover of books, a student of history and the law, with lofty ideals, an innate sense of justice, an abhorrence of fraud and chicanery, and with an exalted conception of the judicial duties and responsibilities. Justice BIRD brought to the Bench qualities of mind and heart that, by their very nature and his example of fidelity to his own ideals, even though concealed by a modesty of demeanor and a reticence, which at times shut out all except his most intimate friends, could not fail to leave a permanent impress upon the institutions and jurisprudence of his State. Such a personality as his does not leave its imprint in high relief, but in quiet unobtrusive ways, shapes and moulds events and men; as every wave that beats upon the rock-bound coast of his native State, as it recedes, leaves some permanent, though invisible change, behind.

For ten years he gave of his strength and talents to the work of the Bench under exacting conditions by reason of the unusual local demands upon the equity powers of the court. No more faithful, conscientious Judge ever graced the Bench of this or any other State.

Undoubtedly the close and continued application to the work finally demanded a toll, to satisfy which he was, before the end of his judicial life compelled to draw upon a diminishing reserve force. With his natural concern for others, he frequently in his later years admonished those who followed him, not to make the mistake which, no doubt, he, at last, realized he had made, of too close application to the work in chambers and of not seeking more recreation and rest from the arduous and exacting labors of judicial life.

In illustration of the exact fidelity with which he performed his duties, a rule he adopted when he entered upon his judicial labors, and religiously observed to the end, will serve as an example. The beneficent principals of equity jurisprudence and its more convenient and speedy form of relief grew out of the theory that an appeal to the conscience of the King was always open to a suitor unable to obtain redress in the courts of law. So, too, in this State the court sitting in equity is always open to the petitioner for equitable relief.

So conscientious was Judge BIRD in conforming to the spirit of this rule, that never for a moment, while in his chambers, was the outer door closed, however inconvenient the interruptions occasioned by those entering merely to pass the time of day, or for a social call, might be to him when engaged in the close mental application required in opinion work. The suitor in equity never had to knock at the door of his chambers. It was open for him to enter at all times.

At *nisi prius* he presided with dignity but with a courtesy and fairness that made him welcomed by the Bar in every county. If at times he may have seemed curt or brusque in manner, it was only an exterior mannerism, of which I doubt, if he, himself, was conscious. Never would he have intentionally or knowingly given offense or shown discourtesy to any one.

Underneath a demeanor, reticent, reserved, and at times seemingly without suggestion of the kindlier emotions, lay a heart as tender as a woman's. To give pain or cause suffering or to deprive a fellow being of his liberty often gave him more concern than any other phase of his judicial work, lest he exact more than justice and the interests of society required. The sentencing of offenders against the law was always to him a trying ordeal, often much more so than to some of the hardened offenders.

"The quality of mercy is not strained,
It droppeth as the gentle rain from heaven,

. . . . . .

"It is an attribute to God Himself,
And earthly power doth then show likest God's,
When mercy seasons justice."

If at times he displayed impatience at the delays of lawyers or of what he deemed unfair tactics in court, it was due to a natural abhorrence for all forms of subterfuge and chicanery. His love of truth and open-handed conduct in and out of court naturally reacted against such practices, and on occasions impelled him to justly condemn or openly express, by words or acts, his contempt for such methods. If, however, he became satisfied that he had acted hastily or had unjustly condemned, no one could be more anxious to make amends than he.

His charges to the jury were generally brief, but clear in defining the issues and in stating the law. If they had a fault, it was in their brevity, which is more often a virtue. If counsel sometimes felt that not enough was said to make their own contentions clear, he maintained that too much defining and refining only tend to confuse the jury, who approach an issue of facts in their own way and prefer a statement of the law in simple terms.

The pole star of his judicial life was exact justice to every man, high or low, rich or poor. To him,

"There is no virtue so truly great and Godlike as Justice."

If at times he seemed to vacillate between two courses, when the scales were trembling in the balance, it was not because of lack of strength of will or force of character, but of a desire to do absolute justice between man and man. Where there was doubt, he sometimes hesitated and his decisions were only reached after great mental travail, lest he do injustice, at which his sensitive mind revolted.

In the Law Court he was equally painstaking and diligent. His written opinions, one hundred and thirty-nine in number, found in thirteen volumes of the reports from *Gifford* v. *Workmen's Benefit Association* in the 105th Volume, Page 17 to *Harris* v. *Moses* in Vol-

ume 117, Page 391, an important case defining the rights of remaindermen in trust estates, are clearly the product of a well-trained mind and models of judicial style, and many of them of real literary merit. He studiously avoided all dicta and unusual or pedantic forms of expression. He had an excellent command of the English language, gained from his wide reading, a logical power of expression, and a clear, cogent manner of stating his premises, which he supported, when necessary, by abundant authorities, that rendered his conclusions compelling.

Not all, of course, are of equal importance, but many of them will be found among the beacon lights by which the course of those who follow after will be safely guided, and the rights and property of citizens be protected and their liberties safeguarded.

In August, 1918, having reached the age permitting his retirement from active service on the Bench, he tendered his resignation, but in 1923, under a Legislative act of that year, he was again restored to his standing as a member of this court as an Active Retired Justice, and continued to serve in that capacity until his death.

Nor was his service upon the Bench his only contribution to the public weal. Without the inducement or hope of financial reward, but only with the purpose of promoting worthy public institutions and charities, he gave of his time and the benefit of his experience and sound judgment. He was for many years one of the incorporators of the Maine Savings Bank, a trustee of the Maine Historical Society, and of the Maine General Hospital, to which institution he left in his will a bequest characteristic of his tender, considerate heart, to lighten the tedious hours of suffering of little children.

"Inasmuch as ye have done it unto the least of these, ..."

He was likewise always deeply interested in the education of the young, and retained to his death an abiding faith in a classical education as the basis of the best form of mental training for young men and women, and in general best fitted to develop the highest type of the individual. He firmly believed in the opportunities afforded by the old Academies for preparatory training, and for many years fostered and guided the interests and destinies of the old North Yarmouth Academy, located at Yarmouth, where he resided after his marriage in 1890.

He was elected to the Board of Overseers of Bowdoin College, which institution in 1909 bestowed upon him the honorary degree of Doctor of Laws in recognition of the eminence he had attained in his profession and of his judicial services. He served this institution in this capacity until his death and always evinced the greatest interest in its welfare and work.

A lover of good books, familiar with the masterpieces of literature, his own private library well selected and well thumbed, when as the result of a generous impulse of a former resident and native of the town, a new library was erected and presented to the citizens, Justice BIRD was the natural selection as the head of its Governing Board, and to him was entrusted the selection of the original list of books. His learning was never obtrusively displayed. It was, however, reflected in his written opinions and in his ordinary intercourse with his intimates.

Formal and reserved with chance acquaintances, he loved the companionship of congenial spirits. He never forced himself upon others, but to the few he admitted within the inner circle of his life, he was a most enjoyable and delightful companion. Possessed of a keen sense of humor, his mind stored with knowledge gained from wide reading, he had all the qualities of an entertaining host and a charming fireside comrade. The beautiful home life, into which we may not intrude on this occaison, speaks in a manner no pen of mine can portray of his many lovable qualities as a man.

His formal and reserved manner and innate modesty renders it difficult to do justice to the real personality that lay hidden beneath. In some respects one can only hazard a conjecture as to what lay behind the veil of his reserve, but as to his fidelity to every trust, his love of truth, his high sense of honor, his loyalty to his profession, his willingness to serve, his gentlemanly qualities and never-failing courtesy and consideration of others, the tender heart and readiness to aid in time of need, ... these and many other humane qualities he could not conceal. He unconsciously lived them every day. They were personified in every word and act.

While not a religious man in the narrow sense, he had a devout respect for all things spiritual and for the church and its work and the eternal truths on which it rests. The Bible had its place among

his companionable books. His familiarity with its literary qualities, and teachings was frequently disclosed by apt reference in his writings, and in ordinary conversation.

With

> "a mind unclouded, strong,
> A cheerful heart, a wise content
> And honored age,"

his closing years were as sunset hours, "splendid and serene," spent in the peace and quiet and loving companionship of his own fireside amid his books he loved. He had "finished the course," and "kept the faith," and when the final summons came, his spirit lingered as though loath to leave its mortal 'bode and those he loved, yet

> "soothed and sustained by an all faltering trust,"

unafraid he obeyed the call, and joined

> "The innumerable caravan that moves
> To that mysterious realm,"

where dwell so many of his former associates who had gone before.

The Resolutions of the Bar are received and adopted by the court, and ordered spread upon its records. As a further mark of respect the court will now adjourn for the day.

INDEX

AFFRAY.

Consent or agreement "to fight or use blows or force towards each other" is not an essential element of the offense of an affray. The statute provides "of two persons voluntarily or by agreement fight," etc., they are guilty of affray. Persons who of their own free will fight or exchange blows act voluntarily, and if the other elements of the offense are established, they are as guilty of affray as if the combat grew out of an agreement.

State v. *Renda and Montalto*, 451.

AGENT.

In a written contract in which is a clause that it contains all the agreements between the parties, oral representations by agents in negotiating the sale will not bind the principal, and affords no ground for the rescission of the contract or for recoupment. *The Lasker Co.* v. *Laberge*, 475.

ALIENATION OF AFFECTIONS.

Evidence of the wealth or standing of a defendant in actions for alienation of affections is admissible on the question of exemplary damages, but evidence of the amount of taxes paid by defendant is not admissible on that question.

Allard v. *La Plain*, 44.

AMENDMENT.

In equity, after the analogy of procedure in action at law, where an amendment might have been made upon seasonable objection, the cause having been tried as if an amendment had been made, the court will regard that as done which could or ought to have been done, and consider the amendment as made.

Sawyer v. *White*, 206.

See *Anne Martin's Case*, 49.

ANTE-NUPTIAL CONTRACTS.

Adequate provision must result for the spouse in ante-nuptial contracts, otherwise a gross disproportion of such adequacy may invalidate such contracts, but the test of such disproportion must be made in the light of property conditions at the time of making the contract.

As affecting ante-nuptial contracts the cardinal principles of law are well settled and universally obtain. Among such principles may be found those which

declare that adequacy in provision for the spouse must result, and that gross disposition of such adequacy may invalidate such contract.

But so far as disproportionate result may arise, in this class of contracts the test must be made in the light of property conditions at the time when the contract was made. *Rolfe* v. *Rolfe*, 82.

APPEAL.

Appeal lies only in cases of felony, from a denial of a motion for a new trial by the presiding Justice. *State* v. *Siddall*, 463.

ASSUMPTION OF RISK.

Contractual assumption of risk, and voluntary assumption of risk, are distinct. Assumption of risk is a question of fact for the jury where the evidence is conflicting. *Hatch* v. *Portland Terminal Co.*, 96.

An employee does not assume the risk resulting from his master's negligence, unless voluntarily assumed with knowledge of the danger.
Richards v. *M. C. R. R. Co.*, 347.

ATTACHMENT.

In an action against a deputy sheriff for wrongful release of an attachment, it would be a useless formality to require the plaintiff to demand goods of an officer which he knew the officer had already released.

In such cases proof of the negligent acts and the attachment of property of sufficient value to discharge the debt when sold on execution and of the amount of the judgment recovered makes out a prima facie cases and damages to the amount of the judgment, and the burden of showing facts in mitigation of damages rests on the defendant and not on the plaintiff.

In the instant case the mere fact the mortgagee, summoned as trustee in the original suit, was discharged as trustee affords no ground for concluding that the mortgage on the goods attached was valid or that the endorsement it was given to secure had become absolute.

The proceedings under Chapter 162, Public Laws, 1917, bear little analogy to those under the ordinary trustee or garnishment process. Under this statute the goods attached are in the hands of the principal defendant and mortgagor, while under the ordinary trustee process the property sought to be attached is alleged to be in the hands of the trustee.

If the attaching creditor loses his attachment against the goods in the hands of the mortgagor, there is no ground on which the case can proceed against the

mortgagee; and a disclosure of the mortgagee's interest in property already released from attachment and the lien thereby acquired lost could avail the creditor nothing under this statute. The discharge of the mortgagee as trustee in the original action followed the release of the attachment as a matter of course and has no significance on the question of whether the mortgage was a valid one or whether anything was due under it. *Isenman* v. *Burnell*, 57.

AUTOMOBILES.

The duties of a motorist approaching the rear of a stationary street car are regulated by statute. If the car has to stop to land or take on passengers, he must bring it (automobile) to a full stop.

But when the automobile is approaching to meet a street car, the statute does not purport to apply. In such case the mutual rights and duties of the parties depend upon the common law.

By the common law the motorist and pedestrian must each exercise due care. But the due care rule demands of the motorist greater vigilance than is required of a pedestrian. The care to be exercised by the motorist must be commensurate with the danger arising from lack of it.

No man has a right to operate an automobile through a street blindfolded. When his vision is temporarily destroyed (as by a glaring light) it is his duty to stop his car.

A pedestrian about to cross a street or pass from a street car to the curbstone is not, as a matter of law, bound to look and listen. But if the road is a city or village street, having considerable automobile traffic, failure to look for approaching vehicles may be strong evidence of negligence.

A pedestrian does his full duty if, before crossing a street, he or she looks for approaching cars and waits until it reasonably appears that a prompt crossing can be safely affected, if approaching automobiles are lawfully controlled. Failure to anticipate negligence on the part of the driver of a motor vehicle does not render the pedestrian negligent as a matter of law.

The law does not expect of a child an adult's caution. But it does require of children that degree of care which ordinarily prudent children of their age and experience are accustomed to use under similar circumstances. A child of eight years accompanied by her mother cannot ordinarily be charged with contributory negligence, though she fails to look for approaching automobiles, if the mother assumes to direct, and does direct, the child where and when to cross the street.

In the instant case the jury were justified in finding (1) that the defendant was negligent, because when blinded by a glaring light he did not stop his car, nor attempt to do so, but merely put the car in neutral, and because he failed to exercise that degree of care required of a motorist in passing a stationary street car; (2) that the child who was injured was not guilty of contributory negligence; because in attempting to cross the street, she acted under her mother's

immediate direction, and (3) that the mother was not guilty of contributory negligence, because before directing her child to make the crossing, she waited until it reasonably appeared that the street could be safely crossed, if approaching automobiles were lawfully controlled.

Day, Pro Ami v. *Cunningham*, 328.

AUTOMOBILE—LIABILITY OF OWNERSHIP.

No liability for damages arises from mere ownership of a negligently driven automobile. A parent is not liable for the negligent operation of an automobile by a minor unless such minior is acting in the service of the parent who must have the right of control. *Fuller* v. *Metcalf*, 77.

BAILMENT.

In the case of a car, negligently driven by a bailee, the owner is not responsible for damage, even though he is riding in the car, because the right of control has been temporarily surrendered to the bailee. *Fuller* v. *Metcalf*, 77.

BANKRUPTCY.

The liability assumed by sureties upon a bond given by the principal for the purpose of vacating an attachment of property in an action against the principal is not affected by bankruptcy of the principal.

In the instant case the effect of the bankruptcy was to discharge the defendant from further liability for the debt, but in no way affected the liability which was assumed by the sureties upon the bond.

The extent of that liability depends upon the amount which should be determined by a judgment which would declare the extent of that liability.

The plaintiff is entitled to judgment for the full amount of the debt, with interest from the date of the writ, but with perpetual stay of execution upon the judgment. *Dunham Bros. Co.* v. *Colp*, 211.

BASTARDY.

It is error for a presiding Justice in a bastardy proceeding to direct a verdict for respondent on the specific ground that complainant had not shown "constancy in her accusation," the sufficiency of the evidence being a question of fact for the Jury. *Everett, Compl't* v. *Allen*, 55.

A release by a minor complaint, standing alone, is not a bar to an action under Chap. 102, R. S., to compel the father of the illegitimate child to contribute to its support and maintenance unless it appears that the minor complainant was

represented by a next friend, and that such settlement was approved by the court, or affirmed by an entry or judgment.

In the instant case by statute in force when the accusation of July 27, 1912 was made the Trustees of Juvenile Institutions had, and now have, all the powers of a guardian as to the person, property, earnings and education of a girl committed to their charge, during the term of her commitment, and all the powers which parents have over their children. As guardian they may appear for and represent the minor in all legal proceedings unless another is appointed for that purpose as guardian or next friend, and may compound and give discharges of the minor's dues on such terms as the Judge of Probate authorizes; having the authority of a parent, the board can act as next friend.

The present record is insufficient to enable the court to pass upon the rights of the parties advisedly. It contains no statement of the proceedings in court upon the accusation of July 27, 1912, nor of the disposition of that case. These are material facts which the court cannot supply.

The statute contemplates that the Justice presiding at nisi prius, not the Law Court, shall render or refuse judgment of filiation; and if entered, fix the amount of payments by defendant, and the amounts of the bonds given to plaintiff and to the town liable for the maintenance of the child,and approve the sureties thereon. *Harding, Complainant* v. *Skolfield*, 438.

BILLS AND NOTES.

A corporation note signed by its treasurer in behalf of the corporation payable to himself does not carry a presumption of authority to use it in payment of his own debt; the authority to so use it must be shown as a part of plaintiff's prima facie case.

The liability of a drawer of a check is conditional upon presentment and dishonor. There can be no recovery against him until nor unless this condition is satisfied or waived.

Omission to file an affidavit denying signature and execution of note sued, is a waiver of proof of signature and also of authority to sign in behalf of the corporate maker. But, in case of a note signed by the treasurer of a corporation and made payable to himself individually, such omission does not waive proof of his authority to use the note to pay his own debt.

Regularity with the meaning of the Negotiable Instruments Act (Section 54) cannot be predicated of a note whereof the payee is, in a trust or quasi trust capacity, the maker. *Gilman* v. *F. O. Bailey Carriage Co., Inc.*, 108.

See *Lawrence Bank Commissioner* v. *Lincoln County Trust Company*, 150.

See *Leiberman et al.* v. *S. D. Warren Co.*, 392.

See *Megunticook National Bank* v. *Knowlton Bros.*, 480.

See *Holston et als.* v. *Haley*, 485.

BOND.

BRIEF STATEMENTS.

BROKER.

BURDEN OF EVIDENCE.

BURDEN OF PROOF.

CARETAKER.

In interstate shipments the rights of the caretaker are determined by the Interstate Commerce Act as amended by the Hepburn Act of 1906.

It is against public policy for a common carrier to exempt itself from liability for its negligence in case of a passenger for hire.

The transportation of caretakers with live stock and perishable shipments is a practice of long standing, and so-called caretaker's "free passes" are authorized in the Federal Act.

The Federal Supreme Court, however, has interpreted the words "free pass" in this connection to mean not free in the ordinary sense, but in fact involves transportation for hire under a contract implied in the contract of shipment.

The Federal Act prohibits all other passes, except "free passes" described by its terms and which are not free in the popular sense. Such a pass as a "gratuitous free pass" is not authorized by the Act. *Miller* v. *M. C. R. R. Co.*, 338.

CARRIERS.

The carrier's liability for personal injury must be determined by the Federal statute if both employer and employee were engaged in interstate transportation. Negligence under the Federal statute is determined under the rule of the common law. Contributory negligence and assumption of risk are not an issue under our workmen's compensation act, but where the Federal statute controls assumption of risk may be an issue, except where the negligence of a fellow servant caused the injury, or, unless the injury was caused by the violation of some statute enacted to promote the safety of employees.

Contractual assumption of risk, and voluntary assumption of risk, are distinct.

Assumption of risk is a question of fact for the jury where the evidence is conflicting. *Hatch* v. *Portland Terminal Co.*, 96.

In the transportation of live stock the carrier is bound to maintain, from point of shipment to point of destination, cars suitable for reasonably safe conveyance of its live freight.

In the case at bar the jury found that defendant, or its agents, were negligent in their handling of the horses and car while the car was at Northern Maine Junction in this State, and the evidence justifies that finding.

The jury heard the evidence and it is assumed that they were properly instructed as to the element of negligence. It is agreed that the cost of the horse found dead in the car at the Junction was not included in the verdict, but the jury must have included in the verdict the cost of the mare found lying on the floor of the car in a crippled condition. The evidence seems to justify a finding that the crippling of the mare was due to her "condition," as the word is used in the

CERTIORARI.

CHARGE OF PRESIDING JUSTICE.

CHECKS.

CONDEMNATION PROCEEDINGS.

CONDONATION.

CONSIDERATION.

There is also evidence in the case from which the jury may have been warranted in finding, in confirmation of the acceptance of Mr. Osgood's offer, that officers of the plaintiff corporation with the knowledge of Mr. Osgood during his lifetime and with the knowledge of the directors of the plaintiff corporation and their sanction as a Board, took steps toward carrying out the purposes for which the proposed gift was to be made, though the authority of said officers to incur any expense in behalf of the corporation during Mr. Osgood's lifetime may be lacking. *Central Maine General Hospital* v. *Carter et als., Exr's,* 191.

CONSTITUTIONALTY OF STATUTE.

See *State* v. *Webber,* 319.

CONTINGENT INTEREST.

Under a will containing the following language, "the whole of my property and estate to be paid to and divided equally between my two children, if living, at or after the time previously herein specified, or if not then living to their legal heirs or guardians," the interest of each of such two children is a contingent interest only and not devisable, and upon the death of such two children before the termination by death of a certain life estate ("the time previously herein specified") created under the provisions of the will, their legal heirs take the remainder of the estate as devisees, neither spouse of two such children being a legal heir of his testator. *Trott et als.* v. *Kendall et als.,* 85.

CONTINUANCE.

Granting or refusal to grant a continuance is a matter of discretion, and in the absence of anything tending to show that this discretion was not properly exercised it is not subject to exceptions. *Cunningham* v. *Long,* 494.

CONTRACT.

If parties enter into an express oral contract, the terms of which are mutually understood and assented to, with an agreement that a written contract shall be drafted which is viewed only as a convenient memorial, the oral contract is binding upon the parties, though the written draft never be signed.

On the contrary, if the parties continue only in negotiation, contemplating the drafting of a written contract which is viewed as a consummation of their negotiations, if the written contract is not executed, no express contract exists. *Clements* v. *Murphy,* 105.

See *Blackard* v. *National Biscuit Co.,* 201.

CONTRIBUTORY NEGLIGENCE.

See *Negligence.*

CORPORATION NOTE.

A corporation note signed by its treasurer in behalf of the corporation payable to himself does not carry a presumption of authority to use it in payment of his own debt; the authority to so use it must be shown as a part of plaintiff's prima facie case. *Gilman* v. *F. O. Bailey Carriage Co., Inc.*, 108.

COUNSEL—IMPROPER CONDUCT OF.

Giving a juror a ride by counsel in the case while it is on trial, held to be improper conduct and entitled a party to the action to have a verdict set aside.
Bean v. *Camden Lumber & Fuel Co.*, 260.

COURT RULES.

Supreme Court XXVIII., which provides for trial at return term, when notice demanding such trial has been given, like other Supreme Court Rules, when properly established, have the force of law and are binding upon the court as well as upon the litigating parties.

The party giving such notice thereby gained some legal right, and the opposite party has the burden of showing sufficient grounds for a continuance.
Cunningham v. *Long*, 494.

CRIMINAL RECOGNIZANCE.

In this State an action of debt as well as scire facias lies upon a criminal recognizance. The provisions of the R. S., Chap. 86, Sec. 88 apply to writs of scire facias. *State* v. *Cassidy*, 217.

CROP MORTGAGE.

See *Corinna Seed Potato Farms, Inc.* v. *Corinna Trust Co.*, 131.

DAMAGES.

Evidence of the wealth or standing of a defendant in actions for alienation of affections is admissible on the question of exemplary damages, but evidence of the amount of taxes paid by defendant is not admissible on that question.
Allard v. *La Plain*, 44.

DECEIT.

In order to sustain an action of deceit it must appear that the representations alleged to be false and to constitute deceit must be false; known to be false by the party making them; made with an intention and purpose to defraud, and that the other party relied and acted upon such false and fraudulent representations and suffered damage. *Prince et al.* v. *Brackett, Shaw & Lunt,* 31.

DEMURRER.

A general demurrer will not sacrifice substance to form. Equity looks with a charitable eye, and sees defects in the bill in point of form, only when they are especially set out. *Edwards et als.* v. *Seal,* 38.

A decree in equity overruling or sustaining a demurrer and nothing more, is interlocutory and cannot be brought to the Law Court until after final decree. But a decree sustaining a demurrer and dismissing the bill is final.
Masters v. *Van Wart,* 402.

DEPOSITS IN BANK.

See *Lawrence, Bank Commissioner* v. *Lincoln County Trust Company,* 150.

EMINENT DOMAIN.

Whether public exigencies require the condemnation of land for public purposes, is a legislative and not a judicial question. The power of such determination may be delegated to a private corporation. When such power so delegated by the Legislature is exercised in good faith and for public purposes, the court has no authority to intervene.

Whether the purpose of condemnation is public or private is a judicial question. The Legislature cannot constitutionally authorize the condemnation of land for private purposes. But if a corporate charter purports to authorize the taking of land for both public and private purposes, such charter is not for that reason unconstitutional, if the purposes are separable.

When a corporation exercising the right of eminent domain, i. e., condemning land refers to its charter for the purposes of condemantion, and it appears that the charter includes and purports to authorize taking land for both public and separable private uses the condemnation will be sustained, the presumption being that the taking is for constitutional and legal purposes only. Even if the record of condemnation literally construed, comprehends and includes private as well as public uses, the bad may be rejected and the good may stand.

In proper cases an injunction will issue to prevent the sale or use of electric current for unauthorized purposes.

Whether a power transmission line authorized by legislative act and carrying a current, the use of which all are legally entitled to share on equal terms, is a public or private use need not at this time and in this case be determined.

Smith et als. v. *Western Maine Power Co.*, 238.

EQUITY.

An appeal in equity, like a general motion for a new trial in an action at law, carries with it necessarily all the evidence in the case. Its absence is ground for dismissal. *Sawyer* v. *White*, 206.

A final decree is one which fully decides and disposes of the whole case leaving further questions for the future consideration and judgment of the court.

Sawyer v. *White*, 206.

A decree in equity overruling or sustaining a demurrer and nothing more, is interlocutory and cannot be brought to the Law Court until after final decree. But a decree sustaining a demurrer and dismissing the bill is final.

Where a defendant has agreed to convey property upon payment of certain notes by the plaintiff, and such notes have not been paid, no fraud being shown, the mere fact that the defendant does not own the property agreed to be conveyed does not entitle the plaintiff to a rescission. A contract whereby one agrees to convey, in the future, property which at the time of making the contract he does not own is neither illegal, reprehensible nor unusual.

When, however, fraud and false representations inducing the making of the contract, are alleged in the bill and proved or admitted by demurrer, the plaintiff is entitled to have the contract rescinded and his notes returned. Courts of Law have no machinery to accomplish this result. There is therefore, no plain, adequate and complete remedy at law.

Moreover in fraud cases, subject to certain well established exceptions, equity has jurisdiction irrespective of whether the injured party has a remedy at law, or whether such remedy will be effective or whether the loss for want of such equitable remedy is irreparable. Generally speaking, when fraud is shown, legal and equitable remedies are concurrent.

In a bill in equity for rescission of a contract for fraud, previous restitution or tender on the part of the plaintiff, need not be shown. An offer contained in the bill is sufficient.

A bill in equity is not like an action at law, brought on the footing of a rescission previously accomplished. Its theory is that the recission is not complete and it asks the aid of the court to make it so. *Masters* v. *Van Wart*, 402.

EVIDENCE.

EXCEPTIONS.

EX VI TERMINI.

FALSE REPRESENTATIONS.

FINDINGS OF A JURY.

FINDINGS OF A SINGLE JUSTICE.

FORCIBLE ENTRY AND DETAINER.

FRAUD.

A deed conveying an interest in real estate, which was procured by concealment and misrepresentation constituting fraud upon the grantor, may be declared null and void in a bill in equity and a reconveyance decreed.

Rents and profits accrued subsequent to such conveyance may also be recovered.

Redman v. *Achorn et al.*, 183.

FREE PASS.

See *Miller* v. *M. C. R. R.*, 338.

GIFT.

See *Central Maine General Hospital* v. *Carter et als., Exr's*, 191.

GUARDIANSHIP.

The question as to whether a person should be placed under guardianship, and the selection of a person as such guardian, are within the sound judgment and discretion of the Justice hearing the case, and his judgment of the facts, and necessity and propriety of his conclusions, are not subject to exception.

Fickett, Applt., 430.

HIGHWAY OR ROAD—RULE OF.

A violation of the statutory rule of the road, which, at crossings, gives the right of way to vehicles approaching from the right, is prima facie evidence of negligence. Lack of knowledge of an intersecting road on the part of a driver does not justify him in driving as though there were no intersecting roads. The negligence of the driver is not imputable to a passenger.

A motorist approaching to enter upon a highway crossing is not under ordinary circumstances required to stop. To listen may avail nothing. But he must look. There are vastly more automobiles than trains and some at least are less noisy than trains. For this reason the duty of looking upon entering a highway intersection is even more imperative than at a railroad crossing.

The collision which gave rise to these actions was due to the joint negligence of the defendant and the plaintiff's driver. Therefore in the actions brought by the plaintiff as owner of the damaged car, and as administrator of the driver who was killed by the accident, judgment must be rendered for the defendant. But Blanche Small, the other plaintiff, was a passenger, to whom the negligence

of the driver is not imputable, and not being guilty of contributory negligence, is entitled to judgment for twelve hundred dollars.

Dansky v. *Kotimaki*, 72.

INDICTMENT.

In an indictment for an attempt to commit a statutory offense, while it must appear that the overt acts were done with an intent to commit the offense named, the language of the indictment, though not approved as to form, alleging that the acts were done in pursuance of an attempt to commit the offense ex vi termini implies that they were done with the intent to commit the offense.

In the instant case in the indictment the attempt was charged in general terms followed by a description of the overt acts constituting the attempt, according to the usual form of charging such offenses; but it did not set forth in express terms that the overt acts were done with intent to commit the offense, but alleged that they were done "in attempting to commit the offense."

State v. *Jones*, 42.

INDORSERS.

Under the common law and the Uniform Negotiable Instrument Act of this State, indorsers are prima facie liable in the order in which their names appear on the instrument, but evidence is admissible to show that, as between themselves, they have agreed otherwise.

It is not necessary that an express agreement for a joint liability be proven. An implied agreement may satisfactorily appear from the circumstances under which and the purposes for which the notes were given and from the acts of the parties. *Holston* v. *Haley*, 485.

INSURANCE.

Where the defendant is insured, the disclosure of such fact, in defense, as a matter of law, is immaterial, and where the court properly instructs the jury to disregard the evidence of such fact, the effect of the influence that might arise therefrom, is removed. *Goodie* v. *Price*, 36.

In an action upon fire insurance policy to recover for loss of property, the requirement of proof of loss is for the sole benefit of the insurer and, whether imposed by contract or statute, it may be waived in part or in whole by the company for whose benefit it is imposed.

When there is no express waiver, it is for the jury to determine whether, from the acts relied upon and proved, the inference could be properly drawn, either that

there was an intention upon the part of the insurer to waive its right to have a proof of loss furnished by the insured, or that the denial of liability, for another cause, was of such a character or made under such circumstances as to reasonably induce a belief upon the part of the insured that the furnishing of a proof of loss would be a useless formality.

In this case the denial of liability was not for failure to furnish proof of loss, but for another cause, namely, that the loss was occasioned by wind, which was not within the terms of the policy. It has been very generally held that if an insurance company denies its liability upon other grounds, and thereby causes the insured to believe that a compliance with the condition to furnish proofs of loss would be unavailing, and but a useless formality, and he for that reason neglects to comply with such condition, it will be considered as equivalent to a waiver.

It is settled by a controlling weight of authority that an unqualified denial by the insurance company of all liability under the policy renders inoperative a provision therein for an arbitration as to the amount of the loss as a condition precedent to a right of action to recover such loss.

Jewett v. *Quincy Mutual Fire Ins. Co.*, 234.

A contract of insurance is to be construed in accordance with the intention of the parties, which is to be ascertained from an examination of the whole instrument.

As a general rule the use of a prohibited article, or the keeping and using of it, must be permanent or habitual in order to violate a policy prohibition against it.

In the instant case, threshing grain, cutting ensilage, and pressing hay being of common knowledge seasonal operations, it must be assumed that that fact was known to the assured as well as to the insurer at the time the contract was made. The permanency of the location and use of gasoline engines in threshing, ensilage cutting and hay pressing contemplated by the parties to this contract, therefore, was only that required to complete the season's work, and the location and use of the gasoline engine appearing to have been in the course of the hay pressing operation for that season, the policy prohibition was violated.

The fact that the engine was located and used in the barn by the hay pressers without knowledge or consent of the assured or his conservator is immaterial. When control of the premises was committed to the hay pressers the assured became responsible for their acts in violation of the policy.

Swift, Conservator v. *Patrons' Androscoggin Mutual Fire Ins. Co.*, 255.

INSURANCE POLICY—LIEN ON.

In order to establish a lien upon an insurance policy or its proceeds under R. S., Chap. 53, Sec. 69, a mortgagee must show conformity to the statute which creates the lien. *Pittsfield National Bank* v. *Dyer et al.*, 466.

INTOXICATING LIQUORS.

INTOXICATION.

INVITOR—INVITEE.

JEOPARDY.

A plea of former jeopardy should be met by the State by a demurrer or replication, in the first instance raising a question of law, and in the latter an issue of fact which must be submitted to a jury.

The instant case does not show the nature of the reply by the State to the respondent's plea or whether an issue of fact or law was presented, nor whether upon the overruling of the motion any or what judgment was entered. Exceptions will be sustained only when it appears from the exceptions themselves that the court mistook the law.

A plea of former jeopardy being in the nature of a dilatory plea, the case should have gone to final judgment before being brought to the Law Court on exceptions. The respondent, however, having brought his exceptions to the Law Court without pleading over, must be deemed to have waived his right to answer further, and the judgment here is final. *State* v. *Cohen*, 457.

JURISDICTION.

Want of jurisdiction apparent on the face of the record can be raised by motion to dismiss at any stage of the proceedings, and cannot be waived.
Miller v. *Wiseman*, 4.

JURORS.

The language "and the persons whose names are in the box are liable to be drawn and to serve on any jury, at any court for which they are drawn, once in every three years and not oftener, except as herein provided" in Sec. 4, Chap. 111, R. S., creates an exemption and not a disqualification, and such exemption is a personal privilege which may be asserted or waived by the juror. It furnishes no ground of challenge to the parties. *State* v. *Albert*, 325.

JURY.

See *Luce* v. *Corinna Seed Potato Farms, Inc.*, 386.

LANDLORD AND TENANT.

At common law where a tenancy at sufferance existed, the tenant had no right of possession as against the landlord, and the landlord might enter, at any time, using such force as was reasonably necessary and expel such tenant.

The authorizing of the civil process of forcible entry and detainer following the termination of a tenancy at will by written notice did not take away the land-

MALA PROHIBITA.

In certain statutory crimes the motive and scienter, unless the act is made mala prohibita because negligently done, are immaterial on questions of guilt.

State v. *Morton*, 9.

MALICIOUS PROSECUTION.

In an action for malicious prosecution, it is necessary to prove both malice and lack of probable cause. The mere fact that a plaintiff fails in an action will not alone furnish a ground for action. If the plaintiff acts upon the advice of an attorney, it may be sufficient to satisfy a jury that probable cause existed, but if he fails to state to his attorney fully and truthfully all the facts, a jury might well find that probable cause was lacking.

In the instant case, it was purely a question of veracity between witnesses. If the jury believed the plaintiff and his witnesses, the defendant, in the original suit, did not fully and truthfully state the facts to his attorney who brought the action, and the jury may have properly found under instructions, to which no exceptions were taken, that probable cause was lacking, and at least legal malice, if not actual malice, was present. *Milner* v. *Hare*, 460.

MANDAMUS.

Exceptions will not lie to a refusal to issue a writ of mandamus to compel the Public Utilities Commission to issue the certificate provided for in Sec. 4 of Chap. 211, Public Laws, 1923, unless it appears that the decree of the Justice denying the writ was based on some erroneous ruling of law or there was an abuse of judicial discretion.

In view of the well recognized control over highways by the state and the possible menace to public safety and the destruction of the highways by the operation over them of heavy high-powered motor busses, the authority of the Legislature to prohibit such operation cannot be questioned.

In view of the history of this class of legislation and its obvious purpose, the certificate permitting such operation cannot be viewed as intended solely for the purposes of registration and its issuance a mere ministerial act. If such had been the intention of the Legislature, it is inconceivable that the statute authorizing its issue could have been couched in the terms in which we find it. If more was intended, then a large measure of discretion must be involved in the issuance of such certificates.

No abuse of discretion appearing either on the part of the Public Utilities Commission in refusing to issue a certificate or of the court below in refusing to issue the peremptory writ of mandamus, or any erroneous ruling of law on which the court's decree was based, the exceptions must be overruled.

Maine Motor Coaches, Inc. v. *Public Utilities Commission*, 63.

In mandamus proceedings the Law Court has no authority under the statute for deciding disputed facts, nor to send a cause back to be heard further. Not, properly, until a peremptory writ has been ordered by a single Justice and a final decision by him taken to the Law Court, has the full court jurisdiction.
Libby et al. v. *York Shore Water Co.*, 144.

MANSLAUGHTER.

When the death of another is caused unintentionally by some unlawful act not amounting to a felony nor likely to endanger life, or while doing some lawful act in an unlawful manner, it is involuntary manslaughter.

Every act of gross carelessness, even in the performance of what is lawful, and a fortiori of what is not lawful, whereby death ensues, is indictable either as murder or manslaughter.

There is little distinction except in degree between a will to do wrong and an indifference whether wrong is done or not.

In the instant case whether the respondent's act be viewed as assault and battery or as gross and culpable negligence, or both, the essential elements of the crime of manslaughter are present. *State* v. *Pond*, 453.

MASTER AND SERVANT.

The duty owed by a railroad corporation and its servants to the employees of a terminal corporation is to use due care to avoid injuring him. It is under no obligation to warn him of latent perils or as to the safety of his working place.
Haaland v. *M. C. R. R. Co.*, 52.

When a workman contracts to perform dangerous work, or to work in a dangerous place, he contracts with reference to that danger and assumes the open and obvious risks incident to the work, or as sometimes expressed, such dangers as are normally and necessarily incident to the occupation. This is a contractual assumption of risk.

With reference to risks and dangers covered by the contract, the employer owes the employee no duty, and so cannot be held guilty of negligence.

A primary duty of a railroad company is to use due care in providing a reasonably safe place and reasonably safe appliances for the use of its employees. It does not undertake to provide a reasonably safe place and reasonably safe appliances but it does undertake to use due care to do so, and that is the measure of its duty.

An employee has a right to assume that the railroad company will perform its duty, and his contractual assumption of risk does not cover risks arising from his employer's negligence in failing to perform its duty.

There may be a voluntary assumption, by the workman, of risks arising from the failure of the employer to perform his duty, and this occurs when the workman becomes aware of them, or they are so plainly to be seen that he must be presumed to have known and appreciated them.

Negligence of the employer being established, voluntary assumption of the risks arising therefrom must be proved by the defendant, if he would avoid the consequences of his negligence.

In the instant case there is no claim of negligence, in not giving warning of danger. The danger was obvious. There is no duty to warn or instruct a competent and experienced employee as to obvious dangers connected with his work.

Without attempting a statement, comprehensive of all cases, involving other elements and conditions, it must be held that, as to car-loading, the contract of employment of a brakeman on a freight train includes the assumption of all obvious, unconcealed dangers incident to operation of trains of cars loaded in accordance with rules of the railroad company designed to accomplish efficient transportation with reasonable safety for the employees, the property in transit and the roadbed and equipment in use.

The plaintiff's lack of observation of surrounding conditions plainly observable to a man of his age, intelligence and adequate experience cannot establish or enlarge the master's liability.

The risk which resulted in the plaintiff's injury was assumed in the contract of employment; the defendant was not negligent in accepting for transportation the car of lumber on which the accident occurred, loaded in conformity to its rules.

But, whether the decision is based upon a contractual assumption of risk, or upon a voluntary assumption of a risk caused by negligence in accepting for transportation the car of lumber piled as shown in this case, the verdict is clearly wrong. *Morey* v. *Maine Central Railroad Company*, 272.

An employee does not assume the risk resulting from his master's negligence, unless voluntarily assumed with knowledge of the danger.

In the instant case the employee may have assumed the apparent danger of the rails falling down from the ordinary starting and stopping of the train, but not from sudden and unusual stopping without warning to the employees.

This court cannot adopt an arbitrary standard for the loss of a foot or other member, to which all jury verdicts must accord. The matter of damages is for the jury. The damages in this case are not so excessively large that this court is warranted in disturbing them. The amounts awarded under Workmen's Compensation Acts afford no criterion for damages in ordinary negligence cases. *Richards* v. *M. C. R. R. Co.*, 347.

MILK.

Milk may be sold in other vessels than bottles containing quarts, pints, and half pints, if sealed and stamped according to law, bottles of other sizes being included within the general term of "other vessels" as used in the statute.

While quart, pint, and half pint bottles may be sealed by apothecaries' liquid measure, having as its unit the fluid ounce, the sealing of all other vessels must be according to their cubical contents; and while the cubical content may be determined by the application of the apothecaries' liquid measure, as the United States fluid ounce is readily transposable into wine measure based on cubical content, every other vessel, except bottles of the sizes above mentioned, must be sealed and stamped according to their exact content, unless the State Sealer of Weights and Measures has established a tolerance in such cases, and in the units of wine measure, viz.: gills, pints, quarts, and gallons, or fractional parts thereof. In the instant case if the petitioner's bottles contain ten ounces, they may be stamped as containing two and one half gills.

Old Tavern Farm, Inc. v. *Fickett*, 123.

MINOR.

A parent is not liable for the negligent operation of an automobile by a minor unless such minor is acting in the service of the parent who must have the right of control. *Fuller* v. *Metcalf*, 77.

The question as to whether a minor is chargeable with negligence is one of fact for the jury, except in case of a child of very tender years when it may be for the court. *Hasty* v. *Cumberland County P. & L. Co.*, 229.

The law does not expect of a child an adult's caution. But it does require of children that degree of care which ordinarily prudent children of their age and experience are accustomed to use under similar circumstances. A child of eight years accompanied by her mother cannot ordinarily be charged with contributory negligence, though she fails to look for approaching automobiles, if the mother assumes to direct, and does direct, the child where and when to cross the street. *Day, Pro Ami* v. *Cunningham*, 328.

The plaintiff, Jasper M. Easler, was of record twelve years of age, and of the usual intelligence of children of his age. He was bound, therefore, to use only that degree of care which ordinarily prudent children of that age and like intelligence are accustomed to use under like circumstances.

Easler v. *Downie Amusement Co., Inc.*, 334.

MORTGAGE.

A mortgage of chattels said to have a potential existence, as a crop to be grown by the mortgagor, stating the season when such crop is to be grown, and definitely

But parents or custodians are holden to the exercises of reasonable care only, and what is reasonable care depends upon the facts and circumstances in any given case.

In the instant cases the question of contributory negligence on the part of the mother of the minor having been passed upon by the jury, is one of the elements of fact, in reaching their verdict for the plaintiff, and it not appearing that the jury manifestly erred in this or other respects, the motion in each case must be overruled. *Hasty* v. *Cumberland County P. & L. Co.*, 229.

An employee does not assume the risk resulting from his master's negligence, unless voluntarily assumed with knowledge of the danger.

Richards v. *M. C. R. R. Co.*, 347.

In the instant case the jury were justified in finding (1) that the defendant was negligent, because when blinded by a glaring light he did not stop his car, nor attempt to do so, but merely put the car in neutral, and because he failed to exercise that degree of care required of a motorist in passing a stationary street car; (2) that the child who was injured was not guilty of contributory negligence, because in attempting to cross the street, she acted under her mother's immediate direction, and (3) that the mother was not guilty of contributory negligence, because before directing her child to make the crossing, she waited until it reasonably appeared that the street could be safely crossed, if approaching automobiles were lawfully controlled.

Day, Pro Ami v. *Cunningham*, 328.

Obstructions to view should admonish the traveler to exercise greater vigilance and caution in approaching a railway crossing, and emphasizes the importance of giving signals by bell and whistle, but they do not at country crossings require a railroad company to stop its trains, nor reduce their ordinary and reasonable speed.

In the instant case in running its train at forty miles an hour at the time and place of the accident, the defendant was doing no more than its duty to its passengers and no less than its duty to the plaintiff's intestate, a traveler upon the highway.

No official mandate being shown requiring the crossing to be guarded, the absence of flagman or automatic signal does not, under the circumstances of this case, prove negligence.

The presiding Justice properly excluded testimony as to the extent and limits of unobstructed vision from a point in the highway opposite the side of the track from which the truck approached it.

Henry, Admr. v. *Boston & Maine R. R.*, 366.

NEGLIGENCE—CONTRIBUTORY.

A plaintiff struck and injured by a railroad train while standing between or upon the tracks, or so near thereto as to be in reach of the train's ordinary and

NEGOTIABLE INSTRUMENT ACT.

NEW CAUSE OF ACTION.

New counts are not regarded as for a new cause of action when the plaintiff in all the counts attempts to assert rights and enforce claims growing out of the same transgression, act, agreement or contract, however great may be the difference in the form of liability as contained in the new counts from that stated in the original counts. *Mills* v. *Richardson*, 12.

OMITTED CHILD.

A proceeding for partition under R. S., Chap. 93, is appropriate for determining the status of an alleged "omitted child" in a will. *Norwood* v. *Packard*, 219.

PARENTS.

The parents or legal custodians of a child incapable of exercising care for its own safety, must exercise reasonable care for its protection, and the negligence of the parent or custodian is imputable to the child who suffers thereby.

If the parent or legal custodian were negligent, the child cannot recover for an injury unless at the time of the injury he was in the exercise of that degree of care which would be required of an adult under the circumstances.

But parents or custodians are holden to the exercise of reasonable care only, and what is reasonable care depends upon the facts and circumstances in any given case. *Hasty* v. *Cumberland County P. & L. Co.*, 229.

PARTNERSHIP.

One partner in a mercantile partnership has no authority to use the name of the firm, out of the scope of the partnership business, as accommodation indorser upon another's note, without the consent or subsequent ratification of the other partners. *Megunticook National Bank* v. *Knowlton Bros.*, 480.

The members not in fact consenting to, or having knowledge of the indorsement are unaffected by any inference deducible from the face of the note or the representations of any other member, unless the plaintiff is a bona fide holder. *Megunticook National Bank* v. *Knowlton Bros.*, 480.

When the indorsee purchases the note in good faith, for an adequate consideration, before maturity, without knowledge of any circumstances affecting its validity, the firm will be liable therefor. *Megunticook National Bank* v. *Knowlton Bros.*, 480.

PARTITION.

PER CAPITA.

PER STIRPES.

PLEADING.

The rule of pleading and evidence inserted in Chapter 116, Public Laws, 1925, that "in any prosecution under this Section, it shall not be incumbent on the State to allege or prove that the respondent did not possess such a permit," is unconstitutional.

A statute may be, however, in part constitutional and in part unconstitutional, and that part of Chapter 116 which defines the offense and prescribes the penalty is valid.

In the instant case the complaint or indictment must negative the possession of a permit, and proof beyond the attendant presumption is not required of the Government to establish a prima facie case.

The respondent takes nothing by his exception to the overruling of the motion in arrest of judgment. The complaint under which the respondent was convicted, fully and accurately alleged that he did not possess a permit issued as prescribed by the statute. *State* v. *Webber*, 319.

The State is not confined in its proof to the date alleged in the indictment, but may offer proof of the commission of the alleged offense on any date within the period of limitation at trial on motion.

Proof of a different date from that alleged in the indictment, resulting in a surprise to the respondent, may be sufficient ground for a continuance, which must, of course, be raised at trial on motion. *State* v. *Mc Nair*, 358.

Where an affidavit is filed, requiring proof of signature or authorization, a possessor of a negotiable instrument is not prima facie a holder in due course within the meaning of the Negotiable Instrument Act. He must prove the signature or the authorization on which his status as a holder depends.
Lieberman et al. v. *S. D. Warren Co.*, 392.

A plea of former jeopardy should be met by the State by a demurrer or replication, in the first instance raising a question of law, and in the latter an issue of fact which must be submitted to a jury. *State* v. *Cohen*, 457.

POOR CONVICTS.

The statute providing for the release of poor convicts, R. S., Chap. 137, Sec. 50, when the convict shall have tendered his promissory note for the amount due for fines or costs, accompanied by a written schedule of all his property, does not grant him release of right, but the release is a matter of discretion.
Violette v. *Macomber*, 432.

PRACTICE AND PROCEDURE.

Questions of law may be raised on exceptions by a party to the procedure provided the bill of exceptions conforms, so far as possible, to the practice in the courts

of law, consisting of a summary statement of the contentions of the excepting party without reference to other documents or the evidence, except in cases where it is contended that facts were found without evidence, and should also show wherein the excepting party was aggrieved.

In Re The Samoset Company, 141.

PROOF OF LOSS.

See *Jewett* v. *Quincy Mutual Fire Ins. Co.*, 234.

PRESUMPTION.

For a relative or member of the household to recover payment for services there must be a contract, either express or implied as a matter not of law but of fact, and such contract must be proved in accordance with the ordinary rule of burden of proof.

It is not enough to show that the valuable service was rendered. It must appear that the one who rendered service expected at the time the services were performed compensation and the one who received so understood or under the circumstances ought so to have understood and by his words or conduct or both justified the expectation.

There is not in any given case a legal presumption of any kind that the services were rendered gratuitously or for compensation.

When the parties bear the relationship to each other as in this case the determination whether upon the circumstances existing in each case the services were rendered on the basis of contract or not is declared by our court to be "peculiarly the province of the jury."

The jury concluded there was a mutual understanding for compensation and the court cannot say that as a matter of law there was no evidence from which such understanding could not be inferred or that the jury's verdict was due to bias or prejudice or was manifestly wrong. *Bryant* v. *Fogg, Admr.*, 420.

See *State* v. *Buckley*, 301.

PUBLIC UTILITIES COMMISSION.

Exceptions will not lie to a refusal to issue a writ of mandamus to compel the Public Utilities Commission to issue the certificate provided for in Sec. 4 of Chap. 211, Public Laws, 1923, unless it appears that the decree of the Justice denying the writ was based on some erroneous ruling of law or there was an abuse of judicial discretion.

Maine Motor Coaches, Inc. v. *Public Utilities Commission*, 63.

QUANTUM MERUIT.

dered not gratuitously if the other party knows it and permits it and accepts the benefit, as there is a presumption that the services were requested with an intention to pay for them and the law implies a promise to pay.

In the instant case whether or not a contract was made between the parties and, if so, its terms were questions of fact for the jury, and the jury by their verdict must have found that an agreement was made as claimed by the defendant and that the plaintiff wilfully abandoned and broke it.

Upon a careful examination of the facts we are of the opinion that the conclusions of the jury were not authorized by the proof and that the only authorized conclusion is that the minds of the parties did not meet and the contract was not completed. *Thurston* v. *Nutter*, 411.

See *Hammond* v. *Consolidated Rendering Co.*, 491.

QUARE CLAUSUM.

See *Cook* v. *Curtis*, 114.

QUESTION OF FACT FOR A JURY.

The question as to whether a minor is chargeable with negligence is one of fact for the jury, except in case of a child of very tender years when it may be for the court. *Hasty* v. *Cumberland County P. & L. Co.*, 229.

The question of the financial standing of accommodation makers is one of fact for the jury. *Berliawsky* v. *Burch et al.*, 471.

See *Everett* v. *Allen*, 55.

See *Dougherty, Admx.* v. *M. C. R. R. Co.*, 160.

RAILROADS.

Within the purview of the franchise tax law, the operation of a railroad consists in the transportation of passengers or freight, or both, by means of cars propelled by steam or other power and running upon rails.

Two different companies cannot well operate the same railroad at the same time, though both may use the same track, in part, to operate their respective roads.

In the instant case notwithstanding that it does not own the track and that the Maine Central Railroad Company also uses the track, the Canadian Pacific Railway Company operates a railroad between Mattawamkeag and Vanceboro, and is liable to pay a franchise tax based upon the mileage between such stations. *State* v. *Canadian Pacific Railway Co.*, 350.

RECEIVERSHIP.

During the receivership of a trust company the time fixed for the presentation of claims against the company may be extended by the court, and commissioners may be reappointed to whom all claims in the first instance should be presented.

Deposits in a commercial bank may be either general or special. In the case of a general deposit the title thereto passes immediately to the bank and the relation of debtor and creditor at once arises between the bank and the depositor. A special deposit passes no title from the depositor to the bank, such transaction being only a bailment and the relation between the bank and the depositor is not that of debtor and creditor, but of bailee and bailor.

In the case of a special deposit the bank merely assumes the charge or custody of the property without authority to use it and the depositor is entitled to receive back the identical money or thing deposited. Where the identical gold, silver, or bank bills which were deposited are to be returned to the depositor, the deposit will be special; while on the other hand a general deposit is one which is to be returned to the depositor in kind.

Where there is no express agreement or understanding between the parties that the deposit should be considered as special, and there is nothing in the character of the transaction from which may be found an implied agreement or understanding between the parties to that effect, it must be held that deposits are general, not special.

Ordinarily a deposit of money, at least if it be current money of the country or state where the deposit is made, will be presumed to be a general deposit unless the contrary appears at the time of the deposit or in some way distinctly implied so that the bank could not reasonably misunderstand the depositor's intent.

If the bank and the depositor intended that the proceeds of a draft left with the bank for collection as well as the draft itself, should remain the property of the depositor, such intention will control and the bank will not take title to the proceeds. On the other hand, when there is an understanding that when the collection has been made the bank shall pass the proceeds to the general credit of the depositor's checking account and such credit is authorized, it is the same as though money had been deposited by the customer to his credit.

The burden of proving that a deposit is special is on the depositor as against the bank.

In the case at bar the proceeds of the draft left with the bank for collection, under the circumstances of this case became a general deposit and no preference thereby arises in behalf of the depositor.

The failure or refusal of the bank to honor certain checks does not create a preference in behalf of the drawer of the checks since it is well established law that in the case of money deposited to the credit of the checking account does not remain the property of the depositor, subject only to a lien in favor of the bank but it becomes the absolute property of the bank and the bank becomes a debtor to the depositor in an equal amount.

Lawrence, Bank Commissioner v. *Lincoln County Trust Co.*, 150.

REPLEVIN.

In a replevin action, upon a nonsuit, the disposition of the property is to be regulated according to the rights of the parties at the time of making the order.

Where chattels are taken from the possession of a defendant, on nonsuit, judgment for return of the property should follow, but if he was not in possession of the property and the situation remains unchanged, an order to return the property to him from whom it was not taken is exceptionable error.

In the instant case the defendant's position is that he never took or detained the goods, that he did not have them in his possession when the replevin action was commenced, and moreover that the complete union of all the elements which constituted their ownership was then and ever afterward in the plaintiff's wife.

In this case the possession of the chattels was as foreign to this defendant, when the taking on the writ occurred, and also when a return was ordered as though Mrs. Millett had had the property, not in a room in the dwelling-house of the defendant, but in a residence distinct from his which she had leased from him, whereof the leasing had made her the owner temporarily.

Millett v. *Soule*, 188.

RES JUDICATA.

The doctrine of res judicata holds that any right, fact, or matter in issue, directly adjudicated upon, or necessarily involved in, the determination by a competent court, of an action in which a judgment or decree is rendered upon the merits, is conclusively settled by the judgment therein and cannot be litigated again between the parties and their privies whether the subject matter of the two suits is the same or not. Where the second action between the same parties, or those in privity, is on a different cause, the earlier judgment is but estoppel as to those matters which were brought to an end in the previous litigation.

In the instant case the important thing is that the identical issue stands decided before on actual trial. What was in issue in the former action may appear from the record, or may not. Such issues as are evidenced, either by the pleadings or parol, as the particular situation may require, and on which judgment was rendered, or such issues as by reasoning are essential to and necessarily involved in the former judgment, are to be considered as at rest.

The judgment is that which works conclusiveness. In the judgment is the connection of antecedent and consequent. And a judgment dismissing an action on settling the ultimate facts in controversy, as distinguished from a dismissal without prejudice, or for want of jurisdiction, or the like, is conclusive to the same extent as if rendered on a verdict. *Edwards et als.* v. *Seal*, 38.

RESPONDENT SUPERIOR.

Liability cannot attach to a corporation exhibiting a circus for an injury to a patron resulting from an indulgement by the employees in a game of ball on the circus grounds while off duty and outside of the hours of their employment under the doctrine of respondent superior, but it may attach under the doctrine that it is the duty of the invitor to the invitee to see that the premises occupied by him are in a reasonably safe condition, and that they are kept so to prevent jeopardizing the safety of his invitees.

Easler v. *Downie Amusement Co., Inc.*, 334.

SCIENTER.

In certain statutory crimes the motive and scienter, unless the act is made mala prohibita because negligently done, are immaterial on questions of guilt.

State v. *Morton*, 9.

SCIRE FACIAS.

In this State an action of debt as well as scire facias lies upon a criminal recognizance. *State* v. *Cassidy*, 217.

SEAL.

A process issuing from a court, the authentication of which rests upon the court seal, is void in absence of a seal. *Miller* v. *Wiseman*, 4.

SERVICES.

Where services are admittedly performed without expectation of compensation, even though without such admission the relation of debtor and creditor might have been presumed, the person performing such services cannot recover.

Hammond v. *Consolidated Rendering Co.*, 491.

SHEEP KILLED BY DOGS.

Under Sec. 110, of Chap. 4, R. S., no judicial inquiry and finding is required, either that the sheep were killed by dogs or as to the number and value. The statute only requires an investigation by the municipal officers, and if satisfied that the injuries were caused by dogs or wild animals, they must either agree

SUDDEN EMERGENCY DOCTRINE.

SUPREME COURT.

SURETIES.

SURPRISE.

TAXES.

Equality and uniformity are the cardinal principles to be observed in tax levies. Where it is impossible to secure both the standards of true value and the uniformity and equality required by law, the latter requirement is to be preferred as the just and ultimate purpose of the law.

A taxpayer has no grievance when it is shown that all property in the taxing district is assessed on the same basis. If the appraisement of all estates in the district is uniform and equal, though magnified, an abatement would produce not equality but inequality.

But when (nothing else appearing) it is shown that property is assessed substantially in excess of its just value inequality is presumed and the taxpayer is prima facie entitled to relief. He is not bound to produce evidence of discrimination.

Under our statute it is not necessary for the taxpayer asking an abatement to prove fraud or intentional overvaluation. If he is found to be overrated he may be granted such abatement as the court deems reasonable.

But, discrimination not appearing, he must prove that the valuation having reference to just value is manifestly wrong. He must establish indisputably that he is aggrieved.

A sale by auction is not a true criterion of just or market value.

Proof that property was sold by public auction at a price lower, even much lower, than the assessed valuation does not alone show that the assessors were manifestly wrong. It does not establish indisputably that the taxpayer is aggrieved.

Spear v. *Bath*, 27.

TENANT AT SUFFERANCE.

See *Landlord and Tenant.*

TOWN MEETING.

Except where otherwise directed by statute or constitutional limitations, when the purposes sought to be effected under an article in a town warrant are within its corporate powers, and are expressed with sufficient precision to be plain to the ordinary mind though not in set phrase, nor with technical formality, action on such article by a majority of the qualified participants in a town meeting is binding on the inhabitants.

In the case at bar it is not claimed that the total borrowed was excessive, nor that the proceeds were diverted from the channel authorized.

Inh. of Argyle v. *Eastern Trust & Banking Co.*, 370.

TRESPASS QUARE CLAUSUM.

Unlawful breaking and entering is the gist of the action of quare clausum and the burden of proof is upon the plaintiff; hence a mortgagor not entitled by agreement, expressed or implied, to retain possession, cannot maintain trespass quare clausum against the mortgagee who enters under his mortgage, and the motive or purpose of entry is immaterial.

In the instant case the mortgage was in usual form containing no agreement for possession by the mortgagor. The defendants had the right to enter as mortgagees, and the law presumes their entry to be in that character and under that title. The fact that the mortgagees obtained a void deed of the timber cut does not rebut this presumption.

If the cutting of timber be waste, recovery cannot be had in this form of action, nor can this declaration be amended to sound in case.

Cook v. *Curtis*, 114.

While in case of the use of excessive force the landlord may be liable to indictment for the common law offense of forcible entry, he is not liable to a tenant at sufferance on the civil remedy of trespass quare clausum.

Gower v. *Waters, et als.*, 223.

TRUSTS.

See *Belding et als.* v. *Coward et als.*, 305.

VARIANCE.

Where there is a variance between evidence and the declaration when an amendment could have been made, if the question of a variance is not raised at the trial, it is too late to raise it after verdict. *Jones* v. *Briggs*, 265.

VERDICT.

It is error for a presiding Justice in a bastardy proceeding to direct a verdict for respondent on the specific ground that complainant had not shown "constancy in her accusation," the sufficiency of the evidence being a question of fact for the jury. *Everett* v. *Allen*, 55.

A verdict for defendant cannot be set aside on a general motion in an action on a note secured by a mortgage where under foreclosure proceedings the equity of redemption had expired before issue was joined, the value of the property being in excess of the amount due on the note. *Morris* v. *Bellfleur*, 270.

VESTED ESTATES.

It is an established rule, in construing devises, that all estates are to be holden to be vested except estates in the devise of which a condition precedent to the vesting is so clearly expressed that the courts cannot treat them as vested without deciding in direct opposition to the terms of the will.

Where there is a bequest to a child, it is a general rule that there is a vested interest unless the contrary intention is shown by the will.

The presumption that the legacy was intended to be vested applies with far greater force where a testator is making provision for a child or a grandchild than where the gift is to a stranger or a collateral relative.

By the common law a vested interest is descendible, devisable and alienable. This common law rule has not been modified by our Legislature.

In the instant case the younger son having died before reaching the age of thirty-five years, his vested interest would pass to his older brother under the provision of law relative to descendibility of vested interests; and by the terms of the will that interest would also pass, since the testator expressly provided that at the termination of the trust, if there be but one son surviving, then the whole of the estate is to be paid to that survivor.

The older son made a will before the time at which the trust terminated under the father's will, but since a vested interest may be devised, then the will of the older son operated, not only upon his own vested interest, but the vested interest of his younger brother which had passed by due process of law to the older brother.

At the death of the older son the trust became a mere passive, dry, naked trust, and his devisees are entitled to have the property transferred at once.

Belding et als. v. *Coward et als.*, 305.

WAIVER.

See *Jewett* v. *Quincy Fire Ins. Co.*, 234.

WARRANTY.

See *The Lasker Co.* v. *Laberge*, 475.

WATER RATES.

See *Inh. of North Berwick* v. *North Berwick Water Co.*, 446.

WEIGHTS AND MEASURES.

See *Old Tavern Farm, Inc.* v. *Fickett*, 123.

WILLS.

In determining the construction and interpretation of a will where a trust is created to terminate on the death of the beneficiary the language "to be divided equally among my heirs" in the residuary clause of the will which embraced the remainder interest in the trust fund, creates a vested interest in those who are heirs at the time of the death of testator.

Under the language "then to become the property of my children or their heirs" in a clause creating a trust to terminate on the death of the beneficiary, the remainder on the termination of the trust goes to the children living at the time of the death of the beneficiary and to the heirs of a deceased child as an executory interest.

In the instant case the testator could have indicated that the determining of his heirs should be referable to a time different than that of his death, but he did not.

The widow was not an heir of her husband. The son and daughter, and they two only, came within the meaning of the term "my heirs." The daughter is dead, but her will lives and it is for the trustees to pay over that which primarily was intended for the daughter, to the authorized representative performing her will.

It is different in the second trust where the testator gives the interest on two thousand dollars to the widow so long as she lives, "Then to go to my children or their heirs." The estate is in trust until the death of the widow. If the children are then living the property is to be theirs, but if a legatee should die in the lifetime of the intervening life beneficiary, then the property is to go over to the heirs of the dead son or daughter. While the precedent beneficiary was living, the daughter of the testator died. Her gift went, not to the testator's heirs, but by substitution to the daughter's heirs, as an executory interest under the daughter's father's will.

The adverb of time—"then" —"then to go to my children"—ordinarily would be construed to relate merely to the time of the enjoyment of the gift, but this word in connection with the disjunctive conjunction—"or,"—and with regard to the wording of the residuary clause, makes it quite impossible to read the will and collect meaning, without perceiving a clear intention to give the two thousand dollars to the children if they survived the widow; otherwise, to the heirs of either nonsurvivor in the stead of the one dead.

Union Safe Deposit and Trust Company v. *Wooster*, 22.

Under a will containing the following language, "the whole of my property and estate to be paid to and divided equally between my two children, if living, at or after the time previously herein specified, or if not then living to their legal heirs or guardians," the interest of each of such two children is a contingent interest only and not devisable, and upon the death of such two children before the termination by death of a certain life estate ("the time previously herein

specified") created under the provisions of the will, their legal heirs take the remainder of the estate as devisees, neither spouse of two such children being a legal heir of his testator. *Trott et als.* v. *Kendall et als.*, 85.

When by will the husband bestows a life tenancy in all his estate upon his wife, for her care, maintenance and support, with remainder over to his children, she also owning other property which she conserves, using the husband's estate largely for her care, maintenance and support, the remainder of her husband's estate, if any, should be restored to the personal representative of his estate by her administrator, in a proceeding in which those two personal representatives are parties. *Wentworth* v. *Mathews, Admr.*, 242.

In the interpretation of a will in ascertaining the rights of legatees, intention of the testator, as collected from the whole will and all the papers which make up the testamentary act, examined in the light of attendant facts, which may be supposed to have been in the mind of the testator, must govern, unless it conflicts with some positive rule of law, or violates some rule of interpretation so firmly established as to have become a fixed rule of law governing the transfer of property by will, then legal rules must prevail.

A devise to heirs, whether to one's own or to heirs of another, carries a presumption that the heirs take by the rules of descent, that is, per stirpes, not per capita, unless such presumption is controlled by words in the will indicating a different intention of the testator.

In the instant case without indicating that the words "to be divided equally" and similar phrases may not in some cases be satisfied by a division among certain individuals named and a class described as the heirs of a deceased person, it is held that the testator's intent was to divide his estate equally between the children of Ursula Austin though described in the will as her heirs and the several other persons named, each taking one eleventh of the residue.
Harris v. *Austin et als.*, 127.

When a legacy lapses which is a part of the residue it presumptively passes as intestate property and does not fall into the residue.

In case of a devise to several persons constituting a class one of whom predeceases the testator, no lapse takes place. The individual dies, but the class designated as the taker under the will remains in esse.

When legatees are designated by name and the character of the estate bequeathed is indicated by the words "in equal parts share and share alike" there is a strong presumption of testamentary intent that the legatees shall take as individuals, and not as a class.

In the instant case by the residuary clause the testatrix left all the residue of her estate to four legatees G., M., A. and C. "in equal parts share and share alike."

G. (Sarah E. Goodrich) predeceased the testatrix. Not being a relative her heirs are not made substituted legatees by statute.

Devise or bequest to children or grandchildren, though they are not personally named, gives a vested interest when the contrary intention is not shown by the will.

Grandchildren living at testator's death took in vested interest by heads and not by class where on termination of testamentary trust the will directs that the remainder "be equally divided among my grandchildren share and share alike." *Cook, Tr.* v. *Stevens*, 378.

WORDS AND PHRASES.

WORKMEN'S COMPENSATION ACT.

Under the Workmen's Compensation Act, if at the time of the accident the employee is "doing his regular work," it may be regarded as equivalent to saying that he was injured in the course of his employment.

Where by consent and desire of the employer, the employee rode upon a truck of employer in going to and from his home to dinner, thus saving time to the benefit of the employer, the errand of the truck at moment of injury being immaterial, constitutes causal connection between the conditions of the case and the injury, and an accidental injury while thus riding would be one rising out of the employment. *Beers' Case*, 1.

While causal connection between the accident and disability must be shown, the accident need not be proved to be the sole or even the primary cause of disablement. It is sufficient to sustain a finding for the injured employee if the accident caused an acceleration or aggravation of a pre-existing disease.

The decree of a Commissioner in an industrial accident case must be based on evidence. Otherwise it cannot be allowed to stand. But a Commissioner's finding that the diseased condition of a petitioner is due to or has been aggravated by an accident will not be set aside merely because not based on the opinion of an expert if it is reasonably supported by other testimony.

In the instant case there was some evidence upon which the Commissioner's decree was based, thus removing it from the realm of mere speculation, surmise or conjecture. *Swett's Case*, 389.

The compensation provided for in Section 16 of the Compensation Act is not necessarily based on the presumption that the injured workman previously had a normal arm, leg, hand or eye. If he had an eye capable of performing the ordinary functions, even though its normal efficiency was impaired and as the result of an accident its vision was reduced below one tenth of the normal vision, he is entitled to compensation under Section 16. *Borello's Case*, 395.

Compensation paid to an injured employee to the date of his death limits the time during which compensation may be recovered by his dependents but is not a bar to recovery.

The power of an Industrial Accident Commissioner to grant additional time to file answer is discretionary. Denial is not subject to review, at all events unless abuse of discretion is shown.

Unless want of answer is waived material facts properly alleged in a petition and not disputed by answer are treated as admitted.

When, without objection, a case goes to trial before a Commissioner upon the issue of causal connection between the accident and death, the want of answer specifying such defense is treated as waived.

In the instant case the finding of such causal connection is supported by the testimony of two physicians. The decree in favor of the petitioner is based upon some evidence and must be affirmed. *Sarah Belle Clark's Case*, 408.

Section 28 of the Workmen's Compensation Act construed to mean that where by agreement approved by the Commission a lump sum is paid in settlement of a claim for compensation, the employer shall not be called upon for further or other payments, even for medical or surgical expenses. *Melcher's Case*, 426.

Under the Workmen's Compensation Act, upon the petitioner seeking compensation rests the burden of proving that the accident by which he received his injury arose in the course of and out of his employment.

APPENDIX

STATUTES AND CONSTITUTIONS CITED, EXPOUNDED, ETC.

CONSTITUTION OF MAINE.

ENGLISH STATUTES.

STATUTES OF THE UNITED STATES.

STATUTES OF MAINE.

REVISED STATUTES OF MAINE.

ERRATA.

Substitute "defendant" for "plaintiff" in ninth line from bottom on page 161.
Substitute "employer" for "employee" in eleventh line from top on page 287.